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Court of Appeals
Division III
State of Washington

No. 337791

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent.

v.

CHRISTIAN ALFREDO SANCHEZ

Appellant,

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA COUNTY

BRIEF OF APPELLANT - AMENDED

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ASSIGNMENT OF ERROR

Christian Alfredo Sanchez was unlawfully stopped, seized, detained and searched, violating his rights under the U.S. Constitution and the Washington State Constitution.

1. Officer Orth's Stopping of the Volvo was a Pretextual Stop.
2. Officer Orth did not have Probable Cause to Stop the Volvo.
3. Officer Orth's Demand for Identification of the Passengers was an Unlawful Detention.
4. Officer Orth's Demand for the Passengers to Exit the Vehicle was an Unlawful Seizure.

STATEMENT OF THE CASE

On February 16, 2014 Sunnyside Police Officer Orth observed a black Volvo 850 (WA#AED7203) come from behind the Seventh Day Adventist Church located at 2000 E. Lincoln Avenue in Sunnyside Washington. Verbatim Report of Proceedings, pages 7, 13, (RP 7, 13,). The time was 2:26 in the afternoon. There were no services occurring at the time. RP 14 . February 16, 2014 was a Sunday. RP 43. Officer Orth states that the driver saw him and put up the hood on his sweatshirt. RP 15.

Orth began to follow the vehicle as it turned westbound on to Lincoln Avenue. RP 15. Officer Orth was traveling eastbound. When he saw the vehicle he turned around and got behind the vehicle and started running his plates. RP 16. Prior to his observation of the vehicle exiting the Church, Officer Orth had not received information from any source that there was a suspicious vehicle reported at the church. RP 47. While following the vehicle it did not appear the vehicle was speeding. RP 49.

Officer Orth testified that he was following the vehicle trying to get a return on the vehicle when it made a quick right turn into the mini mart parking lot. RP 16. Officer Orth says the vehicle did not indicate in any way that it was turning. He testified that turning without a signal is an infraction. RP 19. Officer Orth activated his emergency lights and indicated he was stopping the vehicle. RP 20. Orth says he typically pulls vehicles over for failure to signal and that he does not always cite them. RP 20. In this case Officer Orth did not cite the driver

for failure to use a turn signal. RP 57. Officer Orth was asked how often he gives these citations, every day or every week. His reply was, I couldn't give exact numbers. RP 58.

Officer Orth testified that as he was approaching the vehicle he was contacted by dispatch and was notified that there had been a complaint about that vehicle just a moments prior from the Maverick store across the street. RP 22, 23. He said that information did not have any effect on his decision to stop the vehicle. RP 23.

Orth contacted the driver, Jose Godoy Moreno and indicates that he could immediately smell an overwhelming odor of marijuana coming from inside the vehicle. Orth could not identify the smell as coming from a particular person or persons, and when asked if he could tell if any of them were 21 years of age or older his answer was that it was possible that someone in the vehicle was 21 years of age or older. RP 24. His best guess is that their ages were between 18 and 24. RP 25. He stated that this was important to the investigation because at the time it is legal for persons 21 or older to possess and consume marijuana. Officer Orth asked the occupants if they were 21 years of age and they all said no. RP 25. Orth then asked the driver for identification and for identification of all three passengers of the vehicle, and took the identifications back to his patrol vehicle. RP 25, 26.

Orth says that the front seat passenger ducked down as if he were attempting to conceal something. He also observed a rear seat passenger moving around. RP 26. Officer Orth contacted dispatch and requested additional units. RP 27. He then went back to the vehicle and ordered the rear seat passengers to put their hands on the head rests, and the front seat passenger to put his hands on the dash. He then took out of the vehicle and advised him he was being detained for investigation of drug possession. The driver was then walked back to the patrol car and searched and secured in the rear seat of Orth's patrol car. RP 27.

Orth then instructed Christian Sanchez to step out of the vehicle. Officer Orth says that Christian Sanchez immediately informed him that he had marijuana on him. RP 28, 29. Officer Orth testified that he placed Sanchez into custody for possession of marijuana and for further investigation for the initial stop. He then searched him for weapons. During the search he found what he describes as a large pill bottle in his jacket as well as numerous small baggies containing a white crystal substance. RP 29. When asked if he searched Christian Sanchez on cross examination, Officer Orth replied, yes weapons or contraband, yes. RP 62.

At that time a K-9 officer arrived on scene. Orth requested a walk around the vehicle to see if the K-9 would hit on the vehicle. RP 29. The K-9 did alert and after that Officer Orth requested a tow. RP 29. Officer Orth requested a search warrant for the vehicle and searched the vehicle pursuant to the warrant.

During the search he found a firearm under the front passenger floor mat where Sanchez was seated. RP 30.

Christian Sanchez also testified at the suppression hearing. In his testimony he says he was with the friends in the car about an hour. They used the parking lot of the church to turn around and to the mini mart for cigarettes. RP 67, 68. He describes that there is one entrance with a gate and one without. They entered the parking lot and did a U-turn under an awning and exited the parking lot. RP 68, 69.

Mr. Sanchez testified that he looked in the rearview mirror and saw the officer turn around and come toward their vehicle. Their vehicle stopped at a red light. At the stop Mr. Sanchez told the driver to pull into the mini mart and to use his turn signal, because they knew that the officer was behind them. He indicates they did not have their turn signal on at the light because they weren't going right at the light. They crossed 16th and there is a small gap before the turn in which is the first right. He describes that before the turn there is a large cement post. He describes the entrance to the mini mart as bigger. RP 73. Mr. Sanchez testified that the driver did in fact use his turn signal. He saw the turn signal go on. RP 74.

Mr. Sanchez said that a second police car, a K-9 unit rolled up. At first it did not have its lights on, but he did turn them on before he came to Officer Orth's car. RP 76. The officer asked if they could search the car and they all said no. The car was Jose's mother's car. RP 76. He says that after they said no, the

officer took Chepe out of the car. Chepe is Jose, the driver. RP 76. Mr. Sanchez reiterated that they knew the car smelled like marijuana and that is why he specifically told his friend to use the turn signal. RP 77.

Mr. Sanchez says that he admitted to the officer he had marijuana, but not until after the officer took Sanchez out of the car. RP 78. He says the officer took his identification, went to his car and returned, and that is when he took Mr. Sanchez out of the car. RP 78.

On February 20, 2014 the Yakima County Prosecuting Attorney filed an Information charging Christian Alfredo Sanchez with one count of unlawful possession of a controlled substance – methamphetamine. On February 10 and 11, 2015 the defendant’s motion to suppress evidence was heard before the Honorable Ruth Reukauf, Judge of the Yakima County Superior Court. Judge Reukauf denied the defendant’s motion and findings of fact and conclusions of law regarding the motion to suppress were entered on July 9, 2015.

On August 24, 2015 a stipulated bench trial was held. The defendant waived his right to a jury trial and a bench trial was held on stipulated evidence including law enforcement reports. The defendant was adjudged guilty beyond a reasonable doubt on one count of unlawful possession of a controlled substance – methamphetamine. The defendant was sentenced to time served. The defendant timely filed and perfected his appeal of the Court’s ruling on his motion to suppress evidence.

In the Court's oral ruling her honor stated that Officer Orth made a traffic stop of a vehicle which he initially saw leaving the Seventh-Day Adventist Church parking lot at 2:26 pm. RP 127. That the officer testified when the driver saw him he pulled on a hood, and that he thought that was suspicious. RP 128. That Officer Orth followed the vehicle and ran the plate of the vehicle. That the vehicle made a quick right turn into the mini mart parking lot and that he did not observe a turn signal. And because of that he initiated a traffic stop. She states that the officer testified there was medium traffic and pedestrians standing outside the mini mart, and that he would have pulled any vehicle over for that reason. RP 128.

The Judge stated in her ruling that the officer testified that he could smell an overwhelming smell of marijuana coming from inside the vehicle. Because of the fact that the age of the occupants was a question and guessed they could have been anywhere from 18 to 24 years of age. RP 129, 130. She indicated that at that point to focus of the officer changed from a traffic infraction to a drug investigation. RP 30. The judge indicated the officer knew the age for legally possessing marijuana is now 21. That he asked the occupants if they were 21 and all said no. So he asked for their identification to confirm their ages. RP 130. She indicated Officer Orth saw movement in the car and at that point his focus changed to officer safety. He called dispatch for assistance, had the driver step out of the vehicle and secured him in his patrol car telling

him he was being detained for drug possession. He then went back to the car and asked the defendant to step out of the car. And as soon as Mr. Sanchez did so, he made a statement to the officer that he had marijuana on him. RP 130. He placed the defendant in custody for possession of marijuana, he was handcuffed and searched. Pursuant to that arrest he found other evidence including a pill bottle and numerous baggies with white crystalline substance in them. RP 131.

The judge found the computer aided dispatch (CAD) log persuasive because the encounter took a total of 10 minutes. RP 136, 137. She found the time line did not lend itself to the defendant's version of what happened after the initial traffic stop. RP 137. She stated that this officer, who observed a traffic infraction, following a vehicle because of what he viewed as suspicious circumstances. But the vehicle commits a traffic infraction directly in front of him. He didn't follow him through neighborhoods just simply waiting for something to happen. RP 138, 139. She stated this all happened in a compressed time frame, less than a quarter mile. RP 139.

Judge Reukauf held that once the officer has initiated the traffic stop and he approaches the vehicle, with the odor of marijuana, that there is a basis for that stop to just end. She held it was legitimate then at that point based upon what he was unsure about the ages of the occupants in the vehicle to request ID, under these circumstances. RP 139. She found that before he could complete

the task of checking their ages he saw the defendant's movements inside the car then leads the officer to be concerned for officer safety. He then re-contacts the vehicle and removes the driver and ultimately the defendant. RP 139.

The judge stated that the officer's testimony about discussing the issue and the case law prior to the hearing was not unusual or inappropriate. She also stated that the fact that the officer did not cite the driver for the infraction does not rule the day. RP 140. Officer Orth testified on cross examination that he spoke to the prosecutor before the hearing and that they spoke about the reason for the traffic stop. He also said it was possible the spoke about case law including the Arreola case. And they discussed how often he pulls people over for turn signals. RP 32.

The judge stated that the defense briefing that the passengers in this contact were free to walk away was changed by the smell of marijuana coming from the car. And that fact changes the playing field. RP 141. She found that under the Grande case the age of the people and the state of our law requires further information to be provided [from the passengers]. RP 143.

Judge Reukauf discussed the Arreola case by stating that it was Justice Gonzalez's opinion. That when an officer has observed a traffic infraction, he is following the vehicle because of what he viewed to be suspicious circumstances. RP 138. But again the vehicle commits a traffic infraction directly in front of the officer. He was not following it through neighborhoods

just simply waiting for something to happen. RP 139. She reiterated that this all happened in a very compressed time frame. RP 139.

ARGUMENT

STANDARD OF REVIEW

The standard of review on conclusions of law in an order pertaining to suppression of evidence is a de novo review. Gaines, 154 WN.2d at 716.

SUMMARY OF ARGUMENT

Officer Orth did not have probable cause to stop the Volvo motor vehicle in which Christian Sanchez was riding. Officer Orth changed his direction of travel and followed the Volvo until it made what he testifies was a traffic infraction – failure to use a turn signal - when entering a parking lot of a local business. The stop was a Pretextual stop and was unsupported by reasonable suspicion of crime committed by the occupants of the Volvo. In addition Officer Orth unlawfully detained Mr. Sanchez who was a passenger in the vehicle. When searching Mr. Sanchez for weapons his search was obviously a search for more than items that felt like weapons.

I. BOTH THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT UNREASONABLE SEARCHES AND SEIZURES.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. Mapp v. Ohio, 367 U.S. 643 (1960). The federal constitution, however, only

establishes the minimum level of protection for individual rights. State v. Chrisman, 100 Wn.2d 814, 817 (1984).

"It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." State v. Parker, 139 W.2d 486, 493 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. See State v. Ladson, 138 Wn.2d 343 (1999); State v. Ferrier, 136 Wn.2d 103, 111 (1998); State v. Hendrickson, 129 Wn.2d 61, 69 n.1 (1996); State v. Young, 123 Wn.2d 173, 180 (1994); State v. Williams, 102 Wn.2d 733 (1984). Indeed, the scope of the protections offered by article I, section 7 is "not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" Parker, 139 Wn.2d at 494 (quoting State v. Myrick, 102 Wn.2d 506, 511 (1984)).

II. THE POLICE LACKED PROBABLE CAUSE TO STOP THE DEFENDANT'S VEHICLE FOR A TRAFFIC INFRACTION.

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." State v. Parker, 139 Wn.2d 486, 505 (1999) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971)). In Delaware v. Prouse, 440 U.S. 648, 663 (1979). The United States Supreme Court

emphasized that "people are not shorn of all Fourth Amendment protection when they step from . . . the sidewalks into their automobiles." The Washington Supreme Court echoed this sentiment in Seattle v. Mesiani, 110 Wn.2d 454, explaining that "[f]rom the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." Mesiani, at 456. Indeed, the Washington Supreme Court has repeatedly indicated that the Washington Constitution provides heightened protection against warrantless searches and seizures of automobiles. State v. Mendez, 137 Wn.2d 208, 217 (1999); State v. Ladson, 138 Wn.2d 343, 358 (1999).

Stopping an automobile and detaining its occupants unquestionably constitutes a seizure no matter how brief the stop. Prouse, 440 U.S. at 653 (1979); State v. Ladson, 138 Wn.2d 343, 350 (1999); State v. Takesgun, 89 Wn. App. 608, 610 (1998). Any stop of a motor vehicle based solely on suspicion that a traffic infraction has been committed must be justified by probable cause. See State v. Chelly, 94 Wn. App. 254, 259 (1999) (traffic stop for infraction reasonable only if based upon probable cause); Whren v. United States, 517 U.S. 806, 810 (1996) ("the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"), citing Delaware v. Prouse, 440 U.S. 648, 659, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979). A traffic infraction creates probable cause to seize only the driver, however. City

of Spokane v. Hays, 99 Wn. App. 653, 658 (2000). Any passengers in the vehicle remain free to walk away. Id.; State v. Mendez, 137 Wn.2d 208, 222 (1999).

In this case Officer Orth clearly began following the Volvo 850 because he saw it in a parking lot of a church that in his opinion was not currently holding services. It was a Sunday afternoon during hours of daylight. There was no report of a break-in, of a suspicious person, nor of a suspicious vehicle. He saw a car with four occupants and the driver put up the hood of his sweatshirt. He then began to follow the vehicle until he says the driver failed to signal when turning into the 16th Street Market. No infraction was written for the failure to signal and the veracity of this infraction is very much in question based on the totality of the circumstance.

Under the law as stated above, the traffic stop initiated by officer Orth is a seizure of the vehicle. The question of law that remains to be decided is whether or not this stop was an unlawful Pretextual stop. This is addressed below.

Additionally, the passengers were free to remain in the vehicle or to walk away and the officer unlawfully seized the passengers by demanding identification and ordering them from the vehicle. This is also addressed more fully below.

III. THE TRAFFIC STOP WAS UNLAWFUL AS IT WAS A PRETEXT FOR AN UNRELATED CRIMINAL INVESTIGATION.

Even if the officer technically had probable cause to believe a traffic infraction had been committed, the inquiry into the lawfulness of the stop does not end there. "[P]olice officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches." State v. Henry, 80 Wn. App. 544, 553 (1995). Indeed, the Washington Supreme Court has held that Pretextual traffic stops violate the Washington Constitution. State v. Ladson, 138 Wn.2d 343 (1999). "The essence of a Pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving." State v. DeSantiago, 97 Wn. App. 446, 451 (1999). In evaluating whether a particular stop is Pretextual, "the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Ladson at 358-59.

As the Washington Supreme Court made clear in Ladson:

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. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary.

138 Wn.2d at 353. Thus, the police may not circumvent the warrant requirement by using a traffic infraction as an excuse to detain a citizen and search for evidence of an unrelated offense. State v. Ladson, 138 Wn.2d 343 (1999); State

v. Davis, 35 Wn. App. 724, 726-27 (1983), review denied, 100 Wn.2d 1039 (1984). See also State v. Schoemaker, 11 Wn. App. 187, 192 (1974), rev'd on other grounds, 85 Wn.2d 207 (1975) ("Subterfuge and pretext are not treated favorably when they conflict with constitutional rights"); State v. Michaels, 60 Wn.2d 638, 644 (1962). The determination of whether a stop was Pretextual depends both on objective and subjective factors, and includes an inquiry into the actual motivations of the particular officer. State v. Ladson, supra. Evidence obtained through an illegal pretext stop must be suppressed. Id. at 359-60.

In 2012 the Supreme Court in State v. Arreola, 176 Wn.2d 284 introduced the concept of a mixed motive traffic stop. In Arreola the officer was responding to an uncorroborated tip of a DUI. He followed the vehicle and did not observe any signs of DUI but pulled the driver over for an illegally modified exhaust. Id. At 288-289. After the stop the officer detected signs of intoxication and arrested the driver. In Arreola that officer actually cited the driver for the exhaust violation and charged with a DUI. The Court in Arreola acknowledged that Pretextual stops are unlawful, citing Ladson. They indicate that in a Pretextual stop the officer has not determined that a stop for the traffic infraction is not independently reasonable. Arreola at 295. The court stated, "The misuse of traffic stops in furtherance of illegitimate purposes represents an enormous threat to privacy if left unchecked. The exercise of discretion by police officers in enforcing traffic regulations is extremely important in part because traffic enforcement

is one of the most visible representations of government and, for most citizens, one of the primary ways that they will interact with the government. *See* KELLING, *supra*, at 16; ABADINSKY, *supra*, at 15; AARONSON, *supra*, at 50-51.”

The Court in *Arreola* distinguished the *Ladson* decision by holding that the officer stopped *Arreola* for an exhaust infraction, and that he would have stopped him for that infraction even if he had not received a tip that he was DUI. *Id.* At 298. The Court realized the difficulty in determining if the stop was only motivated by the desire to continue the investigation without the requisite probable cause.

“Although there are concerns that [**991] some police officers will simply misrepresent their reasons and motives for conducting traffic stops, *cf.* SAMUEL WALKER, *TAMING THE SYSTEM* 45-46 (1993) (exclusionary rule led to increase in “number of officers claiming that the defendant had dropped the narcotics on the ground”), the possibility that police officers would engage in such wrongdoing only heightens the need for judicial review of traffic stops. Further, our test for pretext incorporates both an objective and a subjective component, *see Ladson, 138 Wn.2d at 359*, and officers are expected to adjust their practices to be consistent with the law, *cf. WALKER, supra*, at 15, 49-50 (some research “suggests that police officers [do] comply with

restrictive rules”). Washington courts will continue to review challenged traffic stops for pretext.” Id at 297.

The trial court should consider the presence of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless). Id at 299.

The difficulty with this kind of analysis is we have created a situation in which all an officer has to do to legitimize an illegitimate Pretextual stop is to just say, oh yeah, I would have stopped him for that reason alone. This is too easy to do, especially in a case in which the prosecuting attorney is willing to inform the officer just before his or her testimony of that status of the law. It doesn't take much to encourage the officer to say they would have stopped the driver completely independently of their suspicions of some unrelated criminal activity.

In this case Officer Orth indicates he saw a Volvo 850 in the parking lot of the Seventh Day Adventist Church. It was 2:26 in the afternoon on Sunday February 16, 2014. The church is a public place of worship and there is no indication that the parking lot was closed to the public at that time. A church is a public place of worship and its doors and its parking lot are open to the general public. The presence of a vehicle coming from a church parking lot on a Sunday in the afternoon is not suspicious in anyway. All persons in our society enjoy

freedom of religion and freedom from religious persecution. Imagine if an individual's presence at a church or a mosque in and of itself gave rise to a lawful basis for a Terry stop. This type of behavior flies in the face of our individual and inalienable rights as Citizens of the United States and of Washington State.

While Officer Orth indicates there was no service currently taking place, there is no information or investigation to determine if the church was open to the public at 2:26 that Sunday afternoon. For all the information that officer Orth had, the occupants of this Volvo could have been members of the church, there on church business. They could have been there to perform contract work or services, or any number of legitimate purposes. Or as they told the officer after they were detained, they could have been using the lot as a place to turn around and go back to the store for cigarettes.

Officer Orth decided to follow the vehicle because it was in a parking lot open to the public on a Sunday afternoon, and the driver put up the hood of his sweatshirt. There had been no report of a break-in or any vandalism regarding this church. The officer was not responding to a suspicious person or suspicious vehicle call. It is unknown if the officer recognized the ethnicity of the driver or occupants and there is no mention of the officer recognizing the driver or passengers. There is no indication at that time that the driver was driving on a suspended license.

Probable cause to stop a motor vehicle must be based on specific and articulable facts that give rise to a well-reasoned suspicion of criminal activity. In order to meet the Terry standard, an officer's suspicion must be individualized. State v. Parker, 139 Wn.2d 486, 497-98 (1999); State v. Richardson, 64 Wn. App. 693, 697 (1992). State v. Thompson, 93 Wn.2d 838, 841 (1980). A generalized suspicion based purely on an individual's presence in a particular area cannot justify a Terry stop. Sibron v. New York, 392 U.S. 40, 62 (1968).

The only facts articulated as a reason for Orth to become suspicious and decide to follow the Volvo was that it was driving through an empty parking lot open to the public, during hours of daylight, and the driver put his hood up. Orth opines that it was done by the driver for purposes of concealing his identity, but this is nothing more than pure speculation. There is no way to know what was in the driver's mind or if he even noticed the presence of the police officer. If putting a hood up while driving a motor vehicle were to become reasonable suspicion to stop a driver, then the privacy protections of Article 1 Section 7 of the Washington State Constitution and the Fourth Amendment to the US Constitution would be rendered meaningless.

Officer Orth decided to follow the vehicle based on nothing more than a hunch or based on other factors he does not care to enumerate. According to Orth the Volvo "quickly made a right hand turn into the 16th Street Market failing to

signal. At that time I initiated a stop of the Volvo in the Parking lot.” This is the exact set of circumstances that defines an unlawfully pretextual stop.

As stated above: “[P]olice officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches.” State v. Henry, 80 Wn. App. 544, 553 (1995). The Washington Supreme Court has held that Pretextual traffic stops violate the Washington Constitution. State v. Ladson, 138 Wn.2d 343 (1999). “The essence of a Pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, *but to investigate suspicions unrelated to driving.*” State v. DeSantiago, 97 Wn. App. 446, 451 (1999). (Emphasis added).

It is abundantly clear that Officer Orth wanted to know what these men in the Volvo were up to, and he followed them until the driver made a turn and failed to signal (according to Orth.) If this was a true traffic stop, and not a method for getting into the driver and passengers’ personal space, the report would read differently. The report would begin something like, while on routine patrol I noticed a Volvo 850 make a right into the 16th Street Market without using a turn signal or hand signal. After stopping the vehicle I noticed the smell of marijuana.

Instead we have a classic Pretextual stop. Orth was suspicious of the people in this vehicle and followed them until the driver committed a traffic infraction – a rather innocuous one at that. Then he used that stop to conduct a

criminal investigation of these individuals. And it was only then that he gained information through dispatch about an entity called Maverick saying they smelled of marijuana – and ultimately he himself smelling marijuana when he began to question the driver and passengers. But only after the unlawful Pretextual stop of the Volvo. So officer Orth was not lawfully standing where he was standing when he noticed the smell of marijuana.

Because of the Arreola case more analysis is needed on the mix motive of the stop. As I mentioned above, the status of the law now is such that all an officer has to say at a suppression hearing to avoid the stop being held Pretextual, is to say, oh yeah, I would have stopped him for that anyway. In the Arreola case the officer actually cited the driver for the illegally modified exhaust. In this case officer Orth did not give a citation to the driver for failing to use a turn signal. There was conflicting testimony at the hearing. Officer Orth saying he saw no turn signal, and Mr. Sanchez testifying that he knew the officer turned around and was following them, and therefore, specifically told the driver to use his turn signal. He testified that he did in fact use his turn signal.

Also in this case Officer Orth admitted that he met with the prosecutor just before the hearing. He admitted they talked about the reason for the stop, how often he gives this infraction, and that they discussed case law. He even indicated it was possible the prosecutor specifically mentioned the case of Arreola. So what should the court do to determine the legitimacy of the mixed

motive stop? The law says the trial court should consider the totality of the circumstances and look at the subjective and objective intent of the officer.

In this case the officer admits that he was suspicious of the men in the Volvo. So much so that he changed his course of travel, did a U-turn and increased his speed to catch up to the vehicle to run its plates. Also in this case, unlike in Arreola, the officer did not issue the citation.

This court should determine this was a Pretextual stop. In the Court's de novo review of this issue it should consider that the officer was prepped by the prosecuting attorney about the newer issue of mixed motive stops, and consider the fact that the officer did not in fact issue the citation. Additionally, while officer Orth testified that he would stop the vehicle for the no signal violation, he declined to give information on how often he issues such a citation. When asked how often he issues these citations his only answer was he couldn't give exact numbers. RP 58. Although I am sure he could have given an estimate, or if he gives them out weekly or monthly he could have said that is what he does.

III. THE DEFENDANT WAS UNLAWFULLY SEIZED.

A person is seized in the constitutional sense when his or her freedom of movement is restrained. United States v. Mendenhall, 446 U.S. 544, 554 (1980). Restraint amounting to a seizure may arise either from the use of physical force

or through a show of authority. State v. Avila-Avina, 99 Wn. App. 9, 14 (2000); State v. Young, 135 Wn.2d 498, 510 (1998) (quoting State v. Stroud, 30 Wn. App. 392, 394-95 (1981) review denied, 96 Wn.2d 1025 (1982)). A citizen need not submit to the officer's show of authority in order for the court to find that a seizure occurred. State v. Young, 135 Wn.2d 498 (1998) (declining to adopt the federal definition of seizure set forth in California v. Hodari D., 499 U.S. 621 (1991). *The relevant inquiry for the court is whether, in view of all of the circumstances surrounding the incident, "a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter."* State v. Thorn, 129 Wn.2d 347, 352-53 (1996). (Emphasis added). The court must look objectively at the totality of circumstances in making its determination. State v. Coyne, 99 Wn. App. 566, 571 (2000).

A police officer has not seized an individual merely by approaching him in a public place and asking him questions. State v. Thomas, 91 Wn. App. 195, 200 (1998); State v. Aranguren, 42 Wn. App. 452, 455 (1985). So long as the individual is not required to answer and remains free to walk away, no seizure has occurred. Thomas, 91 Wn. App. at 200. Whether an individual was seized turns not on the officer's perceptions of what occurred but on the defendant's reasonable evaluation of the situation. State v. Barnes, 96 Wn. App. 217, 223-24 (1999). The officer's subjective beliefs or intentions in this regard are immaterial unless communicated to the defendant. Id.

Applying this standard, Washington courts have found that permissive encounters "ripen into seizures when an officer commands the defendant to wait, retains valuable property, or blocks the defendant from leaving." State v. Coyne, 99 Wn. App. at 573. When an officer takes custody of a citizen's identification or driver's license, for example, the citizen himself is seized within the meaning of the Fourth Amendment. Coyne, 99 Wn. App. at 572 (retaining suspects coat and license during warrant check was unlawful seizure); State v. Thomas, 91 Wn. App. at 200-201 (seizure occurred when officer retained suspect's license while taking three steps to back of car in order to conduct warrant check via hand-held radio); State v. Dudas, 52 Wn. App. 832, 834-35 (1988)(seizure occurred when deputy retained pedestrian's ID for four minutes) review denied, 112 Wn.2d 1011 (1989); State v. Aranguren, 42 Wn. App. 452, 456-57 (1985)(seizure occurred when deputy retained bicyclists' identification cards during warrant check). Similarly, taking control of a suspect's personal property during the course of a Terry stop constitutes a seizure not just of the property but of the individual. State v. Armenta, 134 Wn.2d 1, 12 (1997) (suspects were seized when officer placed their money in his patrol car for "safe keeping").

Police need not actually take physical custody of the defendant or his belongings to seize him in the constitutional sense. In State v. Ellwood, 52 Wn. App. 70, 73 (1988), for example, the court found that an officer's request for the defendant to "wait right here" constituted a seizure. ; see also State v. Barnes, 96

Wn. App. 217 (1999) (communicating mistaken belief that defendant had outstanding warrant and asking him to "wait" amounted to seizure). Similarly, a seizure occurs when police officers pull up behind a parked vehicle and activate their emergency lights. State v. Markgraf, 59 Wn. App. 509, 511 (1990); State v. DeArman, 54 Wn. App. 621 (1989); State v. Stroud, 30 Wn. App. 392, 396 (1981) review denied, 96 Wn.2d 1025 (1982).

Police may seize an individual through commands or requests even if the words used do not explicitly implicate the freedom to walk away. State v. Richardson, 64 Wn. App. 693, 696 (1992)(police directive to empty pockets and place hands on patrol car transformed encounter into a seizure); State v. Pressley, 64 Wn. App. 591, 598 (1992) (implicitly concluding that officer's request to defendant "to remove her hand or to show him what was in it" was a Terry stop requiring legal justification); State v. O'Day, 91 Wn. App. 244 (1998)(car passenger seized when ordered out of car, pursed placed out of reach, asked about drugs and weapons, and asked for consent to search); State v. Moreno, 21 Wn. App. 430, 434 (1978) ("officer cannot proceed with specific questions designed to elicit incriminating statements without being adjudged to have made a formal arrest"). A request for consent to search may also transform what would otherwise be a social contact into a seizure. State v. Soto-Garcia, 68 Wn. App. 20, 25 (1992).

Restraint amounting to a seizure generally must be supported by probable cause even if no formal arrest is made. State v. Hudson, 124 Wn.2d 107, 112 (1994); Dunaway v. New York, 442 U.S. 200, 208 (1979). Probable cause exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution in believing that a crime has been committed and that the person seized committed the crime. State v. Gluck, 83 Wn.2d 424 (1974). Probable cause must be based on the facts known at or before the time of arrest. State v. Reyes, 98 Wn. App. 923, 931 (2000) (quoting State v. Gillenwater, 96 Wn. App. 667, 670 (1999)). Subsequent events or discoveries cannot retroactively justify a seizure. State v. Mendez, 137 Wn.2d 208, 224 (1999) (quoting State v. Stinnett, 104 Nev. 398, 760 P.2d 124, 126 (1988)).

When a citizen is seized without a warrant, the seizure must be justified in both its inception and in its scope. State v. Avila-Avina, 99 Wn. App. 9, 14 (2000). Factors relevant in evaluating whether the extent of the intrusion requires probable cause include: the purpose of the seizure, the amount of physical intrusion upon the individual's liberty, and the length of the detention. Id.

The stop of this vehicle was based on a pretext to conduct an investigation of the occupants and their reason for being in a church parking lot. The seizure of the driver and all the passengers and the ensuing investigation were not lawful.

In addition, Christian Sanchez has a right under Article 1 Section 7 of our State Constitution to his privacy. Our cases require us to presume warrantless searches and seizures invalid unless an exception applies. *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004). The burden is on the State to show one of those exceptions applies, such as probable cause that a crime is being committed. In *Rankin*, we held that the freedom from disturbance in private affairs afforded to vehicle **passengers** in Washington under *article I, section 7*, prohibits law enforcement officers from effecting a **seizure** against that **passenger** unless the officer has an articulable suspicion that that person is involved in criminal activity. *Rankin*, 151 Wn.2d at 699. We based this holding on the requirement that the articulable suspicion must be specific to the individual to rise to the level of probable cause to arrest. *State v. Grande*, 164 Wn.2d 135 (2008).

Grande, dealt with the arrest of a passenger (as well as the driver) of a motor vehicle in which the officer noticed the smell of marijuana. In 2008 the possession of a less than 28 grams of marijuana was still illegal – pre Initiative 502. However at that time, the possession of marijuana was allowed for certain medical reasons. *RCW 69.51A*. Our Supreme Court in *Grande* held that the seizure and arrest of a passenger based on the smell of marijuana in a motor vehicle in which he was a passenger was a violation of our State’s Constitution. Our state constitution protects our individual privacy, meaning that we are free

from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual. We cannot wait until the people we are associating with "alleviate the suspicion" from us. Unless there is specific evidence pinpointing the crime on a person, that person has a right to their own privacy and constitutional protection against police searches and seizures. *Grande at 146.*

The *Grande* Court concluded thus: We hold that the smell of marijuana in the general area where an individual is located is insufficient, without more, to support probable cause for arrest. Where no other evidence exists linking the passenger to any criminal activity, an arrest of the passenger on the suspicion of possession of illegal substances, and any subsequent searches, is invalid and an unconstitutional invasion of that individual's right to privacy. *Grande at 147.*

Christian Sanchez was a passenger in the Volvo in which officer Orth smelled marijuana. He asked the driver and all passengers if that had marijuana and they said no. He asked if they were smoking out behind the church and they said no. He asked for consent to search the car and they said no. It was out of frustration that he then demanded identification of Christian Sanchez and all other passengers and took them with him to his car, which is a seizure. Orth then ordered the driver out of the car and informed him he was being detained on

suspicion of drug possession. He then ordered Christian Sanchez out of the car and informed him he was being detained on suspicion of drug possession.

Under the law of this State and the US Constitution, Christian Sanchez should have been free to leave. Instead he was unlawfully detained and searched. Officer Orth state's in his report that "I searched Christian's person finding a large pill bottle of green leafy substance, a clear meth pipe in his left inner jacket pocket as well as numerous small baggies containing a white crystal substance."

The stop of the vehicle was a pretext and the seizure of the passenger Christian Sanchez violated the laws of this State and our State Constitution and the fruits of the unlawful search must be suppressed.

IV. THE SEARCH OF THE DEFENDANT CANNOT BE JUSTIFIED AS A SEARCH INCIDENT TO ARREST.

A search incident to a lawful arrest is a recognized exception to the warrant requirement. State v. Boursaw, 94 Wn. App. 629, 632 (1999). The only legitimate purposes of such a search are to look for weapons and to prevent the destruction of evidence. Chimel v. California, 395 U.S. 752, 763 (1969); State v. McKenna, 91 Wn. App. 554, 560-61 (1998). Accordingly, the scope of the search is limited to that which is necessary to accomplish its purpose:

[A] search incident to arrest is valid under the Fourth Amendment: (1) if the object searched was within the arrestee's

control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did not render the search unreasonable.

State v. Jordan, 92 Wn. App. 25, 29 (1998) (quoting State v. Smith, 119 Wn.2d 675, 681 (1992)).

The timing of a search incident to arrest is important in determining its validity. First, the police must have probable cause to arrest prior to conducting the search. McKenna, 91 Wn. App. at 560. Second, the search must be contemporaneous with the arrest. McKenna, 91 Wn. App. at 560. It is not absolutely necessary that a formal arrest occur prior to the search, but the two events must be reasonably related in time and place. Id.; State v. Smith, 88 Wn.2d 127, 138, cert. denied, 434 U.S. 876 (1977). Thus, a search incident to arrest is not permitted once the arrestee has been removed from the scene to be searched. Boursaw, 94 Wn. App. at 633 (citing State v. Boyce, 52 Wn. App. 274, 279 (1988)).

Where a delay occurs between the arrest and the search, the search is valid only if the delay is reasonable. State v. Hill, 68 Wn. App. 300, 308 (1993). "Delay is unreasonable if it involves 'unnecessarily time-consuming activities unrelated to the securing of the suspect and the scene.'" Id. (quoting State v. Smith, 119 Wn.2d 675, 684 (1992)). At some point, the passage of time undermines the purported nexus between the arrest and the search, rendering the search unreasonable. Boursaw, 94 Wn. App. at 632; United States v. Vasey, 834

F.2d 782, 787-88 (9th Cir. 1987) (finding vehicle search unreasonable where it occurred 30-45 minutes after arrest).

The nature of the arrest is also important in evaluating the validity of the search. When an arrest is noncustodial, the justification for a search is absent because the encounter will likely be brief, and the motivation to destroy evidence or use a weapon will be slight. McKenna at 561. *As a result, "[a]lthough an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful noncustodial arrest."* McKenna, 91 Wn. App. at 561; State v. Stortroen, 53 Wn. App. 654, 659 (1989) ("Where a custodial arrest is not justified, no warrantless search pursuant to that arrest may be upheld.") overruled on other grounds in State v. Reding, 119 Wn.2d 685, 694 (1992). Accord Knowles v. Iowa, 525 U.S. 113 (1998) (search not permitted incident to noncustodial arrest for traffic infraction even where custodial arrest for infraction permitted by statute). Moreover, the right to conduct a search incident to arrest ends the moment the officer decides to release the arrestee rather than book him into jail. McKenna, 91 Wn. App. at 561-562; See also, State v. Carner, 28 Wn. App. 439, 445 (1981). Similarly, if the officer never manifests an intention to make a custodial arrest, there can be no search incident to arrest. See McKenna, 91 Wn. App. at 562. (Search incident to arrest impermissible where officer has no intention to book defendant due to jail overcrowding).

The physical scope of a search incident to arrest extends only to the person arrested and the area within his immediate control. Boursaw, 94 Wn. App. at 632. State v. Boyce, 52 Wn. App. 274, 277 (1988). An object is within the arrestee's control if it is within his reach immediately prior to, or at the time of arrest. Boursaw at 635 (quoting State v. Smith, 119 Wn.2d at 681-82); Jordan, 92 Wn. App. at 29. Actual physical possession is unnecessary so long as the object is within reach. State v. Smith, 119 Wn.2d at 681.

Christian Sanchez was seized when the officer requested identification, when Sanchez was ordered from the vehicle, and when the officer questioned him about whether he had any drugs and when he searched Mr. Sanchez. Because the seizure of Christian Sanchez was unlawful the search incident to that unlawful seizure is unlawful and the fruits of that search must be suppressed. In addition, the officer did not arrest the defendant until after he ordered him out of the vehicle and then searched his person. The fruit of the unlawful search must be suppressed.

VI. THE STOP WAS UNLAWFUL AS THE POLICE LACKED ANY REASONABLE SUSPICION UPON WHICH TO DETAIN THE DEFENDANT.

In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court recognized a narrow exception to the general rule requiring probable cause before

a seizure is permitted. Under Terry, a police officer may briefly detain and question an individual if the officer has a reasonable and articulable suspicion of criminal activity. The officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant the intrusion." Terry, 392 U.S. at 21; See also State v. Tocki, 32 Wn. App. 457, 460 (1982) ("investigative stops are carefully circumscribed--the officer's suspicion must be based on specific, objective facts."). The State bears the burden of establishing a lawful basis for any Terry stop. State v. Alcantara, 79 Wn. App. 362, 365 (1995).

Under Washington law, the police may not detain a citizen unless there is a substantial possibility that criminal conduct has occurred or is about to occur. State v. Mendez, 137 Wn.2d 208, 223 (1999) (quoting State v. Kennedy, 107 Wn.2d 1, 6 (1986)); See also State v. Walker, 66 Wn. App. 622, 626 (1992). "[C]ircumstances must be more consistent with criminal than innocent conduct." State v. Mercer, 45 Wn. App. 769, 774 (1986). Moreover, the test is an objective one. Because there is no "good faith" exception to the exclusionary rule in Washington, the subjective beliefs of the officer are irrelevant. State v. White, 97 Wn.2d 92 (1982); State v. Sanchez, 74 Wn. App. 763 (1994), review denied, 125 Wn.2d 1022 (1995); State v. Trinidad, 23 Wn. App. 418 (1979).

In order to meet the Terry standard, an officer's suspicion must be individualized. State v. Parker, 139 Wn.2d 486, 497-98 (1999); State v.

Richardson, 64 Wn. App. 693, 697 (1992). State v. Thompson, 93 Wn.2d 838, 841 (1980). A generalized suspicion based purely on an individual's presence in a particular area cannot justify a Terry stop. Sibron v. New York, 392 U.S. 40, 62 (1968). In State v. Larson, the Washington Supreme Court emphasized that an individual's constitutional protections do not evaporate in any particular area merely because of the local crime rate:

It is beyond dispute that many members of our society live, work, and spend their waking hours in high crime areas, a description that can be applied to parts of many of our cities. That does not automatically make those individuals proper subjects for criminal investigation.

93 Wn.2d 638, 645 (1980). See also Brown v. Texas, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.")

Similarly, the fact that an individual is in the company of others suspected of crime does not establish the necessary reasonable articulable suspicion. State v. Lennon, 94 Wn. App. 573, 580, review denied, 138 Wn.2d 1014 (1999). "Merely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution." State v. Broadnax, 98 Wn.2d 289, 296 (1982); See also Thompson 93 Wn.2d at 841 ("mere proximity to others independently suspected of criminal activity does

not justify [a] stop."). In Sibron v. New York, a companion case to Terry, the Supreme Court stated in no uncertain terms that:

The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.

392 U.S. 40, 62 (1968).

The Washington Supreme Court affirmed the principle of individualized suspicion in State v. Larson, holding that a stop based on an offense committed by one individual in a vehicle cannot be used to detain and question other occupants of that vehicle. 93 Wn.2d at 641-42. Indeed, the Larson Court stressed that an offense committed by the driver of a car "does not reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police **independent cause** to question passengers." Id. at 642 [emphasis added].

In this case Officer Orth indicates he saw a Volvo 850 in the parking lot of the Seventh Day Adventist Church. It was 2:26 in the afternoon on Sunday February 16, 2014. He decided to follow the vehicle because it was in a parking lot open to the public on a Sunday afternoon, and the driver put up the hood of his sweater.

Probable cause to stop a motor vehicle must be based on specific and articulable facts that give rise to a well-reasoned suspicion of criminal activity.

In order to meet the Terry standard, an officer's suspicion must be individualized. State v. Parker, 139 Wn.2d 486, 497-98 (1999); State v. Richardson, 64 Wn. App. 693, 697 (1992). State v. Thompson, 93 Wn.2d 838, 841 (1980). A generalized suspicion based purely on an individual's presence in a particular area cannot justify a Terry stop. Sibron v. New York, 392 U.S. 40, 62 (1968).

As is argued above the stop was a pretext to conduct a criminal investigation that was not related to the reason for the stop – failure to signal a turn. And as is argued above Christian Sanchez was a passenger and has the right not to be disturbed in his private affairs. The smell of marijuana in a motor vehicle is insufficient to seize a passenger, and a passenger cannot be searched simply because the driver of the vehicle has been arrested.

There was no independent suspicion that Christian Sanchez was committing the crime of unlawfully possessing a controlled substance and his seizure, search, and subsequent arrest were unlawful and the fruits of this illegal search must be suppressed.

VIII. THE POLICE LACKED AUTHORITY TO DETAIN AND SEARCH THE VEHICLE'S PASSENGERS.

". . . Washington law indicates a general preference for greater privacy for automobiles and a greater protection for passengers than the Fourth Amendment . . ." State v. Mendez, 137 Wn.2d 208, 219 (1999). In fact, "vehicle

passengers hold an independent, constitutionally protected privacy interest" distinct from that which citizens generally hold in their automobiles and the contents therein. State v. Parker, 139 Wn.2d 486, 496 (1999). The passenger's privacy interest is "not diminished merely upon stepping into an automobile with others." Id. at 503 n.7.

Because constitutional protections are possessed individually, a reasonable suspicion sufficient to detain the driver of a vehicle does not necessarily justify detaining a passenger. Parker, 139 Wn.2d at 497-98; State v. Larson, 93 Wn.2d 638, 642 (1980). "Individual constitutional rights are not extinguished by mere presence in a lawfully stopped vehicle." Parker, 139 Wn.2d at 498. Where police interact with passengers for an investigatory purpose, they must have independent reasonable suspicion to do so. City of Spokane v. Hays, 99 Wn. App. 653, 659 (2000).

In State v. Larson, the Washington Supreme Court specifically addressed the requirement of individualized suspicion in the context of a traffic stop, holding that a stop based on an offense committed by one individual in a vehicle cannot be used to detain and question other occupants of that vehicle. 93 Wn.2d at 641-42. The Larson Court stressed that an offense committed by the driver of a car "does not reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other

circumstances give the police **independent cause** to question passengers." Id. at 642 [Emphasis added].

Similarly, a passenger's mere presence in a vehicle subject to valid search does not justify a search of the passenger. Parker, 139 Wn.2d at 498. Just as police must establish individualized suspicion to detain a passenger, "[a]rticle I, section 7 requires a particularized basis to search." Id. at 503 n.7.

Even in the context of an automobile stop, when a person is not under arrest, the scope of any search of such individual is limited to ensure officer safety only and must be supported by objective suspicions that the person searched may be armed or dangerous.

Id. at 501-502. Thus, under the Washington Constitution, the arrest of one or more vehicle occupants, does not justify the search of other non-arrested passengers. Id. at 502-503.

Moreover, police may not order passengers to stay in or get out of a vehicle absent objectively reasonable safety concerns. State v. Mendez, 137 Wn.2d at 220. During a traffic stop based upon probable cause, the police may take whatever steps are reasonably necessary "to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant." State v. Mendez, 137 Wn.2d at 220. However, in controlling the scene, the officer must take care not to trample upon the privacy rights of the vehicle's passengers. Id.

An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit to satisfy art. I, § 7.

Id. Among the factors to be considered in determining whether objective safety concerns exist are: the number of officers present, the number of passengers, the behavior of those in the car, the time of day, the location, the traffic conditions, affected citizens, or prior knowledge of the occupants. Id. at 220-21.

Even if the officer believed the defendant had himself committed an infraction, his authority over the defendant was limited to that reasonably necessary to issue a citation. State v. Tijerina, 61 Wn. App. 626, 629 (1991). "A passenger stopped for an infraction need only identify himself, give his current address, and sign the notice of infraction." State v. Cole, 73 Wn. App. 844, 849, review denied, 125 Wn.2d 1003 (1994). During any detention for a traffic infraction, officers must either issue a citation or terminate the detention after deciding not to issue one. State v. Tijerina, 61 Wn. App. 626, 629 (1991).

Though the initial basis for detention may be valid, it is unlawful to continue to detain a passenger in order to confirm his identity for purposes of issuing a traffic citation. Cole at 850. Passengers in an automobile are not required to carry a driver's license. State v. Barwick, 66 Wn. App. 706, 709 (1992); Cole, 73 Wn. App. at 848-49. "Indeed, there is no general requirement in this country for citizens to carry any identification." Barwick, 66 Wn. App. at

709 [emphasis in original]. Accordingly, the defendant had no obligation to have identification on his person at the time he was detained, and his lack of identification cannot justify the detention. Absent a reasonable suspicion that the defendant had given a false name, the officer had no right to detain him in order to verify his identity. State v. Chelly, 94 Wn. App. 254, 260-61 (1999).

The facts of State v. Cole, 73 Wn. App. at 845-47, are illustrative. In Cole, during the course of a traffic stop, the police decided to cite the vehicle's passenger for a safety belt infraction. The passenger provided his name and birthdate but had no identification. The officer asked the passenger to step out of the car so that he could attempt to confirm his identity. While outside the car, the passenger dropped a glass pipe with suspected cocaine residue and was later found to possess a vial of flake cocaine. Id. at 846. The Court held that the passenger was not required to carry identification and that the officer exceeded the legitimate scope of the stop by seeking to confirm the passenger's identity. All evidence was suppressed. Id. at 850.

Similarly, in State v. Barwick, 66 Wn. App. 706, during a traffic stop, the police decided to cite the car's passenger with an open container violation. The passenger initially said he had no ID but then offered a Costco card. The Trooper believed that the passenger was acting furtively, as if he were trying to conceal something in his wallet. The Trooper directed him to place his wallet on the car after which a bindle of cocaine was discovered. Emphasizing that the passenger

was not required to carry identification, the Court held that ordering the passenger to place his wallet on the hood of the car exceeded the permissible scope of the detention and suppressed all evidence of the cocaine. *Id.* at 710.

The argument that Christian Sanchez was illegally seized is argued in other sections of this brief as well. This section provides a further treatment of the rights of a vehicle passenger to be free from unlawful searches and seizures. It is clear from this section that Christian Sanchez was not required to carry identification as a passenger and a law enforcement officer has no legal authority to detain a passenger to identify him or her. In addition, as is stated above, under *Grande*, the plain smell of marijuana in a motor vehicle is not a lawful reason to detain and search a passenger.

Officer Orth had no individualized suspicion that Christian Sanchez had committed a crime. He had no lawful authority to seize him or to search him and the fruits of this unlawful search must be suppressed.

VII. ALL FRUITS OF THE UNCONSTITUTIONAL SEARCH AND SEIZURE OF THE DEFENDANT MUST BE SUPPRESSED.

All evidence obtained directly or indirectly through the exploitation of an illegal search, including a suspect's post-arrest statements, must be

suppressed. Wong Sun v. U.S., 371 U.S. 471 (1963); State v. Ladson, 138 Wn.2d 343, 359 (1999); State v. Avila-Avina, 99 Wn. App. 9, 13-14 (2000)("When police obtain physical evidence or a defendant's confession as the direct result of an unlawful seizure, the evidence is 'tainted' by the illegality and must be excluded."). Even a voluntary statement must be suppressed if it is the product of illegal police intrusion, inextricably bound up with the illegal conduct. Florida v. Royer, 460 U.S. 491, 501, 75 L.Ed. 2d 229, 103 S.Ct. 1319 (1983). A confession is suppressible if it would not have been made but for the impermissible police activity. State v. White, 97 Wn.2d 92, 112 (1982).

CONCLUSION

Officer Orth did not have a reasonable suspicion or probable cause of a crime being committed when he stopped the Volvo to investigate his suspicions. It was a pretextual stop. The facts in this case are distinguishable from State v. Arreola. In this case the officer did not give a citation for the failure to signal. He also had a pre-hearing conference with the deputy prosecutor in which they discussed case law, the reason for the stop, possible questions and answers, and the frequency of his stopping drivers for that infraction. Despite the pre-hearing preparation, officer Orth could not estimate the frequency that he actually gives this particular citation. This is a Pretextual stop. The officer was suspicious of these four men because they exited a parking lot of a church on a Sunday; and he

followed them and executed a traffic stop to get into their personal space and follow up on his suspicions.

Under Grande Mr. Sanchez should not have been interrogated about the smell of marijuana in the driver's automobile. He was unlawfully seized and subjected to detention and seizure when the officer took his driver's license from him to investigate his age. Under other stated case law an officer does not automatically have the right to question and seize a passenger in a motor vehicle when the vehicle is stopped for an infraction or other suspicion related to the driver.

Mr. Sanchez was taken into custody on suspicion of possession of drugs. He was not placed under arrest for that crime. The scope of the frisk by law is limited to weapons. Officer Orth in his own words says at that time he searched Mr. Sanchez for weapons and contraband. This is outside the scope of a pat down search for weapons.

For these reasons and the reasons stated above, the trial court's ruling should be reversed, the evidence obtained after the traffic stop should be suppressed and the case dismissed for lack of evidence of possession of a controlled substance – methamphetamine.

Dated this 4th day of January, 2016



Shane M. Silverthorn
Attorney for the Appellant, WSBA 28223

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COURT OF APPEALS DIVISION III – STATE OF WASHINGTON

<p>STATE OF WASHINGTON, Respondent. v. CHRISTIAN ALFREDO SANCHEZ, Appellant,</p>	<p>NO.: 337791 CERTIFICATE OF SERVICE</p>
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CERTIFICATE OF SERVICE

I, Shane M. Silverthorn, certify under penalty of perjury under the laws of the State of Washington that I am the counsel for Defendant herein and that on January 5, 2016 I caused to be served on the person listed below in the manner shown.

AMENDED APPELLANT BRIEF

David Trefry, Yakima County Deputy Prosecuting Attorney
128 N. 2nd Street, Room 329 Yakima, WA 98901.

By Legal Messenger Service

Signed January 5, 2016 in Selah Washington



Shane M. Silverthorn, Attorney

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