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MAY 27, 2016
Court of Appeals
Division III
State of Washington

NO. 339475

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

STATE OF WASHINGTON,

Respondent,

v.

VICTORIA KNEZEVICH

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY
The Honorable Scott Sparks

AMENDED APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The trial court denied Victoria Knezevich's (Ms. Knezevich) motion to suppress evidence an officer discovered during a pre-textual traffic stop. Ms. Knezevich asks this court to review the trial court's decision.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it concluded the officer did nothing wrong when he made the stop or when he contacted Ms. Knezevich. (Conclusion of Law 7; CP 155-158.)

2. The trial court erred when it denied Ms. Knezevich's motion to suppress evidence. (CP 155-158).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err when it denied Ms. Knezevich's motion to suppress evidence, given the totality of the circumstances? (Assignments of Error 1 & 2)

IV. STATEMENT OF THE CASE

A citizen approached an officer to report that a white car had passed him on the interstate doing well over 100 miles an hour. 11/16/15 RP 32. The citizen told the officer he saw a car that matched the one, which passed him on interstate, at a nearby gas station. According the citizen, when he approached the individuals in the car, they admitted to speeding and acted suspiciously. 11/16/15 RP 32. The citizen described the car to the officer and handed him a sticky note that had the car's license plate number written on it.

The officer entered the license plate number in a computer system on his car and discovered the vehicle's registration had expired in 2013. The officer also discovered the vehicle had been sold some time before but title had not been transferred within time

required by law. 11/16/15 RP 34. At that point, the officer decided to head up to the gas station, “just to check them out.” 11/16/15 RP 35. Before he approached the gas station, some people flagged him down to get directions to the interstate. 11/16/15 RP 35.

As the officer gave the people directions, he saw a white car that matched the one the citizen described. He could not make out the license plate number, so he followed the car to see if it was, in fact, the vehicle. The officer confirmed that it was the vehicle and activated the lights on his patrol car to signal the driver to pull over. At that point, he noticed the car’s tabs were also expired. 11/16/15 RP 36.

The officer approached the car and saw a driver and three passengers, including Ms. Knezevich. He arrested the driver for a suspended license and noticed a blue pin tube, without the actual pin and melted on one end, between driver’s side door and the seat. 11/16/15 RP 38. The pin tube caught the officer’s attention because such a device is commonly used to smoke heroin or pills. Ms. Knezevich sat in the passenger’s seat directly behind the driver. 11/16/15 RP 38.

After the officer placed the driver in his patrol car he returned to the car to see if any of the passengers could drive the car away. That is when he noticed a large box of foil at Ms. Knezevich’s feet and another pin tube, tan in color, with a melted end, between the passenger’s side door and seat. 11/16/15 RP 40. At that point, the officer ordered everyone out of the car and asked for identifications. Ms. Knezevich told the officer she did not have any identification. 11/16/15 RP 41. The officer did not testify to this at trial, but in a narrative report, he stated Ms. Knezevich gave him a false name. CP 107-151. From there the record is not entirely clear exactly what information the officer

eventually used to see if Ms. Knezevich had any outstanding warrants. But he checked and he discovered she did. 11/16/15 RP 45.

The officer arrested Ms. Knezevich and the state charged her with possession of a controlled substance, use of drug paraphernalia, and obstructing a law enforcement officer. CP 45. Ms. Knezevich moved the court to suppress the evidence seized from the pretextual stop. She characterized the officer's actions as a "hunt for a crime" and argued the officer had no basis to stop them when he did. 11/16/15 RP 47.

The state maintained the officer had at least three reasons to stop the vehicle: the expired registration, failure to transfer title, and the expired tabs. The trial court agreed. The court reasoned it was the officer's job to run the license plate number the citizen gave him to get information about the vehicle before he stopped it. The court further reasoned because of where Ms. Knezevich sat in the car, she had access to the pin tubes and the foil. The court concluded the officer did nothing wrong when he stopped the car or when he contacted Ms. Knezevich and denied the motion to suppress evidence the officer seized. 11/16/15 RP 52-53; CP 155-158.

At trial, Ms. Knezevich stipulated to the facts, but reserved her right to appeal. 11/19/15 RP 58-59; CP 172-173. The court sentenced Ms. Knezevich to 8 months on the possession of controlled substance charge, 90 days for the drug paraphernalia charge, and 8 months for the obstruction charge to run concurrently. 11/19/15 RP 67-68; CP 159-170. This appeal followed. CP 178.

V. ARGUMENT

BECAUSE THE OFFICER USED PRETEXT FROM INFORMATION HE GATHERED FROM THE DRIVER'S LICENSE PLATE NUMBER TO STOP AND INVESTIGATE MS. KNEZEVICH AND HER FRIENDS THE TRIAL COURT ERRED WHEN IT DENIED HER MOTION TO SUPPRESS EVIDENCE.

Standard of review

Our supreme court requires this court to review de novo the trial court's conclusions of law. State v. Arreola, 176 Wn. 2d 284, 291, 290 P.3d 983, 987 (2012).

Analysis

a. The officer did not act under authority of law when he stopped the car. Article I, section 7 of the Washington State Constitution protects the "private affairs" of each person from disturbance imposed without "authority of law." Const. art. I, § 7. This provision of our state constitution is explicitly broader than the Fourth Amendment to the United States Constitution. State v. Ladson, 138 Wn.2d 343, 348–49, 979 P.2d 833 (1999); U.S. Const. amend. IV; State v. Arreola, 176 Wn. 2d 284, 291, 290 P.3d 983, 988 (2012). It "clearly recognizes an individual's right to privacy with no express limitations" and places greater emphasis on privacy. State v. Ladson, 138 Wn.2d 349 citing State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (quoting State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)).

Our constitution protects citizens against warrantless traffic stops or seizures based on a mere pretext when the true reason for the stop or seizure is not exempt from warrant requirement. Const. art. 1, § 7; State v. Ladson, 138 Wn. 2d 343, 979 P.2d 833 (1999). Pretextual traffic stops occur when an officer stops a vehicle in order to conduct

a speculative criminal investigation unrelated to the driving, and not to enforce the traffic code. State v. Ladson, 138 Wn.2d at 359 citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

To determine whether or not a stop is pretextual, a court would look to the totality of the circumstances, including “whether the officer investigated the driver before the stop; whether this type of stop was within the officer’s normal duties; whether the officer issued a citation; and, whether the particular violation is commonly enforced in that jurisdiction.” State v. Ladson, 138 Wn.2d at 359. When the totality of the circumstances show an officer stopped a vehicle to conduct a speculative criminal investigation unrelated to the driving, and not to enforce the traffic code, our supreme court has consistently required lower courts to suppress any evidence obtained from that stop. State v. Ladson, 138 Wn.2d at 349.

For example, in State v. Ladson, 138 Wn.2d 359, two police officers admitted that while on proactive gang patrol, they routinely followed people who aroused their suspicions, and hoped the people would commit traffic infractions so they would have legal reasons to pull them over. Id. at 346, 979 P.2d 833.

The officers followed a vehicle they believed was driven by a drug dealer, for a number of blocks, until they found a legal reason to pull the vehicle over: the license tabs had expired. Id. The officers stopped the vehicle and learned the driver had a suspended driver’s license. They arrested the driver, and searched the vehicle. Id.

The officers found a handgun under a jacket that belonged to the passenger and arrested him too. When they searched the passenger, they found several baggies of marijuana. Id. at 346-47, 979 P.2d 833.

The trial court found the traffic stop was pretextual and suppressed the evidence. Id. The state appealed and the court of appeals reversed the trial court's decision. Id. The passenger petitioned our supreme court to review the case. The supreme court reversed the court of appeals, and reinstated the trial court's ruling. Id.

Not long after Ladson, this court decided State v. DeSantiago, 97 Wn.App. 446, 451-53, 983 P.2d 1173 (1999). Like the officers in Ladson, the officer in DeSantiago, used a traffic stop as a pretext to pull over a driver he suspected was involved in a drug deal. In DeSantiago, the officer saw a vehicle enter and leave an apartment complex known for narcotics activity. The officer suspected the vehicle's driver had bought drugs, but did not have probable cause to stop him. So the officer followed the driver for about ten blocks, to identify his license plate and to look for a basis to stop the vehicle. State v. DeSantiago, 97 Wn.App at 449.

When the officer saw the driver make an illegal left turn, he pulled the vehicle over. The officer asked the driver for his license, vehicle registration, and proof of insurance. The driver did not have a license or insurance. He produced his Washington identification card, instead. The officer conducted a background check and discovered the driver's license was suspended and there was an outstanding misdemeanor warrant for his arrest. State v. DeSantiago, 97 Wn. App. at 449. The officer arrested the driver and searched the car, where he found a small bindle of methamphetamine on the floorboard and a handgun.

The state charged the driver with unlawful possession of a controlled substance, methamphetamine, and second-degree unlawful possession of a firearm. At trial, the

driver moved to suppress the methamphetamine and gun because the stop was pretextual. The court denied his motion and found him guilty as charged. Id. at 449.

The driver appealed his conviction here. This court reversed the trial court's ruling and found the methamphetamine and the handgun should have been suppressed because the officer was clearly "looking for a basis to stop the vehicle." Id. at 452-53.

Our supreme court revisited pretextual traffic stops in State v. Arreola, 176 Wn. 2d 284, 288, 290 P.3d 983, 986 (2012). The officer in that case relied on an uncorroborated tip about a possible driving under the influence in progress. State v. Arreola, 176 Wn. 2d 288-89, 290 P.3d 983, 986-87 (2012). The officer located a vehicle that matched the description from the report and followed it, for approximately 30 to 45 seconds. The officer did not notice any signs the driver was under the influence. But, he did notice the vehicle had an altered exhaust, which violated state law. So, he pulled over the car. Id.

When the officer approached the car, he could smell alcohol and could see the driver's eyes were red and watery. There were two passengers inside the vehicle and several open containers of alcohol in plain view. The officer cited the driver for the exhaust infraction and for failure to provide proof of insurance and he arrested the driver for outstanding warrants. Id. at 290.

The state charged the driver for driving under the influence and for driving while license revoked in the first degree. At trial, the driver argued the traffic stop was pretextual and sought to suppress all evidence related to the stop. Id. at 290. The officer testified he made a conscious decision to make the traffic stop because of the altered muffler, like he had done before on numerous occasions. Although, he would not go out

of his way to chase down a car with an altered muffler, he often would commence a traffic stop if already on the road and behind such a vehicle, so long as conducting the stop would not hinder a more pressing investigation. Id. at 289.

The trial court found the officer credible and concluded the “stop was not unconstitutionally pretextual” because the muffler infraction “was an actual reason” for the stop. Id. at 290. On appeal, the court upheld the trial court’s findings of fact from the suppression hearing but disagreed with the trial court that the traffic stop was constitutional. Id. The court acknowledged the muffler infraction was an actual reason for the stop but held that because “it was clearly subordinate to the officer’s desire to investigate the driving under the influence report,” and “only a secondary reason,” the muffler infraction could not provide authority of law for the traffic stop. Id.

The state petitioned our supreme court for review. Our supreme court found although the officer was primarily motivated to investigate a possible driving under the influence in progress, when he saw the muffler, he consciously decided to stop the driver for the muffler. The muffler was the actual reason for the stop, because the officer would have made the stop even if he had not been motivated to investigate the possible driving under the influence. Id. at 288. Consequently, if an officer cannot actually, consciously, and independently determine that a traffic stop is reasonably necessary to address a suspected traffic infraction, the stop is pretextual and violates article I, section 7. Id.

The circumstances under which the officers stopped the drivers in Ladson, DeSantiago and Arreola are similar to the circumstances here. Like the officers in Ladson and in DeSantiago, the officer here investigated the driver well before he even encountered the car. He could not cite the driver for speeding because the alleged traffic

violation was no longer in progress and the car was parked at local gas station. So, instead, he ran the driver's license plate number, which revealed the vehicle's registration had expired and its title had not been transferred within time required by law. 11/16/15 RP 34. Armed with that information, he headed to the gas station where Ms. Knezevich and her friends were parked, not to enforce a stale traffic violation, but rather "just to check them out." 11/16/15 RP 35.

Moreover, unlike the officer in Arreola, the officer here never testified as to why he ran the driver's license plate number when the alleged traffic violation was long since over or even whether or not doing so under such circumstances was something he had done before in the course of his duties. Given the totality of the circumstances here, the officer did not act under authority of law when he stopped the vehicle. Therefore, the court should have granted Ms. Knezevich's motion and suppressed the evidence seized.

b. Furthermore, the officer had no reason to contact Ms. Knezevich after he arrested the driver. An automobile passenger is not seized when a police officer merely stops the vehicle in which the passenger is riding. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004), citing State v. Mendez, 137 Wn.2d 208, 222, 970 P.2d 722 (1999). Under article I, section 7, however, passengers are unconstitutionally detained when an officer requests identification "unless other circumstances give the police independent cause to question [the] passengers." Id. citing State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980). Our supreme court reinforced this in State v. Rankin, 151 Wn.2d at 695.

Rankin consists of two cases consolidated. In the first case, when the officer stopped a vehicle for a noncriminal traffic infraction, he recognized the passenger. State v. Rankin, 151 Wn.2d at 692. He had arrested the passenger before for possession of

stolen vehicle and for possession of controlled substances. The officer asked the passenger for his identification and used information from the passenger's identification to see if he had any outstanding warrants. He learned there was an outstanding warrant for the passenger's arrest and placed the passenger under arrest. When the officer searched the passenger he found a knife and about an ounce of methamphetamine. State v. Rankin, 151 Wn.2d at 692. The state charged the passenger with possession of a controlled substance. The passenger moved to suppress the evidence. The trial court granted the motion and dismissed the case. The state appealed the trial court's ruling. State v. Rankin, 151 Wn.2d at 693.

In the second case, the officer stopped a vehicle under similar circumstances: for not having a license plate light. The officer asked the passenger of that vehicle to produce his driver's license. When the passenger reached into his shirt pocket for his identification, a bag of cocaine fell out. Id.

The state charged the passenger with possession of a controlled substance. The passenger moved the trial court to suppress evidence seized from him, but the trial court denied his motion. The passenger was later found guilty of the charge and appealed his conviction. Id.

The court of appeals found the officers could have asked the passengers in both cases to provide identification and reversed the trial court's ruling in the first case and affirmed the passenger's conviction in the second. Id. at 694.

Our supreme court reversed the court appeals' decisions and found article I, section 7 affords automobile passengers a right of privacy that is violated when an officer requests identification for investigative purposes, without any basis to make the request.

The court reasoned, “there is no reason to abandon a right passengers have enjoyed in this state since at least 1980 when such requests for identification from passengers were deemed to violate article I, section 7.” State v. Rankin, 151 Wn. 2d 698-99, 92 P.3d 202, 207 (2004). Officers may engage passengers in conversation. However, once the interaction develops into an investigation, it runs afoul of our state constitution unless there is justification for the intrusion into the passenger’s private affairs. Id. at 699-700.

The facts in Rankin are similar to the facts here. Like the officers in Rankin, after the officer here arrested the driver for a suspended license, he asked Ms. Knezevich for identification. Ms. Knezevich did not have any identification and it is not entirely clear from the record exactly what information the officer used to check Ms. Knezevich’s record, after she gave him a fake name. What is most important is that the officer never justified why he asked Ms. Knezevich for identification in the first place. He mentioned items he associated with smoking heroin or pills, the box of foil and the tan colored pin tube were near where she sat in the car. Other than that the officer could not draw any connection between those items and Ms. Knezevich.

VI. CONCLUSION

The misuse of traffic stops to further illegitimate purpose represents an enormous threat to privacy if left unchecked. The exercise of discretion by police officers to enforce 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. State v. Arreola, 176 Wn. 2d 284, 296, 290 P.3d 983, 990 (2012).

Given the arguments above, we ask this court to reverse the trial court's ruling and to suppress the evidence the evidence the officer obtained from the stop.

Submitted this 27th day of May, 2016.

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DECLARATION OF SERVICE

May 27, 16

Court of Appeals Case No. 339475

Case Name: **State of Washington v. Victoria Knezevich**

I declare under penalty and perjury of the laws of Washington State that on Friday, May 27, 16, I filed an *amended appellant's opening* brief with Division Three Court of Appeals and served copies to:

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