

FILED

JAN 19 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34359-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JERRY DALE HUNTOON,

Appellant.

BRIEF OF APPELLANT JERRY DALE HUNTOON IN REPLY

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A. ARGUMENT IN REPLY

1. Contrary to the unfounded assertions of the plaintiff, STATE OF WASHINGTON, in connections with the erroneous ruling of the superior court, the motion of the defendant, JERRY DALE HUNTOON, to suppress any and all evidence illegally seized and obtained by police on September 4, 2014 and constituting the "fruit of the poisonous tree" in terms of the defendant's unlawful detention and arrest, said motion and relief requested therein should have been granted in light of the absence probable cause to arrest the defendant for the alleged felony crime of driving under the influence [DUI]. [Issues nos. 1 and 2 revisited].

Initially, on pages 6 through 10 of the "brief of respondent," the plaintiff, STATE OF WASHINGTON, argues the superior court of Spokane County, State of Washington, correctly determined that probable cause existed to arrest the defendant, JERRY DALE HUNTOON, for "driving under the influence." In this vein, the plaintiff attempts, at pages 6 and 7, and 10 of its "brief in response," to misinform and mislead this court in terms of the standards of review associated and assigned error associated with the wrongful denial of a motion to suppress which is not supported by probable cause, as raised by appellant, JERRY DALE HUNTOON, in his Assignment of Error no. 1.

In this regard, the STATE neglects to point to the entry of any formal, written findings and conclusions in this case. In this regard, the only reference by the STATE, at pages 5 and 6 of its responsive brief, is confined to the court's oral ruling [RP 54-55] of the superior court.

Suffice it to say, review as to whether probable cause existed herein is de novo review as previously spelled in Part D of his “standards of review,” at pages 10 and 11 of his opening brief.

The prosecution then goes on to claim, without merit, that the stop of Mr. HUNTOON’s vehicle was not pretextual in nature and, even so, that such issue of constitutional magnitude was not preserved on appeal. The STATE is once again being entirely disingenuous in choosing to ignore and distort the legal tenants espoused under Rule 2.5 (a)(3) of the Rules of Appellate Procedure [RAP] in this regard. See, State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007). By the same token, the appellate courts have an independent, fundamental obligation to enforce the established legal principles and constitutional standards, when raised for the first time on appeal. See generally, Barber v. Peringer, 75 Wn.App. 248, 254, 877 P.2d 223 (1984).

As discussed below, a pretextual stop necessarily encompasses a violation of both the Article I, section 7, of the Washington State constitution and the fourth and fourteenth amendments to the United States Constitution. The facts as outlined in Mr. HUNTOON’s opening brief, part C. “Statement of Facts,” at pages 3 through 6, clearly suggest this particular traffic stop was purely ‘pretextual’ in nature and the

defendant's constitutional right to be free from unreasonable searches and seizures was violated.

As stated before in Mr. HUNTOON's opening brief, it is axiomatic to a proper review of this case that the mere evidence of consumption of alcohol does not in itself establish probable cause to arrest a suspect for the alleged crime of driving under the influence in violation of RCW 46.61.502(1)(a) and (1)(b). See generally, City of Seattle v. Pearson, 192 Wn.App. 802, 810, 369 P.3d 194 (2016); State v. Gillenwater, 96 Wn.App. 667, 671, 980 P.2d 318 (1999); WPIC 92.10. Something more is required to warrant a lawful arrest and violation of a citizen's privacy interests under both the federal and state constitutions. Id.

While it may be seen as a 'noble' or worthy cause of our law enforcement to prevent those who are impaired from driving while under the influence, such goal in itself may not be used to bootstrap, justify or overcome an illegal seizure or arrest of a person without the requisite probable cause in the first instance. See, State v. Jackson, 102 Wn.2d 432, 445, 688 P.2d 1272 (1984) (quoting State v. Sieler, 95 Wn.2d 43, 48-49, 621 P.2d 1272 (1980)). In other words, the ends never justify the means by which such noble goals are obtained especially when constitutional protections are clearly at stake as in this case. Id.

Thus, an initial, legitimate traffic stop cannot be transformed into a pretextual fishing expedition for some other underlying purpose or justification. See, State v. Ladson, 138 Wn.2d 343, 352, 979 P.2d 833 (1999); State v. Michaels, 60 Wn.2d 638, 639-40, 374 P.2d 989 (1962); State v. Hoang, 101 Wn.App. 732, 6 P.3d 602 (2000); see also, 32 L. Callahan, ‘‘Washington DUI Practice Manual,’’ Wash.Prac., §20:9 at 436-38 (West 2011). By the same measure, innocuous or equivocal facts or observations by police are constitutionally insufficient in themselves to establish probable cause to arrest. State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); State v. Huft, 106 Wn.2d 206, 210-11, 720 P.2d 838 (1986); Jackson, at 438; State v. Rakosky, 79 Wn.App. 229, 238-39, 901 P.3d 364 (1995); State v. White, 44 Wn.App. 215, 217, 720 P.2d 873 (1986), review denied, 107 Wn.2d 1020(1987); State v. McPherson, 40 Wn.App. 298, 300-01, 698 P.2d 563 (1985). Curiously enough, the prosecution never once addresses this pivotal issue in terms of the innocuous or equivocal nature of the facts or observations by the Washington state trooper Jason R. Bart [badge no. 452].

Probable cause does not arise from facts or observations that do not necessarily indicate that a crime being committed. Young, at 196. More to the point, probable cause exists only when sufficient,

incriminating facts are present to lead a reasonable person to conclude that there is a probability, amounting to more likely than not, that the suspect at hand is involved in criminal activity. State v. Gentry, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995).

At the moment when Mr. HUNTOON was handcuffed, taken into custody and placed under arrest by trooper Bart, the alleged facts and observations upon which the latter relied in terms of the fourth amendment seizure of the accused were (a) the suspect, Mr. HUNTOON, was allegedly speeding in a 30 miles per hour [MPH] zone around 1:00 a.m., (b) the suspect's alleged failure thereafter to immediately pull over when the trooper's emergency lights were activated and by continuing to drive approximately one [1] block further so as to park in front of his residence, (c) the suspect's alleged failure to follow the trooper's directions to remain in his vehicle even though he was in front of his house, (d) the suspect's his eating the remainder of his French fries which he had purchased at a fast food store while on the trip home, (e) the suspect having voluntarily placed his car key out of his possession on the top of the tool chest located in the bed of his truck, (f) from the officer's headlight his eyes seemed watery and bloodshot, and the suspect's face appeared flushed, (g) there was an odor of alcohol coming from the suspect's breath, (h) the suspect's

acknowledgement that he had had two [2] drinks earlier that evening and, finally and perhaps most dispositive from the trooper's view point in deciding to place Mr. HUNTOON under arrest, (i) the suspect's choice to decline the officer's request to perform field sobriety tests [FST] even though he was specifically told that the FSTs were entirely "voluntary" in nature. [RP 20-28, 38-41].

In light of these equivocal circumstances, Mr. HUNTOON once more submits that, immediately upon trooper Bart having contacted him, the latter's investigation became nothing short of "pretextual" in nature. Clearly, such stop violated the constitutional tenets of State v. Ladson, supra. Driving 40 miles per hour, at 1:00 in the morning with no other traffic on the roadway, in a 30 mph zone, was never the real focus during trooper Bart's investigation and contact with the defendant. See, 32 L. Callahan, at §20:9 at 436-38.

In any event, it is clear the vast majority of the factors, identified above, were either purely innocuous or had no bearing whatsoever as to any valid determination that the defendant was "intoxicated." Stated differently, probable cause to arrest did not exist insofar as those facts posed by trooper Bart were not necessarily indicative of any criminal activity in terms of evidence of being under the influence as claimed by

trooper Bart. See, Young, at 196.

In this regard, there was no indication that Mr. HUNTOON was driving erratically or going at a slow speed. Instead, it could be reasonably assumed that he was driving over the limit since as traffic was nonexistent as trooper Bart acknowledged, and Mr. HUNTOON was eager to get home and rest before the next workday.

Also, Mr. HUNTOON testified he did not see the trooper's emergency lights until the time he pulled over. Trooper Bart acknowledged that he did not activate the lights until having turned left onto Lacrosse Avenue. [RP 372]. By the same token, Mr. HUNTOON stated that he had not stayed inside his truck because he had not heard the officer's command until after he had exited his truck. [RP 372]. Then, for safety reasons, trooper Bart had Mr. HUNTOON remain outside his vehicle during the remainder of his investigation.

Similarly, the fact Mr. HUNTOON declined the so-called "voluntary" FSTs is not indicative any reasonable inference of criminal conduct, nor does it constitute any arguable proof of Mr. HUNTOON being under the influence and in violation of RCW 46.61.502(1).

This in itself should be considered a violation of due process on the part of law enforcement. Contrary to trooper Bart reliance upon Mr.

HUNTOON having decline the FSTs, those test are supposed voluntary in nature and Mr. HUNTOON was so advised.

Even when coupled with the alleged observation that Mr. HUNTOON's his eyes appeared watery and bloodshot, and his face flushed, the fact he declined the FSTs does not rise to the probable cause. Young, at 196. There are other plausible explanations for these conditions including, the suspect suffering from allergies, a cold or the flu, or simply being tired from a long day and the lack of sleep. See, Huft, at 211. Suffice it to say, Trooper Bart made no inquiries in this regard. In the end, he simply reached the end he wanted in the first place and placed Mr. HUNTOON under arrest without probable cause.

Mr. HUNTOON showed no signs of any lack of coordination or dexterity [RP 4o], nor did he demonstrated any slurred, garbled or incoherent speech, which are possible indicators of intoxication or being under the influence. See generally, State v. Avery, 103 Wn.App. 527, 541, 13 P.3d 226 (2000).

Once again, probable cause to arrest exists only when there are sufficient facts present to a lead a reasonable person to conclude that there is a probability that criminal activity is afoot. Gentry, at 607. Here, there was no such requisite showing based upon the innocuous observations

described by trooper Bart. Accordingly, Mr. HUNTOON's arrest and seizure for DUI on September 4, 2014 was unlawful.

All resulting evidence was therefore subject to exclusion as the "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 486, 91 L.E.2d 441, 83 S.Ct. 497 (1963); see also, State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967); State v. Birdsong, 66 Wn.App. 534, 540, 832 P.2d 533 (1992). Given the lack of any remaining, admissible evidence in this case Mr. HUNTOON's conviction, judgment and sentence for a violation of RCW 46.61.502(1) should now be reversed and the case dismissed with prejudice. RAP 12.2.

2. Contrary to the further ill-adopted arguments of the plaintiff, STATE OF WASHINGTON, the superior court improperly instructed the jury in instruction no. 6 insofar as the putative evidence or alleged observations of trooper Bart before the arrest of the defendant, JERRY DALE HUNTOON, on September 4, 2014, failed on its face to reach the required level of proof beyond a reasonable doubt. [Issue no. 3 revisited].

Next, on pages 13 through 18 of the "brief of respondent," the STATE OF WASHINGTON attempts to side-step the impropriety associated with jury instruction no. 6 by claiming no unanimity instruction was required by baldly claiming there was "sufficient evidence"

presented at trial [sic] to support the alternative means of committing the crime of driving under the influence. Simply put, this is nothing more than whimsical hypothesizing on the part of the STATE. Instead, the level of evidence to establish guilt beyond a reasonable doubt under the theory expressed in instruction no. 6 was totally lacking in this case.

Again, even if it could be arguably said that the pre-incarceration evidence, allegedly observed by trooper Jason R. Bart, established “probable cause to arrest” the defendant, JERRY DALE HUNTOON, for driving under the influence, the issue remains whether those same facts and observations rose to the level of proof beyond a reasonable doubt of the crime contemplated under RCW 46.61.502(1)(b). Accord, State v. Gillenwater, 96 Wn.App. 667, 671, 980 P.2d 318 (1999). Simply put, they do not.

Once again, the jury was instructed, in paragraph 2 of instruction no. 6 that, that in order “[t]o convict the defendant of the crime of felony driving while under the influence” the jury was required to find “[t]hat the defendant at the time of driving a motor vehicle (a) was under the influence of or affected by intoxicating liquor or (b) had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test of the

defendant's breath.'" [CP 65]. Jury instruction no. 6 then went on to state that "[t]o return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds at least one alternative in paragraph (2) have been proved beyond a reasonable doubt.'" [Emphasis added]. [Id.].

As stated before, a similar situation involving alternative means of committing the crime of driving under the influence arose in State v. Martin, 69 Wn.App. 686, 688-69 & n.1, 849 P.2d 1289 (1993), which the STATE curiously chose to ignore in its brief. There, the Division III of the court of appeals held that "[i]f the jury is not required to be unanimous as to the means of the crime's commission, the evidence in support of each alternative means must be such that a rationale trier of fact could have found each means of committing the crime was proved beyond a reasonable doubt. [Emphasis added]. See also, State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982); State v. Bland, 71 Wn.App. 345, 358, 860 P.2d 1046 (1993).

This requirement of sufficiency of the evidence showing guilt beyond a reasonable doubt embodies constitutional considerations of due process. Id.; see also, Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d

560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). In turn, the giving of this erroneous, alternative instruction was deemed by the Martin court as not “trivial” in nature. Martin, at 689; see also, State v. Maupin, 63 Wn.App. 887, 822 P.2d 355, review denied, 119 Wn.2d 1003 (1992). Consequently, a challenge to the sufficiency of the evidence implicates constitutional due process requirements and may be raised for the first time on appeal. In re Winship, 397 U.S. 358, 361, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); Bland, at 359; Martin, at 689; see also, RAP 2.5(a)(3).

The dispositive issue then becomes whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime, alternatively posed under RCW 46.61.502(1)(b), beyond a reasonable doubt. Jackson, 443 U.S. at 319; Green, at 221-22; Bland, at 359. The answer here is unequivocally “no.”

In retrospect, and even if the evidence and observations made by trooper Jason R. Bart could be said to have risen to the level of probable cause, those same facts did not satisfy the heightened burden of proof showing guilt beyond a reasonable doubt as to the alternative means posed

by the prosecution in paragraph (2)(a) of jury instruction no. 6. [CP 65].
Jackson, 443 U.S. at 319; Green, at 221-22; Martin, at 688-89.

Consequently, that instruction constituted error analogous to that which occurred in Martin. Also, as was the situation in that case, the jury instructions given herein [CP 57-72], and the verdict form wherein the jury found Mr. HUNTOON guilty of count I [CP 73], ‘do not plainly show that the jury was in fact unanimous as to the alternative means supported by sufficient evidence.’ Id.

As a result, it can only be concluded that the erroneous nature of instruction no. 6 affected the outcome of this case and such error was not harmless. Id.; see also, State v. Bonds, 98 Wn.2d 1, 18, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 78 L.Ed.2d 112, 104 S.Ct. 111 (1983). The prosecution cannot, and has not, proven otherwise in its brief. See, State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). In sum, the verdict of guilty entered on January 29, 2016 [CP 73] along with the conviction, felony judgment and sentence, and warrant of commitment, entered on March 18, 2016 [CP 84-87], should once again be reversed and ordered dismissed with prejudice. RAP 12.2.

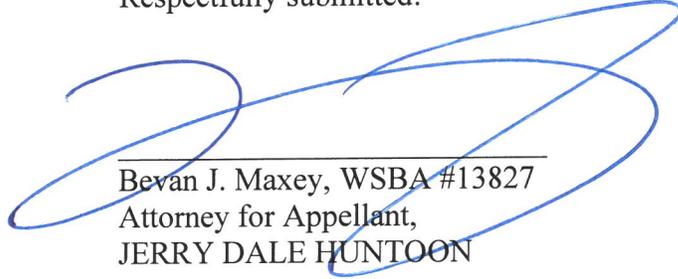
B. CONCLUSION

Based upon the foregoing points and authorities, the appellant, JERRY DALE HUNTOON, once more respectfully requests that the judgment and sentence, and warrant for commitment, for allegedly driving while under the influence [RCW 46.61.502(1)(a),(1)(b) and (6)], which were erroneously entered against him by the superior court of Spokane County, State of Washington, on March 18, 2016, be reversed and such underlying criminal charge ordered dismissed with prejudice by this court. RAP 12.2.

The ‘rule of law’ requires nothing less in light of the STATE OF WASHINGTON’s outrageous violation of Mr. HUNTOON’s constitutional rights, as a citizen of this state, so as to be left alone and to be free from all unlawful and unreasonable government intrusion, as contemplated under both the state and federal constitutions.

DATED this 19th day of January, 2017.

Respectfully submitted:

A large, stylized handwritten signature in blue ink, consisting of several overlapping loops and curves, positioned above the printed name.

Bevan J. Maxey, WSBA #13827
Attorney for Appellant,
JERRY DALE HUNTOON

FILED

JAN 19 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**STATE OF WASHINGTON COURT OF APPEALS
DIVISION III**

STATE OF WASHINGTON,)
)
 Appellee,) NO. 343596-III
)
 vs.) AFFIDAVIT OF
) MAILING
 JERRY DALE HUNTOON,)
)
 Appellant.)

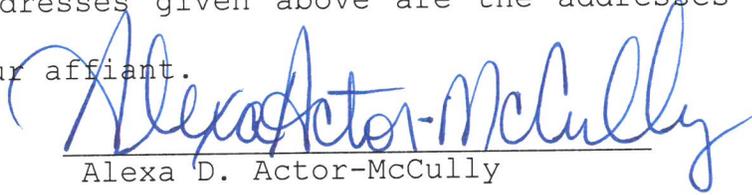
STATE OF WASHINGTON)
 : ss.
 County of Spokane)

ALEXA D. ACTOR-MCCULLY, being first duly sworn on oath, deposes and says: that she is a disinterested person, competent to be a witness, and past the age of 21 years; that on the 19th day of January, 2017, affiant caused true copies of the BRIEF OF APPELLANT JERRY DALE HUNTOON IN REPLY to be served upon the individuals below by depositing a copy of said document in a United States Post Office Box in Spokane, Spokane County, Washington, by first class mail addressed to:

Jerry Huntoon
Inmate - Spokane County Jail
1100 W. Mallon
Spokane, WA 99260

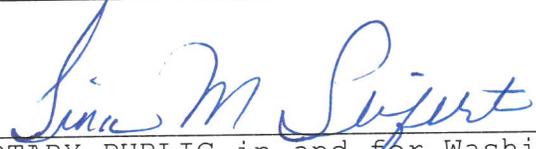
Brian Clayton O'Brian
Deputy Prosecuting Attorney
1100 W. Mallon
Spokane, WA 99260

That the addresses given above are the addresses
last known to your affiant.


Alexa D. Actor-McCully

I certify that I know or have satisfactory evidence
that Alexa D. Actor-McCully is the person who appeared
before me, and said person acknowledged it to be her free
and voluntary act for the uses and purposes mentioned in
the instrument.

DATED: January 19, 2017


NOTARY PUBLIC in and for Washington
Residing at Spokane.
My Commission Expires: 11-29-18

