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Court of Appeals
Division III
State of Washington
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NO. 35645-1-III

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

STATE OF WASHINGTON,
Respondent,

v.

JEROME PLEASANT,
Appellant.

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

The Honorable Cameron Mitchell, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The trial court erred when it denied Pleasant's motion to suppress evidence and found that Jones' traffic stop was not unconstitutionally pretextual. Specifically, Pleasant challenges the trial court's finding that: a) the traffic stop was lawful and b) based on Detective Jones' testimony, the sole reason for the stop was, in fact, the traffic violation.

B. SUPPLEMENTAL ISSUE PRESENTED ON APPEAL

1. Whether the trial court erred when it found Jones' traffic stop was not unconstitutionally pretextual even though just prior to the traffic stop Jones witnessed an interaction he found suspicious between Pleasant and an unidentified male, Jones reported that transaction to another officer both before and after the traffic stop, and Jones suggested the officer find the second male.

C. SUPPLEMENTAL FACTS

Detective Jeremy Jones was parked across the street from Kim's Conoco gas station eating and possibly typing a report. RP 15 (3/21/17). He observed an interaction between two African American males at the gas station across the street where one

male entered the car and then exited and left the gas station. One of the males was Pleasant. RP 24 (3/21/17). Jones reported this interaction to a second officer. RP 20-21. Jones testified that as part of Jones' job with the Street Crimes Unit, he is always observing and looking for oddities. RP 28 (3/21/17).

On direct examination during the suppression hearing, the State asked Jones to describe what he witnessed. RP 6 (3/21/17). Jones testified that he observed a white vehicle leaving Kim's Conoco gas station and that it did not stop for the sidewalk before exiting into traffic. Jones testified that he stopped Pleasant for the failure to stop infraction (RCW 46.61.365)¹. RP 6 (3/21/17). There was no evidence that a person was in the crosswalk or that there was any traffic on the roadway Pleasant entered. RP 15-16 (3/21/17).

Jones did not mention on direct examination that he witnessed and reported the interaction between the two males. RP

¹ RCW 46.61.365 provides:

The driver of a vehicle within a business or residence district emerging from an alley, driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on said roadway.

6-7 (3/21/17). Instead, he testified that of the 36 or more stops for this infraction, Jones only issued 13 infractions for a crosswalk violation in 2016, an amount he considered routine RP 8 (3/21/17).

On cross examination Jones admitted that he observed the previous transaction between the two males and that he found it suspicious. Jones testified that when the second male left, he told the second officer to find him, while Jones pulled Pleasant over for the infraction. RP 23 (3/21/17). During the traffic stop, when Jones learned that Pleasant's license was suspended, Jones arrested Pleasant, placed him in the backseat of the patrol car. RP 10 (3/21/17).

On direct and redirect examination Jones insisted the infraction was the actual reason for the traffic stop and he only suggested another officer contact the male who left the scene because officers in the Street Crimes Unit are "always looking for something to do." RP 21, 23, 27 (3/21/17).

While in the back seat of the patrol car, Pleasant inquired about the amount of bail and asked if he could go into the car to retrieve the money. RP 10-11 (3/21/17). Jones offered to retrieve the money for Pleasant, but Pleasant declined. RP 11 (3/21/17).

Based on Pleasant's response, Jones called a K-9 unit to the location. RP 12. K-9, Lemon (dog) "hit" on the car indicating the possibility of narcotics. RP 12. Jones told the K-9 officers of his concerns about the interaction at the gas station between Pleasant and the other African American male. RP 27 (3/21/17).

Jones called Casaday Tow to tow the vehicle while Jones applied for a warrant to search the vehicle. RP 13 (3/21/17). After Jones obtained a warrant, he and two other officers searched the vehicle and found \$5,200 in cash, two credit cards, cocaine, digital scales, latex gloves with the fingertips cut off, and a white powdery substance Jones believed was baking soda. RP 13 (3/21/17).

The trial court determined that Jones' subjective belief underlying the reason for the stop was not relevant and ruled that the traffic stop was lawfully based exclusively on the infraction. RP 41, 44 (3/21/17). The trial court explained that even if the stop was pretextual, "it would be a mixed-motive question", but did not inquire into Jones' subjective intent. Id.

D. ARGUMENT

1. JONES' TRAFFIC STOP WAS UNCONSTITUTIONALLY PRETEXTUAL

Jones' traffic stop was unconstitutionally pretextual because the trial court failed to consider Jones' subjective intent, and substantial evidence does not support Jones' testimony that Pleasant's alleged traffic infraction was the main reason for the stop.

A trial court's findings of fact on a motion to suppress is reviewed for substantial evidence. *State v. A.A.*, 187 Wn. App. 475, 480, 349 P.3d 909 (2015) (*citing State v. Schultz*, 170 Wn.2d 746, 753, 248 P.3d 484 (2011)). Conclusions of law are reviewed de novo. *A.A.*, 187 Wn. App. at 480.

Generally, warrantless searches and seizures are per se unreasonable under the Fourth Amendment to the United States Constitution. *State v. Kinzey*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). Wash. Const. art. I, § 7, provides more protection than the Fourth Amendment with fewer exceptions for warrantless searches and seizures. *State v. Williams*, 171 Wn.2d 474, 484, 251 P.3d 877 (2011). Art. I, § 7 provides that no person shall be disturbed in his private affairs, or his home invaded, without authority of law.

When the essence of a traffic stop is “not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving” it is pretextual and constitutes a seizure without authority of law under art. I, § 7. *State v. Ladson*, 138 Wn.2d 343, 351, 358, 979 P.2d 833 (1999).

To determine whether a traffic stop is pretextual the court must 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 to determine the actual reason for the stop. *Ladson*, 138 Wn.2d at 358-59.

If both legitimate and illegitimate grounds exist, the reviewing court still applies the objective/subjective test to determine whether the investigation for which the officer has a reasonable, articulable suspicion is the “actual, conscious, and independent cause of the traffic stop.” *State v. Arreola*, 176 Wn.2d 284, 297, 290 P.3d 983 (2012). In other words, the officer must actually determine that addressing the suspected traffic infraction is reasonably necessary to further traffic safety and general welfare. *Arreola*, 176 Wn.2d at 298.

The reasonable articulable suspicion that a traffic infraction

has occurred justifies an exception to the warrant requirement for an ordinary traffic stop, but does not justify a stop for criminal investigation. *Ladson*, 138 Wn.2d at 349. In effect this means that under art. I, § 7, officers cannot use the reasonable articulable suspicion that a traffic infraction has occurred to justify a stop for criminal investigation because each warrantless seizure requires its own exemption from the warrant requirement. *Ladson*, 138 Wn.2d at 349, 358.

In *Ladson*, the Court determined that the traffic stop was pretextual, based on stopping the car for expired license plate tabs, when the officers wanted to investigate their suspicions based on an unsubstantiated rumor that one of the two men might have been involved in drugs. *Ladson*, 138 Wn.2d at 345-46. The trial court entered a finding that the officers selectively enforce traffic violations depending on the officer's subjective belief there is more to investigate. *Ladson*, 138 Wn.2d at 346.

During the stop, the officers discovered the driver had a suspended driver's license and arrested him. When the police searched the car incident to arrest they also searched Ladson's jacket that was on the passenger's seat, and found a small

handgun. *Ladson*, 138 Wn.2d at 346-47. The Court suppressed the evidence as the result of a pretextual stop because the police used a facially valid infraction to stop Ladson as a “pretext for an investigation to discover grounds which would justify yet a further search”. *Ladson*, 138 Wn.2d at 354, 360. The Court held this practice forbids police to use a civil infraction “to circumvent the article I, section 7, warrant requirement or expand ‘jealously guarded’ exceptions.” *Ladson*, 138 Wn.2d at 356.

In *State v. DeSantiago*, 97 Wn. App. 446, 448, 938 P.2d 1173 (1999), while officer Miller was watching an apartment complex known as a narcotics hot spot, he saw a vehicle pull up and DeSantiago went into the apartment for 2-5 minutes. *DeSantiago*, 97 Wn. App. at 446, 448. Miller followed the car for several blocks because he suspected the driver purchased drugs. *DeSantiago*, 97 Wn. App. at 448. Miller stopped the car for failing to use a turn signal as a pretext to search the driver. *DeSantiago*, 97 Wn. App. at 448-49.

When Officer Miller ran DeSantiago’s identification, he learned DeSantiago had a suspended license and an outstanding warrant. Miller found methamphetamine and a handgun during the

search incident to arrest. Miller arrested DeSantiago. *DeSantiago*, 97 Wn. App. at 449. The trial court found the officer's subjective motivation for the stop was pretextual, but refused to suppress the evidence because the traffic stop was objectively reasonable. *DeSantiago*, 97 Wn. App. at 449, 452.

The Court of Appeals held the stop was pretextual even though Miller cited DeSantiago for the traffic infraction. The Court held despite the objective intent to cite for a traffic infraction, Miller's subjectively intended to engage in a pretextual stop. *DeSantiago*, 97 Wn. App. at 448-49, 453. The Court of Appeals reversed and remanded for dismissal with prejudice because Miller's subjective intent to conduct a pretextual stop invalidated the arrest and subsequent search. *DeSantiago*, 97 Wn. App. at 452.

In *Arreola*, 176 Wn.2d 284, the court determined the constitutionality of a mixed-motive stop. The Washington Supreme Court held that "a mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately." *Arreola*, 176 Wn.2d at 298. In other words, to pass constitutional muster, the police officer must make "an independent and conscious determination that a traffic stop to

address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare.” *Arreola*, 176 Wn.2d at 298-99.

Officer Valdivia’s mixed-motive stop in *Arreola* was not unconstitutionally pretextual because the officer stopped the vehicle for having an altered exhaust and would have done so even without the tip about a possible DUI. *Arreola*, 176 Wn.2d at 298-300.

Here, Jones’ traffic stop was like the traffic stops in *Ladson* and *DeSantiago*, except that the court did not consider Jones’ subjective intent. As a member of the Street Crimes Unit, Jones like Miller and the officer in *Ladson* was “always looking for something to do.” RP 21 (3/21/17). Even though Jones testified he commonly stopped vehicles for failing to make a complete stop before entering the roadway from a parking lot, the evidence of only 13 infractions out of 36 stops during the course of a full year suggests that Jones did not routinely make traffic stops based on the infraction, but rather to investigate the possibility of criminal behavior.

Similarly, the evidence did not support an independent and conscious determination that stopping Pleasant was reasonably necessary in furtherance of traffic safety and the general welfare,

because Pleasant safely passed onto the roadway, without incident. *Arreola*, 176 Wn.2d at 298-99.

Jones reported the interaction between Pleasant and the other African American male to another officer prior to conducting the traffic stop and again while Pleasant was in custody. RP 20-21, 23 (3/21/17). Jones even suggested the other officer find the second male and make a field contact. RP 26 (3/21/17). It is clear from Jones' interaction with the other officers and from his concern about the previous transaction that, like Miller, Jones' subjective intent in conducting the traffic stop was to inquire about Pleasant's previous transaction with the male at the gas station and to ultimately search Pleasant's vehicle for evidence of criminal activity unrelated to the traffic stop. Accordingly, the stop was not a mixed-motive stop, but was entirely pretextual.

Even if the traffic stop was a mixed-motive stop, under *Ladson* and *Arreola*, the court should have considered Jones' subjective intent as well as the objective reasonableness of his behavior to determine the actual reason for the stop. *Arreola*, 176 Wn.2d at 297; *Ladson*, 138 Wn.2d at 358-59. The trial court's failure to recognize the relevance of Jones' subjective intent was an

abuse of discretion under *Arreola* which directed that “[t]he trial court should consider both subjective intent and objective circumstances in order to determine whether the police officer actually exercised discretion appropriately.” *Arreola*, 176 Wn.2d at 299; *Ladson*, 138 Wn.2d at 358-59.

Given Jones’ preoccupation with the interaction between Pleasant and another black male and his always looking out for suspicious activity, under the totality of the circumstances, the traffic infraction was not the actual, conscious, and independent cause of the traffic stop. Accordingly, it was unconstitutionally pretextual. When “an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *Ladson*, 138 Wn.2d at 359 (*citing State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)); *State v. Larson*, 93 Wn.2d 638,

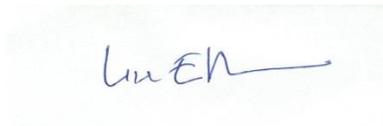
All evidence in this case was uncovered as a result of the unconstitutionally, pretextual traffic stop. Therefore, this court should reverse and remand for suppression of the evidence and dismissal with prejudice.

E. CONCLUSION

Jerome Pleasant respectfully requests this Court reverse his conviction for Unlawful Possession of Cocaine and Unlawful Possession of Hydrocodone, and remand for dismissal with prejudice on the ground that all evidence that was discovered as a result of an unconstitutional, pretextual traffic stop.

DATED this 4th day of September 2018.

Respectfully submitted,

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I, Lise Ellner, a person over the age of 18 years of age, served the Franklin County Prosecutor's Office appeals@co.franklin.wa.us; Teresa Chen (at tchen@co.franklin.wa.us); and Jerome Pleasant/DOC#340775, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on September 4, 2018. Service was made by electronically to the prosecutor and Jerome Pleasant by depositing in the mails of the United States of America, properly stamped and addressed.

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Signature

LAW OFFICES OF LISE ELLNER

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