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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JEROME PLEASANT, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is there substantial evidence to support the superior court's finding that the sole reason for the stop was the traffic violation where the only witness so testified and was found credible?
2. Was the traffic stop lawful where there was reasonable articulable suspicion of a traffic infraction committed in the detective's presence and where investigation of the traffic infraction was an actual, conscious, and independent cause of the stop?

IV. SUPPLEMENTAL STATEMENT OF THE CASE

In his supplemental brief, the Defendant Jerome Pleasant challenges the denial of his suppression motion.

At the motion hearing, there was a single witness, Pasco Police Detective Jeremy Jones. RP¹ 3-5. The detective explained that on May 5, 2016, he was working for the Street Crimes Unit and not any special detail. RP 5, 29. He was parked at Papa Murphy's Pizza at about 10 in the evening "probably eating" or possibly typing a report. RP 6, 15. See also CP 189, ll. 24-25. The detective noticed the Defendant's car across the street at Kim's Conoco gas station leaving the building driveway area and entering into traffic on Court Street without stopping at the sidewalk. RP 5-6, 15-16. Because it was dark and because the windows were tinted, the detective could not identify or even enumerate the vehicle occupants. RP 6.

The detective explained that under RCW 46.61.365, "any car in a business or residential area leaving a driveway must stop for the sidewalk before entering out onto street traffic." RP 6. The law is "set up for pedestrian and bicycle safety to make sure you stop, look both ways, and make sure there's not a pedestrian or bicyclist coming in your direction" before you proceed. RP 17. This part of Court Street in Pasco is a commercial area with "lots of restaurants and shops and

¹ All citations to the transcript within the supplemental brief regard the March 21, 2017 motion hearing.

stores.” RP 8. See also CP 12, 23 (detailing the commercial density). The detective testified that he had stopped individuals for precisely this infraction “numerous times.” RP 8. He had written tickets for that infraction 13 times in 2016 alone. RP 8. Because he did not issue a citation every time, the detective estimated that he had stopped vehicles for this infraction 26-39 times in 2016. RP 8 (“at least double that, maybe triple”).

The detective initiated a stop of the Defendant’s car, and the Defendant pulled over within two blocks of the gas station. RP 6-8. The detective did not know the Defendant. RP 11. He testified that “the actual reason for the stop in this case” “was failing to stop for the sidewalk before entering out into traffic.” RP 14. And in fact, the detective cited the infraction. RP 11. The Pasco Municipal Court found the infraction was committed. CP 14 II. 24-27; CP 25.

The Defendant could not produce either his vehicle registration or insurance. RP 9. When the detective suggested the Defendant check his glove box, the Defendant declined to do so. RP 9. The Defendant was arrested and cited for driving with a suspended license. CP 25; RP 10. When the Defendant asked if he could return to the car to retrieve \$500 in order to post bail, the detective offered to

retrieve the money for him. RP 10-11. The Defendant responded, "Never mind then." RP 11. The detective found the Defendant's responses suspicious and requested a canine sniff. RP 12. A search warrant produced the evidence of the crime for which the Defendant is convicted. CP 1, 141, 142 (possessing cocaine with an intent to deliver and possessing hydrocodone); RP 13-14.

In cross-examination, defense counsel asked the detective about the dash cam video. RP 19. A largely inaudible transcript was attached to the defense memorandum. CP 189-92. The transcript suggests that earlier at the gas station a man had approached the Defendant's car on foot, sat in the passenger seat for a little bit, and then walked off heading east on Court Street while the Defendant entered the store. CP 189-90.

The detective acknowledged that he had observed this interaction and suggested that another officer make a field contact with the pedestrian. RP 20, 21 ll. 16-19. The detective explained that his suggestion was not based on any suspicion.

[T]his is a common thing with the Street Crimes Unit. We're always looking for something to do. If there's a guy in the area and he's looking for a field contact or something to do, I'll mention, "There's a guy across the street if you want to go do a field contact."

RP 21.

... with a proactive team, we're constantly looking for field contacts whether it be pedestrians, bicyclists, traffic stops, or whatever.

RP 24-25.

When defense counsel suggested that the traffic stop had been motivated by a desire to investigate this conversation, the detective appeared confused what one thing had to do with the other.

RP 22-23. The detective explained that the conversation between two motorists at the gas station had not been suspicious on its own.

RP 23-24. Although defense counsel referred to this conversation as a transaction (RP 20, 22, 25, 31, 32), the detective never did (CP 189-92). It was not, to his knowledge, a drug transaction. RP 29, ll. 13-16.

However, "the totality of the circumstances" known *after* the arrest provided a new context for that observation. RP 24. The Defendant had been unwilling to check his glove box for his registration and insurance to save himself a \$134 ticket. CP 189; RP 11. He had been unwilling to allow the detective to retrieve bail money from the car. RP 11. The vehicle smelled of marijuana. RP

12, 28. And in hindsight, the momentary meeting in the Defendant's car might not be so innocent as it first appeared. RP 24.

The detective informed defense counsel that suspicion about a so-called transaction "was not my basis of the stop. The basis of the stop was the infraction." RP 21, ll. 14-15.

You're saying it caused the initial stop. That's not my words, those are your words. This -- this is not what caused the stop. The cause of the stop was the infraction on the sidewalk.

RP 23, ll. 6-9.

The court denied the motion to suppress. CP 176. "Court will indicate that [the detective's] testimony is credible." RP 41. "It is clear, based on Detective Jones's testimony, the sole reason for the stop was, in fact, the traffic violation."

V. OBJECTION TO DEFENDANT'S SUPPLEMENTAL FACTS SECTION

The Defendant's Supplemental Facts section contains many misstatement of the record.

The Defendant states there "was no evidence that a person was in the crosswalk or that there was any traffic on the roadway Pleasant entered," Supplemental Brief of Appellant (Supp BOA) at 2

(citing RP 15-16). This misrepresents the record in several regards. First, the Defendant was infracted for not stopping for a *sidewalk* before entering into traffic, not a crosswalk. RP 6 (discussing RCW 46.61.365). There is no record to indicate that there was a crosswalk near the location of the infraction and no inquiry, because a crosswalk has no relevance to the instant facts. The concern was the sidewalk.

Second, contrary to the Defendant's statement, there is a record of traffic on the roadway.

Q. Were there other cross-traffic?

A. Yeah. There's Court Street traffic, sure.

RP 16. This commercial area of Court Street is busy day and night.

The Defendant states the detective "admitted that he observed the previous transaction between the two males and that he found it suspicious." Supp BOA at 2. Contrary to RAP 10.3(5), no citation is provided. This the actual record:

Q. So after watching the video, isn't it true to say that you had watched two individuals transact? You referenced one leaning in through the window and that you found that to be very suspicious and then you indicated to the --

A. I said that on camera? I found that to be suspicious?

....

Q. Okay. And you actually described, to the officer, that it was suspicious what they were doing?

A. I don't recall if I used the word "suspicious" or not.

Q. If you had noticed two individuals talking at a gas station would you, in your normal course of business, deem that suspicious?

A. No.

It would depend on the totality of the circumstances. I can't -- I can't say what they were doing or why they were -- why he had somebody in his vehicle. I didn't -- I can't attest to what they were doing.

RP 20, 23-24. See also CP 189. The detective did not find the conversation suspicious prior to initiating the traffic stop.

The Defendant states that the detective testified that he stopped motorists for this infraction "36 or more" times. Supp BOA at 2 (citing RP 8). In fact, he testified that the number was double or triple the number of infractions issued. RP 8. Because he issued 13 citations, the number of stops would be 26 to 39.

The Defendant represents that the person who had conversed with him in his car at the gas station was African American. Supp BOA at 4 (citing RP 27). RP 27 does not say this. Defense counsel suggested that this person was black. RP 20, 31. But an attorney's remarks are not evidence. WPIC 1.01. The transcript of the dash cam suggests that he was not black. RP 189-90 (referring to the Defendant as "the black dude" suggesting race is a characteristic

which distinguishes the two men). Ultimately, we cannot confirm or disprove this in the record.

The Defendant states that at RP 41 and RP 44 the superior court judge refused to inquire into the detective's subjective belief, determining that it was not relevant to the motion. Supp BOA at 4. This is not the record. At RP 41, ll. 3-14, the judge correctly noted the federal jurisprudence. He then applied the state jurisprudence by making findings about the credibility of the detective as to his subjective expression of his true intent. The judge found the detective credible, noting that he actually regularly cited this infraction. RP 41, ll. 15-24. At RP 44, the judge noted that a mixed motive was permissible under *State v. Arreola*, 176 Wn.2d 284, 290 P.3d 983 (2012). However, he did not find a mixed motive.

It is clear, based on Detective Jones's testimony, the sole reason for the stop was, in fact, the traffic violation. Therefore, there's been no violation of the Fourth Amendment or Article I, Section 7 of the Washington State Constitution.

RP 44, ll. 10-14.

VI. ARGUMENT

A. THE SUPERIOR COURT'S CREDIBILITY FINDING IS A VERITY ON APPEAL.

In challenging the denial of the motion to suppress for pretextual stop, the Defendant makes only two assignments of error.

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.

Supp BOA at 4. The Defendant does not assign error to the court's finding that Detective Jones' testimony was credible. It is, therefore, a verity on appeal. *State v. Arreola*, 176 Wn.2d 284, 288, 290 P.3d 983 (2012). In any case, a reviewing court defers to the trier of fact on issues of credibility. *In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991 (2012).

B. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE DETECTIVE'S "SOLE REASON" FOR THE STOP WAS TO ENFORCE THE TRAFFIC LAWS.

The Defendant assigns error to the court's finding that the sole reason for the stop was the traffic violation. Supp BOA at 1. The standard of review for a trial court's factual findings is substantial

evidence. Supp BOA at 5; *Blackburn v. State*, 186 Wn.2d 250, 256, 375 P.3d 250 (2016). Substantial evidence is defined as a quantum of evidence of sufficient to persuade a rational, fair-minded person of the truth of the premise. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369, 372 (2003).

In a claim of pretext, the court must consider the subjective intent of the officer. *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). Here Det. Jones' testimony reveals his intent was to enforce the traffic laws.

The record is the detective's testimony and the parties' briefs. CP 9-25, 179-92; RP 3. The detective testified that the only reason he stopped the car was to cite the infraction. Relevant to intent is the officer's routine practice. *State v. Arreola*, 176 Wn.2d at 289. Citing for this infraction is something that he regularly does. It is something that he did here. The detective seemed genuinely confused by defense counsel's suggestion that there could be any other motive. This is because he did not find it suspicious that two men would engage in a conversation at a gas station. It became interesting after the stop, but even then the detective ultimately determined it was not sufficiently probative to add to the affidavit in support of search

warrant. CP 58-59.

The judge, who observed the witness, testify found him to be credible. *State v. Alvarez*, 45 Wn. App. 407, 413, 726 P.2d 43, 48 (1986) (credibility findings lie with the fact finders who alone have the opportunity to view the demeanors of those testifying).

There is substantial evidence for the court's finding.

C. THE SUPERIOR COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS.

A lower court's conclusions of law in a pretext ruling are reviewed de novo. *State v. Arreola*, 176 Wn.2d at 291. An officer may not rely on some legal authorization as a mere pretext to dispense with a warrant when the true reason for the seizure would not be exempt from the warrant requirement. *Id.* at 294. "[A] traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop." *State v. Arreola*, 176 Wn.2d at 297. The lower court found the actual cause of the stop was the traffic infraction only. There was no pretext, nor even a mixed motive.

The Defendant argues that the court did not consider the detective's subjective intent. Supp BOA at 10, 11. As explained *supra*, that is not the record. The court found the detective's expressed intent credible.

The Defendant argues that failure to cite every similar traffic infraction that was the basis for a stop suggests that all of the stops were pretextual. Supp BOA at 10. The Defendant does not explain what analysis dictates this conclusion. It is unsound. There are many reasons why an officer may not cite an infraction that precipitate a stop. The officer may be called away mid-stop to assist in a different investigation. The officer may act in his or her discretion to give the motorist a warning. Or a stop may develop into something more. The officer may observe several infractions after the stop and choose to write a ticket for only the most serious. The officer may learn of crimes and choose to refer on the more serious matters only. During the encounter, the officer may learn that a vehicle occupant's needs eclipse the infraction, e.g. when an occupant is having a health emergency or seeking police assistance or protection.

The Defendant argues that any citation for an infraction is unwarranted if the infraction did not escalate into a crime. Supp BOA

at 10-11 (arguing that Defendant entered traffic without injuring anyone). This is another unsound argument. No law and no public policy require a reckless endangerment or vehicular assault be committed before law enforcement can cite the infraction under RCW 46.61.365.

The Defendant would like the Court to believe that the detective suggested a field contact prospect, because he suspected drug activity. Supp BOA at 11. The detective denied this to be the case. RP 21, 24-25. He said he had no reason to suspect drug activity. He did not see a drug transaction, and he did not suspect it. Indeed, it is hard to imagine how the interaction described would suggest a drug transaction. There is nothing suspicious about a conversation. At night when the weather is cool, it stands to reason that they would converse out of the weather. The detective's failure to include this information in the affidavit in support of a search warrant further demonstrates that he did not make the connection that defense counsel drew at the hearing. The detective requested a warrant on suspicion for a VUCSA offense. CP 57. He did not add this information, because he did not find that it was no probative of the crime.

The Defendant argues that the detective was “preoccup[ied]” with the conversation at the gas station. Supp BOA at 12. A law enforcement officer is trained to be observant, to draw inferences, and to multi-task. It is not unusual for law enforcement officers to be paying attention to radio traffic about their fellow officers even as they are involved in something else. This ability to pay attention to many things at once does not equate to preoccupation.

Where the detective expressed a singular proper motive, where the court found this testimony credible, and where the record provides substantial evidence to support such a finding, there was no pretext. The court did not err in denying the motion to suppress.

VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction.

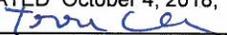
DATED: October 4, 2018.

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<p>Lise Ellner liseellnerlaw@comcast.net Erin Sperger erin@legalwellspring.com</p>	<p>A copy of this supplemental brief was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 4, 2018, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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