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NO. 35704-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ERIC OLSEN,

Appellant.

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

The Honorable M. Scott Wolfram, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's CrR 3.6 motion to suppress evidence.

2. The trial court erred in finding that the traffic stop of appellant's car was not pretextual.

3. The trial court erred in entering written findings of fact 1, 2, and 4 in support of the order denying the motion to suppress. CP 29-32.<sup>1</sup>

4. The trial court erred in entering conclusion of law 1 in support of the order denying the motion to suppress. CP 29-32.

Issue Pertaining to Assignments of Error

Appellant was charged with possession of heroin and drug paraphernalia after police discovered the items in his car. Police stopped the car appellant was driving purportedly to cite him for having an expired vehicle registration. Officers acknowledged they were "looking for drugs" after having earlier seen the car parked in the driveway of a house suspected of drug activity. A second officer arrived within minutes of appellant's car being stopped and immediately began questioning appellant what he was doing at the house. Appellant eventually admitted to having

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<sup>1</sup> The September 22, 2017 findings of fact, conclusions of law, and order regarding CrR 3.6 hearing are attached as an appendix.

a small amount of heroin in the car after being told that a drug detecting dog would search the car if he did not agree to a search. Appellant was never cited for having an expired vehicle registration, but rather, for displaying disfigured license plates. Defense counsel's motion to suppress the evidence as an unlawful pretext stop was denied on the basis that officers conducted a lawful mixed motivation stop. Did the trial court err in denying appellant's motion to suppress on the basis of an unlawful pretextual stop where officers were admittedly "looking for drugs", the seizure was objectively unreasonable in light of the expired vehicle registration justification for the stop, and absent the alleged registration violation, the presence of appellant's car near a suspected drug house did not justify a warrantless seizure?

B. STATEMENT OF THE CASE

1. Procedural History.

The Walla Walla County prosecutor charged appellant Eric Olsen with one count each of unlawful possession of heroin and use of drug paraphernalia for an incident alleged to have occurred on October 29, 2016. CP 3-4.

Olsen's motion to suppress evidence was denied following a pretrial CrR 3.6 hearing. RP<sup>2</sup> 64; CP 29-32. Written findings of fact and conclusions of law were entered several weeks after the suppression hearing. CP 29-32.

Olsen waived his right to a jury trial and stipulated the facts were sufficient for a finding of guilt. CP 33-34; RP 6, 70. The trial court found Olsen guilty as charged. CP 35-36.

Olsen was given a first-time offender waiver and sentenced to 30 days confinement. Olsen was given credit for 1 day served and the remaining 29 days confinement were converted to 232 hours of community service. The trial court also imposed 12 months of community custody. The trial court waived all non-mandatory legal financial obligations (LFOs). CP 37-46; RP 74-75.

Olsen timely appeals. CP 49.

2. Suppression Hearing.

On the afternoon of October 29, 2016, narcotics enforcement police officer, Gunner Fulmer, was conducting a patrol in Walla Walla "areas that are known for high volume narcotics use and trafficking[.]" RP 22. Fulmer saw an unoccupied car that he did not recognize parked in

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<sup>2</sup> This brief refers to the consecutively paginated verbatim report of proceedings for July 12, 2017, September 22, 2017, and October 30, 2017 as "RP".

the driveway of a house that he routinely surveilled for suspected drug activity. RP 22, 35. Fulmer searched the license plate of the car and discovered the registration had expired. RP 23. Fulmer notified other Walla Walla police officers that the car's registration had expired. RP 3, 9, 14, 22.

At some point, Fulmer also notified police officers that the car had left the house.<sup>3</sup> RP 3, 9, 14, 22. In response, Walla Walla police officer Paul Green headed toward where the car was traveling. RP 3, 14-15. Green observed that both the 2016 and 2017 tabs were displayed on the license plate, but that the month tab was absent. RP 3, 6. Green also explained that his computer showed the registration on the car had expired. RP 4-5.

Green decided to stop the car, explaining that if he "had been on patrol" and saw a car displaying tabs in this manner he would have stopped it. RP 3-4, 18. Green denied that Fulmer ordered him to stop the car. RP 9, 14.

Olsen was driving the car. There is no evidence Olsen displayed any signs of drug or alcohol impairment. Olsen did not have a driver's

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<sup>3</sup> Fulmer's written report indicated that he saw the car leave the house. CP 15. Fulmer explained at the 3.6 hearing however, that his written report was incorrect, and he had not personally watched Olsen's car leave the house. RP 34-35. In contrast, officer Paul Green corroborated Fulmer's written report and testified that Fulmer said he saw the car leave the house. RP 14-15.

license with him, but Green confirmed he had a valid driver's license. RP 4-5.

Green could not recall whether he told Olsen the car's registration had expired. Nor could Green recall whether Olsen had a copy of the car's registration with him. Instead, Green told Olsen he stopped him because he had improperly displayed tabs. RP 4-5. Green later discovered one of the tabs was for a different car registered in Olsen's parent's names. RP 6. Green returned to his car, where over the next 15 minutes he investigated and wrote Olsen a citation for the improperly displayed tabs. RP 5-6. He did not issue a citation for the expired registration. RP 11-13.

Within five minutes of Green stopping Olsen's car, officer Fulmer appeared at the scene with his drug detecting dog and another police officer. RP 7, 10, 18-19, 25-26, 38-39, 44. Fulmer began speaking with Olsen and immediately asked about him about drugs. RP 35. Fulmer explained his "intent" and "goal" in questioning Olsen was not to address "tabs or anything about registration". RP 35, 39. As Fulmer acknowledged, "this was a stop about investigating drug activity[.]" RP 39.

Green returned to his car and could not hear what Fulmer and Olsen were discussing. RP 7-8. Green explained however, "I knew that he [Fulmer] was talking to Mr. Olsen about drugs because that's what

Officer Fulmer usually does." RP 8, 10. Green also acknowledged that "we were looking for drugs." RP 12, 17.

In response to Fulmer's questioning, Olsen explained that he was coming from a friend's house where he smoked marijuana. RP 26, 36-37. Fulmer feigned surprise and responded that he believed Olsen's friend used heroin. RP 26-27. Olsen did not respond. Fulmer told Olsen that he was going to get his drug detecting dog and walk it around the car. RP 28, 56. If the dog indicated drugs were present, police would then impound and search the car. RP 27-28, 54. Olsen started reaching toward the center console compartment of the car. RP 26-28, 47. When Fulmer told him to stop reaching, Olsen explained that he had a syringe and a small amount of heroin in the car. RP 28, 51-55.

Fulmer ordered Olsen out of the car and advised him of his constitutional *Ferrier*<sup>4</sup> warnings. Olsen consented to a search of his car. Fulmer arrested Olsen after finding a syringe and heroin in the car. RP 29-30, 55.

Olsen confirmed that Fulmer never asked him about the car registration or license plate tabs. RP 45. As Olsen explained, the citation for improperly displayed tabs was later dismissed by the court. RP 48-49.

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<sup>4</sup> State v. Ferrier, 136 Wash.2d 103960 P.2d 927 (1998).

Based on this information, Olsen argued that his seizure was unlawful because police used the improper pretext of a license plate tab violation to conduct an investigation into drugs. Olsen noted that the officers' subjective intent was evidenced by Fulmer's nearly immediate arrival and questioning about drug use. Olsen argued that the search of his car was unlawful, thereby requiring suppression of the items discovered in his car. RP 58-61, 64; CP 7-27.

The State maintained that Olsen's seizure was not improperly pretextual under State v. Arreola.<sup>5</sup> The State noted the officers indicated they would have stopped Olsen for the vehicle registration and improper license plate display regardless of their desire to also investigate drugs. RP 56-58, 62-63; Supp. CP \_\_\_\_ (sub no. 24, Plaintiff's Memorandum in Response to Motion to Suppress, filed 6/30/17).

The trial court denied Olsen's motion to suppress, explaining that the officers stated purpose of stopping the car for license tab infractions was a "routine" and "legitimate basis". RP 64-65; CP 29-32. The trial court noted that "had the two officers been reversed in the sense that had Fulmer pulled the vehicle over, I'm thinking at that point the defense has a

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<sup>5</sup> State v. Arreola, 176 Wn.2d 284, 295-96, 290 P.3d 983 (2012).

pretty good argument. But it was Officer Green who pulled the vehicle over. It was Officer Fulmer who watched the vehicle leave." RP 64.

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE MIXED-MOTIVE STOP WAS PRETEXTUAL WHERE THE SEARCH FOR DRUGS WAS NOT REASONABLY LIMITED IN SCOPE TO INVESTIGATING THE INITIAL SUSPICION OF EXPIRED VEHICLE REGISTRATION.

1. The stop of Olsen's car was pretextual.

Under the Fourth Amendment and Article I, Section 7, a warrantless seizure is per se unreasonable unless it falls within one of the narrow, carefully delineated, and jealously guarded exceptions to the warrant requirement. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). "These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement." State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

Pretextual traffic stops violate Article 1, Section 7 of the Washington State Constitution. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). Whether a stop was pretextual is determined on the totality of the circumstances, considering both the subjective intent of the

officer and the reasonableness of the officer's behavior. Id. at 358-59. A trial court's ruling on whether a stop is pretextual is reviewed de novo. State v. Myers, 117 Wn. App. 93, 96, 69 P.3d 367 (2003).

A "pretextual stop" describes a stop in which an alleged violation is "a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." Ladson, 138 Wn.2d at 358. It is "a false reason used to disguise a real motive." State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Moreover, it represents an abuse of a law enforcement officer's discretion to establish enforcement priorities:

Given the complicated nature of police work and the regulation of traffic in particular, police must exercise discretion in determining which traffic infractions require police attention and enforcement efforts. Yet in a pretextual traffic stop, a police officer has not properly determined that the stop is reasonably necessary in order to address any traffic infractions for which the officer has a reasonable articulable suspicion; instead, the traffic stop is desired because of some other (constitutionally infirm) reason -- such as a mere hunch regarding other criminal activity or another traffic infraction -- or due to bias against the suspect, whether explicit or implicit.

State v. Arreola, 176 Wn.2d 284, 295-96, 290 P.3d 983 (2012).

The Court's analysis in Ladson is instructive because it involved a traffic stop similar to the one here. Officers Mack and Ziesmer were on gang patrol when they recognized Fogel, the driver of the car in which

Ladson was riding, from a rumor that Fogel was involved with drugs. The officers followed Fogel's car for several blocks in the hopes of finding some reason to investigate for possible drug activity. When they determined the license plate tabs were expired, they pulled the car over for a traffic infraction in order to pursue a criminal investigation. Ladson, 138 Wn.2d at 346.

Following the pretextual stop, Ladson was ordered out of the car and patted down. Police found a handgun in Ladson's jacket. Police also found marijuana and \$600 in cash in Ladson's jacket during the search incident to his arrest. Ladson, 138 Wn.2d at 346-47.

Ladson moved to exclude the evidence on the grounds the search was based on a pretext and therefore illegal. The trial court granted Ladson's motion to suppress, but Division Two of this Court reversed. Ladson, 138 Wn.2d at 347 (citing Whren v. United States<sup>6</sup>).

The Supreme Court reversed the Court of Appeals, and held the initial traffic stop was illegal because it was used as a pretext to pursue a criminal investigation. Since the stop was unlawful, the subsequent search was unlawful. Ladson, 138 Wn.2d at 360 (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). Therefore, the Court suppressed the

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<sup>6</sup> 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

subsequently seized evidence and reversed Ladson's conviction. Ladson, 138 Wn.2d at 360.

The facts in Ladson are similar to the facts in this case. Like the officers in Ladson, here Green and Fulmer were on proactive patrols in "areas that are known for high volume narcotics use and trafficking." RP 22. Fulmer saw Olsen's car parked in the driveway of a house he routinely surveilled for suspected drug activity. Fulmer did not recognize the car and no one was inside it at the time. RP 14, 35. Fulmer nonetheless ran the car's license plate and discovered the registration was expired. RP 21-22. Fulmer then informed other officers, including Green, that the car's registration was expired and that the car was leaving the area.

In response to Fulmer's information, Green immediately headed toward the location Olsen's car was traveling. Green then followed the car long enough to confirm that the registration was expired. RP 3-5. There is no evidence Green observed any driving that was consistent with drug or alcohol use.

Though Green claimed to be stopping Olsen for a registration violation, he explained to Olsen that the reason for the stop was that he had improperly displayed car tabs. RP 5. Green could not recall telling Olsen that his registration was expired and did not cite Olsen for expired

registration.<sup>7</sup> RP 5, 11-13. Moreover, Green freely admitted that the purpose of stopping Olsen's car was to look for drugs. RP 12, 17-18.

Within five minutes of Olsen's car being pulled over, Fulmer also responded to the scene with his drug detecting dog. Green did not ask for Fulmer's assistance in processing the scene or issuing the improperly displayed car tabs citation. Rather, Fulmer appeared on his own initiative with the stated goal of "investigating drug activity." RP 35, 39. Fulmer asked Olsen no questions concerning the car's expired registration or improperly displayed license tabs.

The totality of the circumstances here shows that the officers subjective intent for stopping Olsen's car was to conduct a drug investigation. But, although Fulmer may have suspected that Olsen was visiting the house with suspected drug activity, there is no evidence anyone actually saw Olsen enter or leave the house, or otherwise interact with any of the home's occupants. Fulmer had never even seen Olsen's car at the house before. RP 22. Numerous cases have repeatedly made clear that stopping someone to investigate suspected criminal drug activity requires reasonable individualized suspicion, not some general aura of suspiciousness radiating from a compromised location. See e.g. State v.

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<sup>7</sup> Failing to cite a driver for traffic infractions is a factor to consider when determining the officer's subjective intent for making the stop. State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), rev. denied, 142 Wn.2d 1027 (2001).

Weyand, 188 Wn.2d 804, 816-17, 399 P.3d 530 (2017) (walking quickly and looking around, even after leaving a house with extensive drug history at 2:40 a.m., is not enough to create a reasonable, articulable suspicion of criminal activity justifying a *Terry*<sup>8</sup> stop); State v. Fuentes, 183 Wn.2d 149, 164, 352 P.3d 152 (2015) (visiting an apartment of a woman known to have a conviction for possession with intent to distribute and observing Sandoz's pale, thin face, visible shaking, and "big" eyes did not give the officer reasonable suspicion that Sandoz was engaged in criminal activity); State v. Doughty, 170 Wn.2d 57, 60, 239 P.3d 573 (2010) (finding seizure illegal where police did not know what Doughty was doing at suspected drug house); State v. Gleason, 70 Wn. App. 13, 18, 851 P.2d 731 (1993) (where Gleason was seized leaving apartment complex with history of drug sales, finding seizure unwarranted where it was the first time Gleason was seen in the area, officers did not know what occurred at the apartments, and there was no evidence Gleason acted suspiciously).

The stop of Olsen's car ostensibly for a registration violation, but in reality, to investigate drugs for which there was no reasonable individualized suspicion, is precisely the type of pretext stop the Ladson court condemned. As Ladson warned, "The ultimate teaching of our case

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<sup>8</sup> Terry v. Ohio, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

law is that police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope the reason for the exception." 138 Wn.2d at 357. Just like the officers in Ladson, here Green and Fulmer used the expired vehicle registration as an excuse to make the stop because the suspected drug activity did not fit into one of the narrowly drawn exceptions to the warrant requirement under the Fourth Amendment and Article I, Section 7.

Ladson remains good law. Nonetheless, the Supreme Court's decision in Arreola must also be addressed.

In Arreola, an officer responding to a tip concerning a suspected DUI followed the car for half a mile and did not observe any signs of DUI, but stopped the car for having an illegally altered exhaust. 176 Wn.2d at 288-89. After approaching the car, the officer observed detected an "odor of alcohol," and noticed the driver's "eyes were red and watery." The officer also saw "two passengers and several open containers of alcohol in plain view inside the vehicle." Arreola, 176 Wn.2d at 290. Under the facts of Arreola, the officer's independent rationale for conducting the stop was held to justify the stop under Article 1, Section 7, even though the officer admitted he was primarily motivated to look for evidence of DUI. Id. at 289-90.

In reaching this conclusion, the Arreola court created a new type of traffic stop called a "mixed-motive" stop. 176 Wn.2d at 297. The Court defined a mixed-motive traffic stop as a stop based on both legitimate and illegitimate grounds. Id. The Court held the officer's stop of the accused was a mixed-motive stop because the trial court found the driver's exhaust system infraction was an actual reason for the stop. In so holding, the Court observed the trial court found the officer would have stopped the accused for the exhaust infraction even without a previous DUI report. Id. at 298.

The Court held:

[A] traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.

Arreola, 176 Wn.2d at 297-98. The stop is, therefore, justified even when the officer's primary motivation is a hunch or some other legally insufficient reason and the legitimate reason is secondary. Id. "In such a case, an officer's motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop, *so long as discretion is appropriately exercised and the scope of the stop remains*

*reasonably limited based on its lawful justification.*" Id. at 299 (emphasis added).

Arreola is distinguishable from Olsen's case for several important reasons. In Arreola, the officer testified that he would often stop a vehicle for an altered muffler "because, as a member of the community, he appreciates concerns about the excessive noise that such mufflers emit." 176 Wn.2d at 289. He also testified "he made a conscious decision to make the traffic stop because of the altered muffler." Id. This testimony therefore supported the trial court's findings. Here, in contrast there was no testimony that reacting to the expired registration or improperly displayed tab was "reasonably necessary in furtherance of traffic safety and the general welfare." For unlike an altered muffler, which emits "excessive noise" regardless of the time or traffic conditions, an expired registration or improperly displayed license plate poses no danger or nuisance to the public.

Moreover, although Green testified that he often stops cars with expired tabs that he encounters while on routine patrol, Green did not see Olsen's car while out on a routine patrol. Rather, Green actively sought out Olsen's car after being told of its location by Fulmer. RP 3-4, 9, 14. As Arreola recognized, this is an important consideration in determining whether the stop is mixed-motive or pretextual. 176 Wn.2d at 298-99

("The officer in *Ladson* would not have conducted the stop had there been no street rumor, and the officer abused his discretion by conducting the stop without deeming it reasonably necessary to enforce license plate tab regulations.").

Finally, unlike in Arreola, here, the stopping of Olsen's car was not treated just like any other ordinary traffic stop. Fulmer's nearly immediate presence at the scene in order to investigate entirely unrelated suspicions of drug activity was not reasonably related to the initial stop for an expired registration and improper license plate display and was not, therefore, "reasonably limited based on its lawful justification." Arreola, 176 Wn.2d at 299. Unlike in Arreola, here there is no evidence that either officer observed any signs of intoxication or drug use in Olsen that justified extending the investigation beyond its initial lawful justification for an expired car registration. Even if Green and Fulmer had not acknowledged that their intent in stopping Olsen's car was to investigate drug activity, Fulmer's action of appearing at the scene nearly immediately with a drug-detection dog, without being summoned, is objectively unreasonable in light of the initial justification for the stop. Thus, Arreola's stated exception to taint when there exists a legitimate basis for the stop does not apply.

Justice Chambers' dissent in Arreola warned that the Court's majority opinion would destroy the "spirit of *Ladson*[" 178 Wn.2d at 301 (Chambers, J. dissenting). As Justice Chambers foreshadowed, "Going forward, police officers in Washington will be free to stop citizens primarily to conduct an unconstitutional speculative investigation as long as they can claim there was an independent secondary reason for the seizure." Id. at 302.

Olsen's case highlights the dangers of extending Arreola's mixed-motive reasoning. Similar to this case, in State v. Tait, 191 Wn. App. 1035, 2015 WL 7777223, rev. denied, 85 Wn.2d 102, 377 P.3d 719 (2016), a seizure of Tait's car to investigate a suspended license also quickly became an investigation into Tait's suspected drug possession.<sup>9</sup> Officer Fulmer and his drug detecting dog appeared at the scene, and several drugs were subsequently found in Tait's possession. Tait, 2015 WL 7777223, \*1-2. Like Olsen, Tait was subsequently charged and convicted of unlawful possession stemming from an ostensibly mixed-motive stop. 2015 WL 7777223, \*2, 5. Based on an erroneous

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<sup>9</sup> Under GR 14.1(a), Olsen asks this court to take judicial notice of the similar facts, and involvement of some of the same Walla Walla Police Department officers, in this unpublished, non-binding opinion. "Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963).

interpretation of Arreola's holding, police officers are now free to engage in a pattern of mixed-motive stops that do not comport with the holding in Ladson or with article I, section 7's command that "[n]o person shall be disturbed in his private affairs...without authority of law." 178 Wn.2d at 302 (Chambers, J. dissenting).

Under the totality of the circumstances, the stop was a pretext to search for drugs and the trial court erred in denying Olsen's motion to dismiss on those grounds. Whether Olsen's seizure was a mixed motive stop or not, it was still pretextual in violation of Article I, Section 7. Suppression of evidence found as a result of the unlawful search is required. Ladson, 138 Wn.2d at 360. Absent the illegal seizure, insufficient evidence exists to sustain the convictions. Reversal and dismissal is required.

2. To the extent Olsen must argue *Arreola* is incorrect and harmful for this court not to follow the decision, Olsen so argues.

Olsen respectfully submits that the majority decision in Arreola was wrongly decided. For reasons stated above, and in the Arreola dissent, the majority decision in Arreola is "incorrect and harmful."<sup>10</sup> It should be criticized and overturned.

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<sup>10</sup> State v. Johnson, 188 Wn.2d 742, 757, 399 P.3d 507 (2017) (quoting In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

Olsen recognizes that this Court is not entirely free to disregard the Supreme Court's decisions. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227, 39 A.L.R.4th 975 (1984). This Court, however, has not shied from careful criticism of Supreme Court decisions in appropriate cases.<sup>11</sup> This Court clearly has the freedom to display its disagreement with the supreme court's decisions. See, e.g., State v. Bacani, 79 Wn. App. 701, 902 P.2d 184 (1995) (Grosse, J., concurring) ("The reasoning supporting the 1903 decision in State v. Morgan, 21 Wash. 226, 71 P. 723 (1903), is as dead as the judges who authored it"), rev. denied, 129 Wn.2d 1001 (1996). Such criticism has been important in changing erroneous supreme court decisions.<sup>12</sup>

Olsen understands however, that this Court is not in a position to overrule binding Supreme Court precedent even if it is incorrect and harmful. See e.g., Fergen v. Sestero, 174 Wn. App. 393, 398, 298 P.3d 782 (2013), aff'd, 182 Wn.2d 794, 346 P.3d 708 (2015). Hence, the issue

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<sup>11</sup> See, e.g., State v. Ferguson, 76 Wn. App. 560, 570 n.13, 886 P.2d 1164 (1995) (criticizing the rule in State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993), as "go[ing] too far"); accord Seattle v. Wilkins, 72 Wn. App. 753, 757 n.6, 865 P.2d 580 (1994); State v. Berlin, 80 Wn. App. 734, 743, 911 P.2d 414 (1996) (reluctantly following Davis, stating that the supreme court "should clarify and limit Davis"), rev'd, 133 Wn.2d 541, 947 P.2d 700 (1997).

<sup>12</sup> State v. Wilson, 83 Wn. App. 546, 553, 922 P.2d 188 (1996) (criticizing the rule in State v. Thompson, 95 Wn.2d 888, 892, 632 P.2d 50 (1981)), rev. denied, 130 Wn.2d 1024 (1997). Thompson was subsequently overruled in State v. Hardy, 133 Wn.2d 701, 709 n.9, 946 P.2d 1175 (1997) (citing Wilson's criticism with approval).

is raised here with the understanding that definitive relief may only come at the next level.

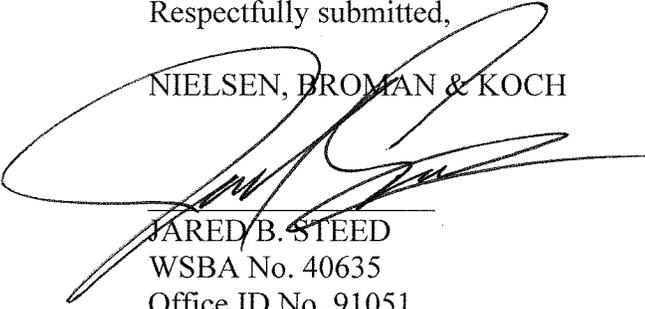
D. CONCLUSION

Olsen's seizure was an unlawful pretextual stop. The trial court erred in denying Olsen's motion to suppress. This Court should therefore reverse Olsen's convictions and remand for dismissal with prejudice.

DATED this 29<sup>th</sup> day of March, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

## **APPENDIX**

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2017 SEP 22 P 2:57

WALLA WALLA COUNTY  
WASHINGTON

SUPERIOR COURT OF WASHINGTON – COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

ERIC L. OLSEN,

Defendant.

NO. 17 1 00032 6

STATE'S  
FINDINGS, CONCLUSION  
AND ORDER REGARDING  
3.6 HEARING

THIS MATTER having come before the court upon defendant's motion for a CrR 3.6 hearing regarding admissibility of physical evidence found by law enforcement, and the court having heard evidence and arguments by the parties, and having reviewed the legal memoranda of counsel, and being fully advised, the court makes the following findings,

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**UNDISPUTED FACTS**

1. On October 29, 2016, Walla Walla Police Department ("WWPD") Off. Fulmer saw a vehicle with expired tabs at a house known to be involved in illegal drugs activity. He communicated his observations to fellow officers, and sometime later WWPD Off. Green saw the vehicle traveling within the city and ran the plates which came back with an expired registration. Off. Green proceeded to conduct a traffic stop for that violation. During the stop Off. Green also discovered that the driver, defendant Olsen, did not have his driver's license on him and returned to his patrol vehicle to write out the infraction paperwork.

3.6 Findings,  
Conclusion and Order – P. 1

OFFICE OF THE PROSECUTING ATTORNEY  
240 WEST ALDER, SUITE 201  
WALLA WALLA, WA 99362-2807  
PHONE (509) 524-5445

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3 2. When Off. Fulmer heard that Off. Green had pulled over this vehicle he proceeded to  
4 the location of the stop. There he made contact with Mr. Olsen in his vehicle and asked him  
5 initially where he had just been. When told that he had been at Mr. Demaray's home and used  
6 marijuana with Mr. Demaray, Off. Fulmer expressed surprise and stated that he knew Mr.  
7 Demaray to use heroin, not marijuana. Off. Fulmer then told Mr. Olsen that he intended to  
8 use his K-9 partner to sniff the exterior of Mr. Olsen's car and explained the process of doing  
9 that, but also told him that if he wished he could give consent to search his vehicle. Mr. Olsen  
10 began reaching towards the center console of his vehicle, causing Off. Fulmer to tell him not  
11 to do so, for officer safety reasons, but that if he had something illegal in the car to just let him  
12 know if he wanted to turn it over. Mr. Olsen then told Off. Fulmer that he had heroin and  
13 syringes in the car by the console. Off. Green was still working on the infraction paperwork  
14 at this time.  
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17 3. Upon being told that heroin and syringes were in the car, Off. Fulmer advised Mr.  
18 Olsen of his *Ferrier* warnings which Mr. Olsen stated he understood and consented to a  
19 search of his vehicle. Mr. Olsen was placed in proximity to his vehicle so that he could  
20 communicate if he wanted to halt or restrict the search as Off. Fulmer proceeded to search the  
21 vehicle for the syringes and heroin, finding the heroin inside the console and the syringes next  
22 to the driver's seat. Mr. Olsen was subsequently arrested. Off. Fulmer's contact with Mr.  
23 Olsen and his search of the vehicle took approximately fifteen minutes, which was while Off.  
24 Green was still doing infraction paperwork which he completed within fifteen to twenty  
25 minutes.  
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**DISPUTED FACTS**

1. There are no disputed facts.

**COURT'S FINDINGS AS TO THE FACTS**

1. The Court finds that Off. Green had a lawful basis to stop Mr. Olsen's vehicle based on the expired registration violation and failure to have his driver's license on his person.

2. The Court finds that Off. Green would have conducted a traffic stop of Mr. Olsen's vehicle based on the registration violation regardless of having information of where the vehicle had been seen earlier by Off. Fulmer.

3. The Court finds that Mr. Olsen's consent to search his vehicle was voluntarily and intelligently made after *Ferrier* warnings.

4. The Court finds Mr. Olsen was not detained at the scene beyond the scope of the traffic stop for the violations found by Off. Green.

5. The Court finds that Off. Fulmer had probable cause to arrest Mr. Olsen upon finding the drugs and syringes inside the vehicle.

**COURT'S REASON FOR ADMISSIBILITY OF PHYSICAL EVIDENCE**

1. The syringes and heroin found inside Mr. Olsen's vehicle are admissible for the reason they were found during a lawful traffic stop and pursuant to a valid consent to search the vehicle that did not exceed the scope of the traffic stop.

DATED this 22 of Sept, 2017.

  
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Judge of the Superior Court

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Presented by:



GABRIEL E. ACOSTA WSBA# 16719  
Deputy Prosecuting Attorney

Approved as to form:



JULIE CARLSON STRAUBE WSBA# 32316  
Attorney for Defendant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**March 29, 2018 - 3:30 PM**

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