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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC L. OLSEN,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

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

II. RELIEF REQUESTED

Respondent asserts no error occurred in the suppression ruling, conviction, and sentence of the Appellant.

III. ISSUE

Did the superior court err in denying the suppression motion, where the detaining officer had a single motive to cite the infraction such that there was no pretext and the scope of the investigation was limited to that purpose?

IV. STATEMENT OF THE CASE

The Defendant Eric Olsen seeks review of the denial of his motion to suppress alleging the traffic stop was pretextual.

Walla Walla police officer Gunner Fulmer is a canine handler. RP 20. Because his dog is trained to find the odors of narcotics, part of his job description requires Ofc. Fulmer to patrol areas of the city known for high volume narcotics use and trafficking. RP 20, 22.

On October 29, 2016, Ofc. Fulmer was patrolling when he

observed a Subaru Outback that he had not seen before, parked in Donnie Demaray's driveway. RP 22, 35. The officer ran the plates and learned that the tabs were expired. RP 20-22. Ofc. Fulmer testified that it is his practice to stop vehicles with expired tabs to advise the driver of the violation. RP 22-23. In this case, the car was parked and unoccupied. RP 22.

When he circled back 30-40 minutes later, the car was gone. RP 21, 23-24. Ofc. Fulmer "chatted with a couple of the officers on our MPT, which is our computer" to ask if they were familiar with the Subaru with the expired registration. RP 3, 24. The system works like a group text message or listserv between on-duty officers. RP 24.

Walla Walla police officer Paul Green saw the communications and then observed the car. RP 3, 14. He testified that Ofc. Fulmer was not directing any officer to perform a traffic stop, and that there would have been no repercussions had he ignored the car. RP 14. Ofc. Fulmer also testified that he did not request his fellow officers to stop the car. RP 32-33.

Ofc. Green got behind the car, ran the plate, and independently verified that the vehicle registration was expired. RP 3, 5. Ofc. Green particularly noticed that the plate displayed tabs for two years, 2016

and 2017, but lacked any month tab. RP 3. He testified that when he comes across a vehicle with tabs displayed in this way, “I effect a traffic stop.” RP 3-4. “[I]f I have the time, I effect a traffic stop.” RP 8. The unusual display of two years and no month suggests a tampering with the tabs as turned out to be the case here. RP 5 (the tabs had been issued for a different vehicle). Although a relatively new officer, Ofc. Green had pulled over approximately 50 vehicles for a tab violation. RP 7, 17, 19.

Ofc. Green stopped the car with the Defendant driving and cited him for invalid registration.¹ RP 4-5. [He would later learn that one of the tabs had been issued for a different vehicle, belonging to the Defendant’s parents. RP 5. This would cause Ofc. Green to cancel the first ticket and issue another for the more appropriate infraction of display change or disfigured plate. RP 7, 11-13.] Because the Defendant did not have his license on him, which can be scanned into the system, it took the officer a little longer than normal to fill out the paperwork. RP 4-6 (approximately 15 minutes).

While Ofc. Green was preparing the infraction notice, Officer

¹ There is no significant distinction between a tabs violation and a registration violation. Expired tabs indicate that the owner has not renewed his or her registration. WAC 308-96A-295.

Fulmer arrived and spoke with the Defendant. RP 7, 25-26 (arriving 3-5 minutes after the traffic stop). Dispatch records would corroborate the times. RP 39.

The Defendant told Ofc. Fulmer that he was coming from Oak Street where he had been smoking marijuana with his long-time friend Donnie Demaray. RP 26-27. Ofc. Fulmer knew Mr. Demaray to use heroin, not marijuana, and told the Defendant so. RP 26. In fact, the police know Mr. Demaray to be a drug dealer. CP 57.

Seeing that Ofc. Green was still occupied with writing the ticket, Ofc. Fulmer figured that he would have time to apply his canine partner to the exterior of the Subaru while the Defendant was stopped. RP 28. He advised the Defendant of his intent. RP 27. Before deploying the canine, Ofc. Fulmer explains that if the canine alerts, the officer will apply for a warrant. RP 54-55. A search authorized by a warrant usually results in the car being held for a longer period of time than a search based on consent. RP 54-55 (up to 12 days, but typically 2-3 days).

Upon learning the officer's intent to deploy the canine, the Defendant informed that he had a syringe with a small amount of heroin. RP 27, 28. The Defendant only has one arm. RP 52. He

reached across his body with his left hand to the center console on his right to retrieve the syringe. RP 28, 47-48. Not able to locate it, he suggested it may be in the glovebox. RP 48.

Ofc. Fulmer asked the Defendant to stop reaching and to step out of the car. RP 28, 55. The officer gave the Defendant the Ferrier warnings, and the Defendant consented to allow the officer to retrieve the syringe and heroin from between the center console and seat. RP 29, 30, 32, 55. No further search was conducted, and the canine was not deployed. RP 31.

The Defendant was charged with possessing heroin and using drug paraphernalia. CP 3-4; RP 31. He filed a suppression motion alleging a pretextual stop. CP 7-27. The State's responsive memorandum has been added to the record on appeal by supplemental designation. CP 53-58.

At the hearing, Ofc. Green explained that he was alert to how every contact may develop. "Any time I make a traffic stop, I'm investigating for drugs." RP 17. "I always keep my eye out of indicators of drug use." RP 18. But he did not stop the Defendant for that purpose. "It was a stop for the tabs." RP 17. "Many times I'm just pulling them over for the violation." RP 18.

The Defendant testified at the hearing “pretty much along the lines” of the officers’ testimony. RP 44. He said Ofc. Green made the first approach, asking for documentation which the Defendant could not produce. RP 42-43. He said Ofc. Fulmer arrived “within a minute or two,” “pretty rapidly.” RP 42-43. He admitted that he volunteered that he was holding and began to reach for the heroin to show them. RP 47.

He equivocated on whether he had volunteered Mr. Demaray’s name.

And I think I said Mr. Demaray's -- I don't believe they brought up his name. I think I said I was leaving a house. Actually, I don't believe I said I was just leaving Donnie Demaray's house. I don't believe that was what initially came out of my mouth. I think they had said -- stated they had seen where I was and asked what I was doing there.

RP 44.

The Defendant believed there were more officers at the stop. RP 41-42, 51. His memory on this point is contradicted by the officers’ testimony and is impossible to reconcile with the actual number of officers who could have been on shift at one time. RP 10-11, 18, 34.

He did not remember being given the Ferrier warnings, but felt

he had consented so that his mother's car would not be impounded.
RP 48.

After the court denied the motion, the Defendant proceeded by way of a stipulated facts trial and was sentenced to 30 days converted to community service hours. CP 29-46; RP 66, 70, 75.

The court's order on the suppression issue includes undisputed facts and "findings as to the facts." CP 30-31. On appeal, the Defendant does not challenge the voluntariness of his consent to search after *Ferrier* warnings. Brief of Appellant (BOA) at 1 (assignments of error); CP 31.

V. ARGUMENT

A. THE COURT DID NOT ERR IN RULING THE STOP WAS NOT PRETEXTUAL.

1. The investigative detention was justified by probable cause of a traffic infraction and was reasonable in scope.

A warrantless traffic stop for an investigative purpose is constitutional under WASH. CONST. art. I, § 7 if it is based upon reasonable articulable suspicion of criminal activity or a traffic infraction and if the stop is reasonable in scope. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012). An investigative detention

must last no longer than necessary to effectuate the purpose of the stop. *State v. Williams*, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984). However, the scope of an investigatory stop may be enlarged or prolonged if the stop confirms or arouses further suspicions. *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990).

In this case, Officer Green had probable cause for a tabs violation. He stopped the car, requested the driver's documentation, and began to write out the ticket. According to his report, his involvement was limited to the infraction and transport. CP 58.

While the Defendant was waiting for Officer Green to complete the ticket, Officer Fulmer engaged the Defendant in conversation. This conversation by itself did not extend the length of the detention and did not involve any intrusion on the Defendant's liberty.

Very shortly afterward, the Defendant volunteered that he was holding heroin and attempted to show it to the police. At that point, the scope of the investigation increased to that justified by probable cause of a felony. This permitted the request for consent to retrieve the drugs, the search, and the arrest.

The actual search took several minutes, because the objects were rather small and hard to find in a messy car. RP 30-31, 43. But

this detention for the duration of that search was justifiable, not because Officer Green was busy writing a ticket for expired tabs, although he was, but because there was probable cause for possessing heroin.

Broken down most simply, only the following police acts occurred prior to the discovery of probable cause of a felony:

- Officer Green's stop of the vehicle;
- Officer Green's request for driver information;
- Officer Green's creation of the infraction ticket;
- Officer Fulmer's query where the Defendant was coming from; and
- Officer Fulmer's advisement of his intent to conduct a canine sniff of the exterior of the car.

All are justified as being within the scope of the expired tabs. It is common and inoffensive for an officer conducting a traffic stop to ask a driver where they are coming from or where they are going to. A seizure does not occur simply because an officer approaches and asks a few questions as long as the person would feel free to disregard police. *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed.2d 389, 111 S. Ct. 2382, 2386 (1991) (the encounter is consensual and

no reasonable suspicion is required). In this case, the Defendant demonstrated his comfort disregarding Ofc. Fulmer's questions. RP 26, ll. 22-25 ("ended the conversation that we were having"). *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990) (an officer does not seize a person simply by engaging in a conversation).

If Officer Fulmer had conducted the canine sniff, it would have been lawful. A canine sniff outside a parked car is not a search. *Illinois v. Caballes*, 543 U.S. 405, 408-10, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); *State v. Mecham*, 186 Wn.2d 128, 147, 380 P.3d 414 (2016) (citing *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010)). A vehicle occupant does not have an expectation of privacy in the air around the exterior of the car. *Hartzell*, 156 Wn. App. at 929-30. The officer testified that he felt he had reasonable articulable suspicion in that the Defendant had just come from a known drug dealer's house. RP 56. However, because a sniff is not a search and because the sniff would not have detained the Defendant any longer than the citation, the officer did not need lawful cause to deploy the dog.

Before the officer could retrieve his canine partner, the Defendant volunteered that he was holding heroin and attempted to

show it to the police. At that point, the scope was expanded based on probable cause of a felony, not merely reasonable articulable suspicion of a traffic infraction.

2. There was no pretextual stop, where the true reason that Officer Green performed a traffic stop was to cite the infraction.

A pretextual traffic stop is where an officer relies on legal authorization only as a mere pretext to dispense with a warrant when the true reason for the seizure is not exempt from the warrant requirement. *State v. Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012) (quoting *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999)). A pretextual traffic stop is illegal. *Arreola*, 176 Wn.2d at 294.

The superior court found that Officer Green did not stop the Defendant in order to investigate a drug offense, but only to cite him for the registration infraction. It was not a pretextual stop.

On a claim of pretext, the matter necessarily turns on the credibility of the officer or officers. The superior court believed the officers and specifically found that Ofc. Green would have conducted a traffic stop “regardless of having information of where the vehicle had been seen earlier by Ofc. Fulmer.” CP 31, FF 2. The Defendant assigns error to this finding which is a credibility determination. BOA

at 1. Credibility determinations cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003).

The judge explained that ultimately his decision rested on Ofc. Green, who was the officer who made the stop:

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 pretty good argument. But it was Officer Green who pulled the vehicle over. ... And the reason for the stop while driving[:] the tab was not registered[.] [A]nd the infraction with reference to the tab, that was the reason for the stop by Officer Green. And so the contact is a routine stop, expired license tabs, and that's the legitimate basis for the stop. ... It's what this officer does and does do when he comes across that type of information.

RP 64-65.

The offense in the pretextual stop is that it is *not* initiated because the stop is "reasonably necessary" to enforce the traffic laws or because the traffic violation "actually merits police attention." *Arreola*, 176 Wn.2d at 296-97. Here Officer Green testified that he always stops vehicles for exactly the tab concern that was presented to him when there is nothing more pressing that demands his attention. He testified that the traffic violation was the reason for this stop. The court found him credible.

3. *State v. Arreola* reasonably addressed the common

experience of mixed motives.

The Defendant asks this Court to prepare a record that he may use to request the Washington Supreme Court revisit *State v. Arreola*. BOA at 21 (“raised with the understanding that definitive relief may only come at the next level”). *State v. Arreola* is the Washington Supreme Court’s most recent, significant discussion on pretextual stops and provides a thorough recitation of the legal standards, the history, and the rationale supporting the standards. The prosecutor’s arguments reasonably relied on this authority. CP 53-55. However, as discussed *supra*, the superior court’s ruling below is justified by the law that pre-dated *State v. Arreola*. Officer Green had no ulterior motive, only a single purpose of citing for the registration/tabs violation.

The Defendant asserts that *State v. Arreola* is incorrect and harmful and “created a new type of traffic stop.” BOA at 15, 19. The opinion was relatively recently decided – in 2012. Yet the Defendant cites for support a court’s criticism of a 1903 case for reasoning “as dead as the judges who authored it.” BOA at 20 (citing *State v. Bacani*, 79 Wn. App 701, 902 P.2d 184 (1995) (Grosse, J., concurring)). That human beings have complicated motives and

suspicion is not a dead concept.

Justice Steven Gonzalez is the author of the 7:2 majority opinion in *Arreola*. He is not known for being a backward thinker. *Ladson* took on the real concern of racial profiling. Justice Gonzalez followed his decision in *Arreola* with criticism of the “antiquated” procedure of peremptory challenges which “contributes to the historical and ongoing underrepresentation of minority groups on juries.” *State v. Saintcalle*, 178 Wn.2d 34, 69-118, 309 P.3d 326 (2013) (Gonzalez, J., concurring). There is no doubt that his advocacy advanced the adoption of GR 37 this spring.

Six other justices signed onto Justice Gonzalez’s majority opinion. The court’s discussion was well informed by amicus briefs from attorneys representing the ACLU, the Office of the Attorney General, WAPA and the Washington State Patrol. The parties were well represented by Susan Gasch and Tyson Hill.

In *Arreola*, the court considered how to assess a fact pattern where the detaining officer acknowledges mixed motives. In the instant case, the detaining officer had a singular motive. The most that can be said on these facts is that the two officers (one detaining and one making a social contact) had different motives.

A mixed-motive traffic stop is one based on both legitimate and illegitimate grounds. *Arreola*, 176 Wn.2d at 297. Because of their training and experience, it is common for officers to have intuitions and suspicions that cannot always be articulated. Where a civilian sees a car driving too fast or too slow, an officer suspects intoxication or worse. This educated suspicion should not prevent an officer from ticketing a violation of law occurring in one's presence.

Nor should an improper motive be imputed to an officer simply because they have more experience. The legislature expects all general authority officers to enforce traffic laws and has taken step to remove artificial barriers to such enforcement. RCW 10.93.070. Detectives, canine handlers, sergeants, etc. can ticket traffic violations. The job is not limited to patrol officers. The common sense rule is for officers to enforce traffic laws as they occur. *Delaware v. Prouse*, 440 U.S. 648, 659, 99 S. Ct. 1391, 1399, 59 L. Ed. 2d 660 (1979) ("The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations.")

When the officer exercises discretion appropriately by making 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, such stop is not pretextual and will not violate article I, § 7. *State v. Arreola*, 176 Wn.2d at 297-98.

That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop, and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion, because the officer would have stopped the vehicle regardless. The trial court should consider the presence of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless). But a police officer cannot and should not be expected to simply ignore the fact that an appropriate and reasonably necessary traffic stop might also advance a related and more important police investigation. *Cf. Nichols*, 161 Wash.2d at 11, 162 P.3d 1122 (“[E]ven patrol officers whose suspicions have been aroused may still enforce the traffic code” (quoting *State v. Minh Hoang*, 101 Wash.App. 732, 742, 6 P.3d 602 (2000))). 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.

State v. Arreola, 176 Wn.2d at 299.

This holding clarifies that challenges will necessarily be decided by the trial court which makes findings of credibility, thus limiting criminal defendants' ability to seek review. This is reasonable. The further the courts get from the testimony, the less the ruling will be about the true facts of the case.

The Defendant argues that the facts of his own stop are significantly distinguishable from those in *Arreola*. BOA at 16-17. The State disagrees. First, he argues that, unlike a registration violation, an altered muffler violation merits police attention as a true general welfare concern due to the danger or nuisance of a muffler's emission of excessive noise. BOA at 16. Apparently the Defendant is not familiar with the Mattawa area that Officer Valdivia patrols.

The only possible time to ticket a tab/registration violation is when an officer observes the violation and the driver is present. If a patrol officer cannot ticket this violation, then the law on vehicle registration cannot be enforced and Eyman wins.

The Defendant argues that Officer Valdivia's testimony (that he made a conscious decision to make the traffic stop because of the altered muffler) is distinguishable from Officer Green's testimony.

BOA at 16. It is not. Under cross-examination, Ofc. Green acknowledged that this stop matured into a case about drugs, a matter to which any patrol officer is always alert. However, his intention when he initiated the stop was to investigate the infraction only. And, from his report, that is all he did investigate. CP 58

Q ... this was essentially a stop about drugs; correct?

A **It was a stop for the tabs**, but we are -- Any time I make a traffic stop, I'm investigating for drugs.

Q Okay. And specifically in this case, you said before that this was -- this particularly was a case about drugs; correct?

A I don't know if I said that. I -- You said was this a stop about drugs and I said, yes.

RP 17 (emphasis added).

Q -- often times you are investigating for something else or actually for drugs or for other criminal activity; correct?

A Well, many times I'm just pulling them over for the violation. I always keep my eye out for indicators of drug use.

Q Okay. But in this case you were directed by Fulmer to pull him over; correct?

A I was informed there was a violation. And, yes, I pulled him over **because of that violation**.

RP 18 (emphasis added).

Q Kind of going on with it, but were you instructed to pull that person over for tab violations?

- A There was nobody else that saw the violation other than myself, so no.
- Q Okay. So it wasn't a situation where Officer Fulmer was having you pull him over for a drug investigation. It was just tabs; correct?
- A **Correct.**

RP 19 (emphasis added). Ofc. Green credibly testified, consistent with *Arreola*, that he “would have stopped the vehicle regardless.” *State v. Arreola*, 176 Wn.2d at 299. That is the essential factor that makes the stop inoffensive to the privacy interest in article I, § 7.

VI. CONCLUSION

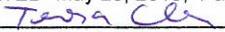
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction.

DATED: May 25, 2018.

Respectfully submitted:



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Deputy Prosecuting Attorney

<p>Jared Steed steedj@nwattorney.net sloanej@nwattorney.net</p>	<p>A copy of this brief was sent via U.S. Mail or 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 May 25, 2018, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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