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Supreme Court No. _____
COA NO. 56896-5-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY GATEWOOD,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Petitioner Gary Gatewood, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Gatewood seeks review of the Court of Appeals opinion in State v. Gatewood, No. 56986-5-I, (slip op. filed February 12, 2007). A copy of the opinion is attached as an Appendix.

C. ISSUES PRESENTED FOR REVIEW

Since this Court's seminal decision in State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999), finding Article I, section 7 of the Washington Constitution prohibits pretextual stops, the state and appellate courts have effectively marginalized Ladson's holding out of existence. This case presents a prime example of the courts' efforts to avoid Ladson's application. According to the facts adduced at a suppression hearing, patrol officers drove past a bus shelter and allegedly saw petitioner Gatewood allegedly move furtively as if to conceal something. They turned their vehicle around and stopped Gatewood for the civil infraction of jaywalking in order to investigate the suspicious behavior they had observed earlier and discovered contraband.

1. Should this Court grant review of the Court of Appeals holding that these facts do not establish an unconstitutional pretext for conducting a stop under Ladson? RAP 13.4(b)(1); RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Even assuming the Court's finding the stop was not pretextual was proper, should this Court grant review of the Court of Appeals holding that Gatewood's allegedly furtive movement and jaywalking sufficiently established the requisite reasonable articulable suspicion of criminal activity needed to justify an investigatory detention under the Fourth Amendment and Article I, section 7? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Shortly after midnight on June 26, 2004, police officers Chan and Longley were patrolling the south Rainier valley area of Seattle when they passed a bus shelter with three or four persons seated inside, including petitioner Gatewood. 1RP 5-6.¹ According to Longley, Gatewood's "eyes got big" when he saw the officers drive past and he turned his body to the left. 1RP 6-7. The officers turned their vehicle around to return to the shelter with the intention

¹ Pertinent volumes of the verbatim report of proceedings are cited:
1RP - Suppression Hearing, 7/7/05
2RP - Suppression Hearing, 7/12/05.

of questioning Gatewood. 1RP 10-11. As they approached, Gatewood left the bus shelter and crossed Rainier Avenue about 20 feet north of where that street intersects with 39th Avenue. 1RP 8-9. It was not clear that Gatewood had seen the officers returning.

Chan believed Gatewood was jaywalking and the two officers pulled their vehicle in front of Gatewood to block his path. 1RP 10-11, 47. Longley instructed Gatewood to "stop," but Gatewood turned around and walked in the opposite direction. After walking about 40 feet, Gatewood reached into his pants and put something into nearby bushes. 1RP 11-12.

The officers suspected Gatewood threw a gun in the bushes and took him into custody. 1RP 14. From the area where they saw him discard an object, they recovered a .22 caliber hand gun. 1RP 14. At the bus shelter where Gatewood had been sitting, Longley found cocaine. 1RP 15, 17.

The Honorable Douglass North of the King County Superior Court denied Gatewood's motion to suppress evidence, and Gatewood was subsequently convicted of unlawful possession of a firearm and possession of marijuana based on drugs found on his person. CP 13-19, 20-22.

On appeal, Gatewood contended his stop for jaywalking was a pretext to investigate Gatewood's earlier, allegedly "suspicious" behavior, and thus was unconstitutional under Article I, section 7 of the Washington Constitution. He alternatively contended the facts adduced at the suppression hearing failed to establish a reasonable articulable basis for an investigatory stop and detention. The Court of Appeals rejected both claims, found the facts established a sufficient justification for an investigatory stop under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and accordingly held the stop for jaywalking was not pretextual.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. DIVISION ONE'S OPINION FINDING NO PRETEXT DESPITE THE ABSENCE OF A SUFFICIENT BASIS FOR A TERRY STOP RENDERS THIS COURT'S OPINION IN *LADSON* NUGATORY, MERITING REVIEW UNDER RAP 13.4(b)(1).

- a. Where the State cannot initially muster sufficient evidence to support a reasonable suspicion of criminal activity, the decision to stop an individual for a subsequent civil infraction with the intention of investigating the earlier activity violates Article I, section 7's rule against pretext stops. In State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999), this Court decided that Whren v. United States, 517 U.S. 806, 116 S.Ct. 135 L.Ed.2d 89 (1996),

permitting officers to conduct pretextual traffic stops of private citizens, violated Article 1, § 7. Ladson, 138 Wn.2d at 357-58. The

Ladson Court reasoned:

the problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation) but only for some other reason (i.e. to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure without a warrant. Pretext is result without reason.

Ladson, 138 Wn.2d at 351.

On this basis, the Ladson Court rejected the Fourth Amendment's objective "reasonableness" standard for evaluating investigative detentions. Ladson, 138 Wn.2d at 353 ("Article 1, section 7, forbids use of pretext as a justification for a warrantless search because our constitution requires we look beyond the formal justification for the stop to the actual one.").

Here, Chan and Longley's interest was peaked by Gatewood's apparent alarm upon seeing police officers; however, it cannot legitimately be contested that Gatewood's widened eyes and movement to the left did not provide a reasonable articulable

suspicion he was engaged in criminal activity. See e.g., State v. Henry, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (sweating and nervousness not sufficient to create suspicion suspect is armed and dangerous); State v. Terrazas, 71 Wn. App. 873, 879, 863 P.2d 74 (1993) (fact that defendant's hands were under a blanket during stop did not generate reasonable suspicion he was trying to conceal something from officers). Consequently, the officers found another justification to conduct a stop of Gatewood: his alleged violation of SMC 11.40.140, Seattle's anti-jaywalking ordinance.

The facts adduced at the suppression hearing thus create a clean factual scenario in which the officers' decision to stop Gatewood and investigate further cannot be anything other than pretextual. Stated differently, because they lacked adequate justification to stop Gatewood when they made the decision to turn their vehicle around, the officers found a rationale to stop him – the alleged violation of the jaywalking ordinance – that was “at once lawfully sufficient, but not the real reason.” Ladson, 138 Wn.2d at 351.

b. In violation of principles of *stare decisis*, Division One refused to follow *Ladson*, meriting review. Notwithstanding Ladson's plain application to the facts at bar, Division One

deliberately conflated the facts known to the officers at the time they elected to turn around and find a pretext to investigate with the pretextual reason itself. Slip Op. at 3-4. But the record controverts Division One's view of the events as an integrated whole. The officers *first* saw behavior that aroused their suspicions but did not engender a constitutional basis to detain, *then* decided to investigate further, *then* seized upon the pretext of the civil infraction as a justification to conduct their speculative investigation. Under Ladson, the requisite predicate of improper subjective intent and pretext were thus established. For this reason, Division One's decision finding the stop permissible amounts to a deliberate refusal to accept Ladson's application. All Washington courts are bound by the precedent set by the Washington Supreme Court. State v Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997); State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). Under RAP 13.4(b)(1), this Court should grant review.

2. THIS COURT SHOULD REVIEW DIVISION ONE'S OPINION FINDING THE TOTALITY OF THE CIRCUMSTANCES ESTABLISHED A REASONABLE, ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY.

The right of individuals to be free of unwarranted government intrusions in their private affairs prohibits warrantless

seizures absent a reasonable articulable suspicion of criminal activity. Terry, 392 U.S. at 20; Ladson, 138 Wn.2d at 350. “An investigative detention is constitutionally authorized only if (1) “the officer’s action was justified at its inception,” and (2) “it was reasonably related in scope to the circumstances which justified the interference in the first place.” Terry, 392 U.S. at 20. For an investigative detention to be constitutional, the officer must be able to point to specific, articulable facts that criminal activity is afoot. State v. White, 97 Wn.2d 92, 105, 800 P.2d 1061 (1982).

The trial court found sufficient justification for a Terry stop given (1) Gatewood’s apparently startled reaction to seeing police; (2) his allegedly furtive movement; and (3) the jaywalking, which officers speculated may have been caused by Gatewood’s observing that the officers had returned. 2RP 76. Without citation to *any* authority, the Court of Appeals agreed.

The initial problem with this result is that the officers’ decision to detain was based solely on the first two observations. However, even assuming the propriety of considering all three of these factors taken together, they did not establish a likelihood of criminal activity absent a showing the jaywalking was *in fact* an effort to flee the officers. This issue was not definitively resolved in

the State's favor. See State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue").

The result reached by the Court of Appeals represents a low point in form-over-substance, result-oriented decisions that elevate the fact that contraband was discovered over the constitutional violation that occasioned its discovery. Pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), this Court should grant review.

F. CONCLUSION

Division One refused to follow Ladson and approved a stop where a sufficient justification was not present. Petitioner Gary Gatewood respectfully requests this Court grant review.

DATED this 13th day of March, 2007.

Respectfully submitted:



I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct. SUSAN F. WILK (WSBA 28250)
Attorneys for Appellant

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

fmj
Name

MAR 13 2007
Date

Done in Seattle, Washington

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 GARY NATHANIEL GATEWOOD, SR.,)
)
 Appellant.)

No. 56896-5-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: February 12, 2007

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PER CURIAM. Warrantless investigatory stops are permitted if justified by a reasonable articulable suspicion of criminal activity. Here, the police observed Gatewood’s startled reaction upon seeing them drive by the bus shelter where he was sitting with others at 12:20 a.m., saw Gatewood immediately move as if trying to conceal something in the bus shelter, and then leave the bus shelter and cross the street in an apparently illegal manner as the police circled back to see what was going on. Taken together, these facts provide sufficient justification for the subsequent investigatory stop. We affirm.

FACTS

At 12:20 a.m. early one June morning Seattle Police Officers Larry Longley and Edward Chan were on patrol together near the intersection of Rainer Avenue South and 39th Avenue South. The officers observed several people sitting in a bus shelter near the intersection. Officer Longley testified at the CrR 3.6 hearing that as the police car passed the shelter, a man later identified as Gary Gatewood looked at their police car and “his eyes got big, and

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he was shocked like he was surprised to see us." At that point, Officer Longley "saw him reach to his left and twisted his whole body to the left, inside the bus shelter, as though he was trying to hide something." Officer Longley observed this and became suspicious. He told Officer Chan, who was driving, "I saw this guy hide something inside the bus shelter, let's come back . . . and see what is going on." Chan did so. As they circled around, Longley saw Gatewood get up from the shelter bench, walk some distance down the sidewalk, and then begin to cross Rainer Avenue midblock. The officers then decided to stop Gatewood.

The officers pulled their patrol car into Gatewood's path to cut him off. Officer Longley got out of the car and told Gatewood, "I need to talk to you." Gatewood turned from Longley and began walking away from him. The officers then repeatedly told Gatewood to stop, but he refused to comply. Gatewood walked towards a large bush, bent over, and stuck both hands into the waistband of his pants. Gatewood appeared to pull something from his pants and then reached his arms into the bush. While this was happening, the officers, concerned for their safety, pulled their service revolvers. They demanded Gatewood show his hands, which he did after removing them from the bush. The officers then told him to get on the ground and they placed him in handcuffs.

After placing Gatewood in handcuffs, the officers located a handgun in the bush where Gatewood had appeared to place something. A subsequent search of Gatewood yielded suspected cocaine and marijuana, and a search of the bus shelter yielded suspected crack cocaine.

Before trial, Gatewood moved to have the gun and the drugs suppressed as the fruits of an unconstitutional search and seizure. Specifically, he argued that the officers' decision to stop him for jaywalking was pretextual, in violation of the Washington State Constitution, and there were not sufficient facts to justify a Terry¹ stop. The trial court denied Gatewood's motion and he was later convicted of unlawful possession of a firearm in the second degree and unlawful possession of forty grams or less of marijuana. Gatewood appeals.

ANALYSIS

Both issues raised in this case turn on whether the police officers stopped Gatewood based on a reasonable articulable suspicion of criminal activity. Gatewood first argues that the stop was pretextual. Specifically, he contends that the officers had no justifiable reason to stop him other than to enforce the Seattle Municipal Code's prohibition against crossing an arterial street outside a crosswalk, and that the officers used that infraction, without more, to justify the seizure.² Washington prohibits warrantless pretextual investigatory stops because they represent "pretext of form lacking connection to a reasonable, articulable suspicion of criminal activity which would justify the exception to the warrant requirement in the first place."³

Here the totality of the circumstances, including both the subjective intent of the officers as well as the objective reasonableness of the officer's behavior, reveal that Gatewood was stopped not simply because he was crossing an

¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

² See SMC 11.40.140.

³ State v. Ladson, 138 Wn.2d 343, 351, 979 P.2d 833 (1999).

arterial street mid-block, but because the officers had a reasonable articulable suspicion of criminal activity. When asked what made them decide to stop

Gatewood, Officer Chan testified:

All things combined, what Officer Longley told me he saw as a motion to hide something. And as I was coming down 39th, it appeared to me that Mr. Gatewood moved quickly through the shelter.

Whether he saw our car or saw us, I don't know, but as soon as my car pulled aside him, he stopped on Rainier, to cross Rainier, it appeared to me, to leave the area. It was very clear that he did not want to be at that bus shelter any longer. So, all those things combined, including jaywalking, yes.

Thus, according to the officers involved, it was not merely the suspected municipal code violation that justified the stop in their minds, but all the circumstances combined that gave rise to a reasonable suspicion of criminal activity.

Furthermore, the trial court found that what the officers observed that morning amounted to reasonable suspicion justifying the stop. The trial court stated:

The court held that after taking all the circumstances together the officers had reasonable articulable suspicion of criminal activity based upon driving past the bus shelter, seeing Mr. Gatewood's startled reaction to the police being there, his furtive movements in trying to conceal something in the bus shelter followed by his leaving the bus shelter and crossing the street in an apparently illegal manner.

Officer Chan indicated that he though[t] Mr. Gatewood may have seen him come back. That may have been what caused Mr. Gatewood to leave and jaywalk across the street at that time. All those circumstances together provide a sufficient justification, provide rather reasonable articulable suspicion of criminal activity which provided a basis for a Terry Stop.

The trial court went on to reason that Gatewood's behavior after being told by the officers to stop justified them handcuffing Gatewood and the subsequent search of the bush and Gatewood's person. We agree with the trial court that such facts were sufficient justification for a Terry stop and affirm.

FOR THE COURT:

Grosse, J.
Appelwick, C.J.
Edenfor, J.