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STATE OF WASHINGTON

No. 62142-4-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION ONE

King County No. 07-1-08126-3 SEA

STATE OF WASHINGTON,

Respondent,

v.

ROGER SINCLAIR WRIGHT,

Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Table of Cases..... ii

I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

 A. Assignments of Error1

 B. Issues Pertaining to Assignments of Error.....1

II. STATEMENT OF CASE2

 A. Procedural Background.....2

 B. Factual Background3

III. ARGUMENT.....10

IV. DISCUSSION12

 A. Officer Gregorio Clearly Did Not Have Probable Cause to Stop Mr. Wright for Having His Headlights Off 25 Minutes After Sunset on a Clear Day.....12

 B. A Traffic Stop May Not be Used as a Pretext to Search for Evidence16

 C. If the Initial Stop was Illegal, than any Evidence Seized or Statements Made by the Defendant Must be Suppressed.....21

 D. Both Charges Against the Defendant Should be Dismissed for Lack of Admissible Evidence.....23

V. CONCLUSION.....23

Proof of Service

TABLE OF AUTHORITIES

FEDERAL CASES

Delaware v. Prouse, 440 U.S. 648.....13

Jackson v. Virginia, 443 U.S. 30723

United States v. Cortez, 449 U.S. 441.....14

Whren v. United States, 517 U.S. 806.....16

Wong Sun v. United States, 371 U.S. 47122

STATE CASES

State v. Barwick, 66 Wn.App. 706, 833 P.2d 421 (1992).....22

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008).....13, 14, 21, 22

State v. Green, 94 Wn.2d 216, 616 P.2d (1980); *State v*23

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996).....19

State v. Henry, 80 Wn.App. 544, 910 P.2d 1290 (1996)22

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986).....14

State v. Knapstad, 107 Wn.2d 345, 729 P.2d 48 (1986).....23

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)13, 16, 17, 19, 21

State v. McKinney, 148 Wn.2d 20, 60 P.3d 46 (2002).....13

State v. Meckelson, 133 Wn.App. 431, 135 P.3d 991 (2006), *rev. denied*, 159 Wn.2d 1013, 154 P.3d 919 (2007)20

State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962)19

State v. Montes-Malindas, 144 Wn.App. 254, 182 P.3d 999 (2008)
..... *passim*

State v. Myers, 117 Wn.App. 93, 69 P.2d 367 (2003)20

State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)19

STATE STATUTES

RCW 46.37.0208, 12

I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Assignments of Error

1. The trial court erred in finding there was either probable cause or reasonable suspicion for Officer Gregorio to stop Defendant Wright, question and arrest him and search his car.

2. The trial court erred in finding that the stop of Defendant Wright was not invalid as pretext search.

3. The trial court erred in denying Defendant's Motion to Suppress and refusing to exclude all evidence and statements taken from the Defendant.

4. The trial court erred in entering written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence. CP 81-87

5. The trial court erred in finding the Defendant guilty of possession of MDMA and possession of marijuana.

B. Issues Pertaining to Assignments of Error

1. Whether there was probable cause for the stop. [Error 1]

2. Whether the initial stop is invalid as a pretext to search Mr. Wright's car. [Error 2]

3. Whether all the evidence must be suppressed as a “fruit of the poisonous tree.” [Errors 3 and 4]

4. Whether the charges should be dismissed for lack of admissible evidence. [Error 5]

II. STATEMENT OF CASE

A. Procedural Background

The Defendant, Roger Wright, was charged by Information with one count of Possession with Intent to Distribute Marijuana and a second count of Possession with Intent to Distribute the drug commonly known as “ecstasy.” CP 1-6. He filed a Motion to Suppress all the evidence seized following a traffic stop. CP 13-21. After changing attorneys (CP 22-23), he filed a Supplemental Memorandum in support of his Motion to Suppress. CP 24-69.

On June 24, 2008 a hearing was held in King County Superior Court pursuant to CrR 3.6 to suppress all the evidence in the case, including statements made by the Defendant. As noted by the prosecutor, “our 3.6 motion . . . I believe will be dispositive in this case.” RP (6/24/08) at 3.

Following the hearing and argument of counsel, the judge entered Findings of Fact and Conclusions of Law denying the Motion to Suppress. CP 81-87. The Defendant waived his right to a jury trial and the court

convicted him of Possession with Intent to Distribute Marijuana, acquitted him of Possession with Intent to Distribute Ecstasy but found him guilty of simple possession of that drug, a lesser included offense. CP 70-71, RP 79-80. He was sentenced to 30 days of community service and two months of electronic home detention along with the usual financial penalties and costs, and he timely filed a Notice of Appeal. CP 88-95, 96-105.

The Defendant executed a Stipulated Facts and Waiver of Jury Trial pleading to preserve his right to appeal. RP 67; CP 70-71. The court found the Defendant not guilty of possession of ecstasy with intent to deliver, but guilty of the lesser offense of possession of ecstasy (Count I) and possession of marijuana with intent to manufacture or deliver (Count II). RP 79-80.

B. Factual Background

The only witness in the case was the arresting officer, Chris Gregorio, who had been a Seattle Police Officer for “about four years” at the time of his testimony. *Id.* at 4. Officer Gregorio was on “routine patrol, handling 911 calls, enforcing traffic, contacting people out on the streets and he stopped Mr. Wright on “November 29 of 2006 at about 4:45 p.m.” *Id.* at 5-6. He identified Mr. Wright as a “black male,” and contacted him “on south Roxbury Street” when the officer was driving

northbound “on Waters Avenue South.” *Id.* at 7-8. He described this neighborhood as a “hotspot” as follows:

If there’s what we call hotspots, there is a lot of crime in any particular area, usually you’ll have officers kind of floating around the area. If there’s burglaries in that particular area, usually we get a lot of people traveling the area looking for any suspicious activity and things like that. If there’s hot drug areas, again those areas kind of get flooded with officers.

Id. at 8. The area where the officer stopped Mr. Wright was a “hot” area “for burglaries and car prowls.” RP 8.

He decided to stop Mr. Wright within “seconds” of observing him a block away driving in a different direction from the officer. RP 10. The officer was initially traveling “northbound” on Waters Avenue and saw the Wright vehicle on a parallel street one block away “make an eastbound turn,” toward the officers, then the officer

observed that the vehicle had no lights on, I kind of stopped my vehicle. That vehicle then stopped . . . I sat there for half a second or whatnot. As I started to turn westbound onto Roxbury, the vehicle had backed up back onto 59th Avenue, stopped then proceeded westbound on Roxbury, and I pulled up behind him at that time, initiated a traffic stop.

Id. at 10. The officer drew a diagram (Exhibit 1) to illustrate the relative locations of the two vehicles, which was admitted for pretrial purposes. RP 12.

Mr. Wright was alone in the vehicle but Officer Gregorio nevertheless “called for another officer to arrive on the scene.” RP 13. He approached on “the driver’s side” and claimed to smell “a strong odor of marijuana emitting from the vehicle,” so he “told him he was under arrest and passed him off to another officer . . . Officer Larned.” RP 14-15. The Defendant was questioned, produced a bill of sale for the car and, while the glove box was open the officer “was able to see a large roll of money.” RP 16-17. Mr. Wright’s “eyes started to well up with tears,” and he was arrested, placed in the back seat of Officer Larned’s car and given his *Miranda* warnings. RP 17-18. This occurred “within minutes . . . probably five minutes or less.” *Id.* at 16.

Mr. Wright waived his *Miranda* rights and answered:

. . . Why are you asking me this, sir? You said you pulled me over because you thought I was in a stolen car. I told you I wasn’t. Can’t you just give me my ticket and let me go, sir, . . .

RP 20 (reading quotation from police report). The Defendant was questioned further and told the officer “he was smoking marijuana earlier.” *Id.*

On direct examination, the officer verified that he “had indicated to [Mr. Wright] that the area was a hotspot for stolen cars, burglaries, car prowls and so on.” *Id.* at 21. The officer persisted in questioning him

about the presence of marijuana in the car and, according to Officer Gregorio:

Alls he would tell me is he was smoking it. He asked me why I was trying to stick it to him and put him in a bind. Again I asked him if there was any marijuana in the car, and he didn't say that he didn't want to answer any more questions, just stopped answering my questions. At that point, realizing that my investigation with him and questioning wasn't going anywhere, I just requested a dog . . . so a Renton police officer and his K-9 responded to search the car for me.

RP 21.

On cross-examination, Officer Gregorio verified that the stop occurred at 4:45 in the afternoon, and admitted that he did not know what time the sun had set that day. RP 24-25. He testified that, when he observed Mr. Wright's car without its lights on he was "150 meters" distant, or approximately 450 feet. RP 25-26. The officer was already "close to mid-intersection of Waters Avenue South and South Roxbury" when he stopped and saw Mr. Wright to the left of him a block distant "in the process of the turn." RP 27.

There was nothing reckless about Mr. Wright's driving, he was not speeding or committing any other traffic infractions. RP 29. The officer radioed in Mr. Wright's license plate and determined that the car was not stolen, there was no defective equipment including mufflers, broken windows, etcetera, and that Mr. Wright pulled over "in a safe and lawful

manner” after the officer initiated the traffic stop with his emergency lights. RP 30. The officer did not issue a citation to Mr. Wright for driving without his lights or any other infraction. RP 31.

Normally, the officer would not ask for backup unless perhaps the car has “three, four people in it, . . . for officer safety reasons.” RP 32. The officer’s written report made clear that he was concerned because “this area has been a hotspot for car prowls and vehicle thefts,” which was “something that was weighing heavily” on his mind. RP 33. He admitted he had no reason “to believe that he was involved in a car theft,” stating “I didn’t have any reason to believe that he was involved in a car prowl, no.” He conceded that the prevalence of car thefts in the area was on his mind or he would not have put it in his report. RP 33.

In Officer Larned’s report, the backup call indicated that Officer Larned was involved in “a suspicious vehicle stop,” which Officer Gregorio described as follows:

Suspicious vehicle stop would be a vehicle sitting in an area for an undetermined time, people sitting in the vehicle, high drug, high crime activity areas, driving slowly through neighborhoods in a blacked out, possibly casing the neighborhoods, instances like that.

RP 35. Officer Gregorio conceded that the “suspicious vehicle stop” reference in Officer Larned’s report would have had to come from him, and that Officer Larned’s report said nothing “about headlights being out.”

Id. at 36. Similarly, in the Affidavit of Probable Cause signed by Officer Larned the first reason he gave for this stop “is hotspot for car prowls and vehicle thefts.” RP 38.

The Officer testified that the time of the stop recorded in his police report is accurate because “it’s pulled off my CAD system” which he gets “from my computer, which is documented by our dispatch.” RP 31. Accordingly, these are very accurate times. *Id.* Officer Larned’s report similarly had a time of 1645 hours (4:45 p.m.) for the radio call requesting a backup, which was identical to the time reported in Officer Gregorio’s report and both times would have come off the CAD computer system, which is very accurate. RP 34-35.

The court took judicial notice of the fact that the officer stopped Mr. Wright 24 minutes after sunset on the day of this incident, even though the law does not require that headlights be turned on until 30 minutes after sunset. *See* RCW 46.37.020. Even the State conceded that the headlight violation did not occur because the stop happened “six minutes shy of . . . the sunset provision of the traffic code.” RP 58. The court agreed that “we’re shy of about six minutes there from the infraction standpoint.” *Id.* at 49. The court also expressed concern “about how he [Officer Gregorio] could see that the headlights weren’t on.” RP 50. The defense argued: “You cannot pull a young black man over driving a

Lexus in a high crime neighborhood because that makes you suspicious, and that flies in the face of our Constitution, and the suppression rule is intended, as we know from *Map v. Ohio* forty years ago, to deter police misconduct, to keep the police from doing this kind of thing” because “if you break the rules and you pull somebody over on a hunch and shake them down or search them or break into their house or whatever,” the evidence will be suppressed. RP 51.

The court found it significant that the stop happened “literally in seconds” as opposed to other Washington cases, such as *State v. Montes-Malindas*, 144 Wn.App. 254, 182 P.3d 999 (2008), where the police observed the car for a longer period of time before pulling it over for having its headlights out. RP 53. The defense argued that the fact that Mr. Wright was a minority, as were the defendants in other cases, was a significant factor and the court agreed. RP 54.

However, the court did conclude that there was “a reasonable suspicion” to justify the stop, reasoning as follows:

Whether or not the officer reasonably surmised that a crime was in progress, well, here the crime in progress was the traffic violation. . . . Here’s an officer who’s on routine patrol. He testified unrefuted that this is a hotbed area for burglaries, stolen vehicles, vehicle prowls. He sees a driver in a matter of seconds. He has no time to create a motive to stop the vehicle for the suspicion of either a burglary or a vehicle prowl. . . . You’re in an area that’s known to be, and by the way, your headlights are out. . . . You’re in an

area where there is stolen vehicles, and Mr. Wright proceeds to tell him, this is my car, I'm not in a stolen car. .

..

RP 59-60. Therefore, the court distinguished the holding in *Montes-Malindas* because in that case “the officer had watched the van for a considerable amount of time,” before making a protectual stop. RP 61. Accordingly, the court refused to make a finding “of pretext.” RP 63.

III. ARGUMENT

Roger Wright, a young African American, was driving a late model Lexus when he was pulled over by Patrol Officer Gregorio pursuant to “a suspicious vehicle stop” at 4:45 p.m. on November 29, 2006. *See* Report of Officer M. Larned, copy attached as Exhibit 1 to Defendant’s Memorandum, CP 24-69. According to the Incident Report of Officer Gregorio:

On 11/29/2006 I was working uniform patrol as Unit 2-Sam-4 in a marked patrol car in the State of Washington, County of King in the City of Seattle. At 1645 hours I was traveling northbound on Waters Ave S. As I was driving past S. Roxbury St, I observed a green Lexus WA Lic #695RMN driving without headlights northbound on 59th Ave. S. and was in the process of turning around onto S. Roxbury St. and when he saw me he stopped mid turn, backed-up a few feet. I then started to turn onto S. Roxbury St. westbound from Waters Ave. S. The Lexus then backed up a little more and turned westbound on S. Roxbury St. This area has been a hot spot for car prowl and vehicle thefts. I activated my emergency lights and initiated a traffic stop. The vehicle stopped in the 5800 block of S. Roxbury St.

Id. at Exhibit 2.

When Officer Gregorio approached he claims to have “detected to the odor of marijuana omitting from the interior of the vehicle.” *Id.* When he asked Mr. Wright for his driver’s license, Wright inquired why he had been stopped and, while looking for the car registration and insurance documentation, Wright “opened the glove box and moved some papers around and I was able to see [sic] appeared to be a large roll of money.”

Id. Wright appeared “nervous and agitated” and began to cry. Officer Gregorio then

told him to exit the vehicle because he was under arrest. He began blubbering and telling me he did not want to get out of the car. I opened up the car door and told him that if he did not get out of the car I would take him out of the car. He reluctantly exited the car, I grabbed the back of his shirt to hand him off to Officer Larned to place him under arrest and search him for weapons.

Id. In the Certification for Determination of Probable Cause, Officer Gregorio states under oath “I activated my emergency lights and initiated a traffic stop for the traffic infraction of driving with defective headlights SMC 11.82.060.” *Id.*, Exhibit 3 at p. 1.

The car was searched, Mr. Wright was *Mirandized* before being questioned and, according to Officer Gregorio’s report, Gregorio told Mr. Wright “I smelled marijuana in the car and he said, ‘why are you asking

me this sir? You said you pulled me over because you thought I was in a stolen car. I told you I wasn't, can't you just give me a ticket and let me go sir?" *Id.*, Exhibit 2. When asked further about the odor of marijuana in the car Wright explained that he had been "smoking it earlier," then Wright refused "to answer my questions so I requested a K-9 come to search the vehicle." *Id.*

The K-9 Unit arrived, the car was searched resulting in the seizure of two small baggies of suspected marijuana, a prescription bottle of Oxycodone bearing the name Roger Wright, \$1,300 in cash, and some paraphernalia. A quantity of ecstasy was found in the trunk. *Id.*

IV. DISCUSSION

A. Officer Gregorio Clearly Did Not Have Probable Cause to Stop Mr. Wright for Having His Headlights Off 25 Minutes After Sunset on a Clear Day.

Officer Gregorio's report states that Mr. Wright was "driving without headlights" at 4:45 p.m., but headlights are not required that time of day. RCW 46.37.020 provides:

Every vehicle upon a highway within this state at any time from a half hour *after* sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons in vehicles on the highway are not clearly discernable at a distance of 1000 feet ahead shall display lighted headlights, . . . (Emphasis added.)

The defense has requested, pursuant to ER 201, that the Court take judicial notice of the fact that, on November 29, 2006, visibility was 9.6 miles and the sun set at 4:21 p.m., according to the Old Farmer's Almanac. CP 7-12. According to his own report, as validated by the computer printout of his radio traffic on that date, Officer Gregorio stopped Roger Wright at 4:45 p.m. (16:45 hours), 24 minutes after sunset on a clear day. Accordingly, there was no valid basis for the stop.

Traffic stops for violation of traffic laws based on less than reasonable suspicion are unconstitutional. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held that stopping a vehicle to check the driver's license and automobile registration, where neither traffic nor equipment violations or suspicious activity preceded the stop, was unreasonable under the Fourth Amendment.

It is well known that the Washington State Constitution provides even broader protection against this type of search and seizure than the Fourth Amendment. In a very recent decision, *State v. Einfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008), our Supreme Court rejected the "private search" doctrine and reiterated its reasoning from *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002), that "the protections guaranteed by article I, section 7 of the State constitution are qualitatively different from

those provided by the Fourth Amendment to the United States Constitution.” *Id.* at 634. “Exceptions to the warrant requirement are narrowly drawn, and ‘[t]he State bears a heavy burden in showing that the search falls within one of the exceptions.’ *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).” *Id.* at 635. The *Eisfeldt* Court reasoned that, “unlike the Fourth Amendment, article I, section 7 ‘focuses on the rights of the individual rather than the reasonableness of the government action.’ *State v. Morse*, 156 Wn.2d 1, 12, 123 P.3d 382 (2005).”¹ *Id.*

“Reasonable suspicion” is defined as “the ability to reasonably surmise from the information at hand that a crime was in progress or had occurred.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (*citing United States v. Cortez*, 449 U.S. 441 (1981)). However, the State’s argument that “Officer Gregorio could reasonably surmise from the information he had that the Defendant committed a headlight violation,” is specious. *See State’s Response*, CP ____.² The State conceded at the time that “the sun had set just under 30 minutes prior” to the stop, then argued the non sequitur that “it was reasonable for Officer Gregorio to surmise

¹ In *Eisfeldt*, a contractor who had permission to be in a private residence uncovered evidence of a marijuana operation, called the police and showed them what he had discovered. The police then obtained a warrant for that house and, based on what they uncovered, they obtained a warrant for a second house, then arrested two individuals who confessed. The Court rejected the federal doctrine that “a state actor does not offend the Fourth Amendment if the search does not expand beyond the scope of the private search” that preceded the search by police officers and suppressed all the evidence. *Id.* at 636.

² Supplemental Designation of Clerk’s Papers filed 11/4/08.

that the Defendant was committing the infraction of failure to display lighted headlights.” *Id.* The State’s argument that the Defendant’s driving violated a Seattle Municipal Code that makes it an infraction to “stop, stand or park a vehicle within an intersection,” must also fail since the Defendant’s conduct, even as described in Officer Gregorio’s report, does not violate that provision. SMC 11.72.210, 11.31.010. *See* CP ____.

Under these facts, Mr. Wright had committed no offense so the stop was illegal.

Most closely on point is the recent Court of Appeals decision in *State v. Montes-Malindas*, 144 Wn.App. 254, 182 P.3d 999 (2008). In that case an officer stopped a van for driving without its headlights long after sunset but the van turned its lights on before the officer pulled it over and conducted a search that uncovered methamphetamine and an unlawful firearm. The court invalidated the search because the arrest was held to be a pretext and suppressed all the evidence. In doing so the Court specifically noted:

And it is not reasonable to stop a car only after its lights have been turned on. He also did not issue a citation for any headlight violation. . . . No evidence was presented to indicate the presence of other traffic on the roadway or the existence of endangerment to pedestrians or property resulting from Mr. Montes-Malindas’s brief roadway travel without his headlights on. He pulled onto the street in front of a business and traveled about 100 yards, apparently

without interfering with any other vehicular or pedestrian traffic, before turning his headlights on.

Id. at 1003.

This reasoning applies *a fortiori* to the facts of this case where Mr. Wright was not legally required to turn on his headlights since the sun had set only 25 minutes prior and visibility was clear. But more importantly, as in *Montes-Malindas*, “this was an unlawful pretext stop,” and “all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *Id.*, citing *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

B. A Traffic Stop May Not be Used as a Pretext to Search for Evidence

Washington is one of the few jurisdictions that prohibits police officers from using an otherwise valid traffic stop as a pretext to search a vehicle for evidence.³ In *State v. Ladson*, *supra*, the Washington Supreme Court held, under Washington Constitution article I, section 7, that there is “a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement. We therefore hold pretextual stops violate article I, section 7, because they are

³ In *Whren v. United States*, 517 U.S. 806 (1996), the United States Supreme Court eliminated the pretext doctrine under the Fourth Amendment.

seizures absent the ‘authority of law’ which a warrant would bring. Const. art. I, § 7.” *Id.* at 358.

In *Ladson*, the undisputed facts established that two Thurston County Sheriff’s detectives “were on proactive gang patrol” and admitted “they do not make routine traffic stops while on proactive gang patrol although they use traffic infractions as a means to pull over people in order to initiate contact and questioning.” *Id.* at 345-46. “On the day in question” two African Americans were driving in a vehicle and one of them was recognized as a person who “was involved with drugs.” *Id.* at 346. The officers noticed that the driver’s “license plate tabs had expired five days earlier” and pulled him over. *Id.* “The police then discovered that Fogel’s driver’s license was suspended and arrested him on the spot.” *Id.* The *Ladson* Court held this to be an illegal pretext stop and suppressed all evidence.

Most directly on point with the facts of this case is the Court’s holding in *Montes-Malindas, supra*, which clearly requires suppression of the evidence here. In that case a Wenatchee police officer observed the defendant,

Jesus Montes-Malindas and two other people in a van, acting nervously. One of the men in the van got out and into another occupied car, and left the area. Mr. Montes-Malindas then switched places with the occupant in the driver’s seat.

182 P.3d at 1001. The officer parked his cruiser so he could observe the van and:

When the van pulled out of the parking lot onto Miller Street, Sergeant Dresker noticed that the headlights of the van were not illuminated, although it was dark. As the van passed, Sergeant Dresker pulled out and got behind the van. The driver then turned the headlights on. The van had driven about 100 yards without its lights illuminated.

Id.

At this point, Sergeant Dresker turned on his emergency lights, stopped the van and observed “that the male rear seat passenger was not wearing a seatbelt. The female front seat passenger told him the van was hers and she had no insurance.” *Id.* Sergeant Dresker was told that the driver “did not have a driver’s license and that he did not have any identification. Because of his lack of license and identification, combined with the suspicious activity he saw in the parking lot, the officer decided to be cautious.” *Id.* The passenger then provided a false name and “Sergeant Dresker arrested Mr. Montes-Malindas for having no valid operator’s license.” *Id.* The van was searched incident to this arrest and resulted in the discovery of “some narcotics paraphernalia,” a firearm and “a residue-filled baggie that contained crystal methamphetamine. The defendant was charged with possession of the methamphetamine and first degree unlawful possession of a firearm.” *Id.*

The Court began its analysis by recognizing

With a few exceptions, warrantless searches and seizures are *per se* unreasonable and violate article I, section 7 of the Washington Constitution. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). One such exception is a search incident to the arrest of a person in possession of a vehicle, which permits an officer to “search the passenger compartment of a vehicle for weapons or destructible evidence.” *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986). But “arrest may not be used as a pretext to search for evidence.” *State v. Michaels*, 60 Wn.2d 638, 644, 374 P.2d 989 (1962).

Accordingly, “a traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further.” *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999).

Id. at 1002.

The Court applied the following analysis from the *Ladson* case:

In *Ladson*, the Washington Supreme Court rejected the *purely objective test* for pretextual stops because “an objective test may not fully answer the critical inquiry: Was the officer conducting a pretextual traffic stop or not?” *Ladson*, 138 Wn.2d at 359, 979 P.2d 833 (overruling *State v. Chapin*, 75 Wn.App. 460, 464, 879 P.2d 300 (1994) (objective test)). The Court therefore *added* a subjective component to the test: “When determining whether a given stop is pretextual, the Court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” *Id.* at 358-59, 979 P.2d 833.

“To satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code.” *Id.* The subjective component is significant

because it makes it “easier for courts to find that a stop was pretextual based on the totality of the circumstances rather than *only* the objective circumstances, regardless of an admission of any pretextual subjective reasons for the stop.” *Montes-Malindas*, 182 P.3d at 1002 (emphasis in original). In *Ladson*, the Court found that, “[b]ased on the totality of the circumstances, we conclude that this was an unlawful pretext stop,” suppressed the evidence and reversed the conviction.

Id. at 1002 (emphasis in original). *Accord*: *State v. Myers*, 117 Wn.App. 93, 94-95, 69 P.2d 367 (2003) (reversing conviction where officer admitted that he pulled a driver over to check if the driver’s license was suspended, rather than to cite the driver for making two lane changes while signaling simultaneously); *State v. Meckelson*, 133 Wn.App. 431, 437, 135 P.3d 991 (2006), *rev. denied*, 159 Wn.2d 1013, 154 P.3d 919 (2007) (“It is not enough for the State to show that there was a traffic violation. The question is whether the traffic violation was the real reason for the stop.”).

In *Montes-Malindas*, the Court rejected the officer’s explanation for his conduct, “that the stop was made only because of the delayed engagement of the headlights.” 182 P.3d at 1003. Rather, the Court considered that Sergeant Dresker “also stated that he was suspicious of the activity that he saw in the parking lot.” Thus, the Court concluded “that those suspicions probably were on his mind when he decided to pull over the van and approach the passenger side, rather than the driver’s side.” *Id.*

In this case Officer Gregorio noted in his own report that “[t]his area has been a hotspot for car prowls and vehicle thefts. I activated my emergency lights and initiated a traffic stop.” See RP 33 and Exhibit 3. It is equally noteworthy that Officer Larned’s report described this as “a suspicious vehicle stop” after receiving a radio call for backup assistance from Officer Gregorio. See RP 35-36. No driving citation was issued against Mr. Wright by either officer.

Therefore, Officer Gregorio’s claim that he stopped Mr. Wright’s vehicle for a headlight violation is even weaker than the stop in *Montes-Malindas*, where the car drove long after dark without its lights on. As noted above, Mr. Wright had no legal obligation to turn his lights on at the time of the stop and his actions in briefly backing up are hardly illegal.

C. **If the Initial Stop was Illegal, than any Evidence Seized or Statements Made by the Defendant Must be Suppressed.**

As noted in *Montes-Malindas*, “If a pretextual stop occurs, the Washington Constitution requires that ‘all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.’ *Ladson*, 138 Wn.2d at 359, 979 P.2d 833.” *Id.* at 1002. In *State v. Eisfeldt*, *supra*, the Supreme Court suppressed all of the evidence, including a confession, due to the initial illegality based on the *Wong Sun* doctrine because: “The exclusionary rule has traditionally barred from

trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.” (Citing *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).) *Eisfeldt, supra*, at 640. “Where evidence is obtained as a direct result of an unconstitutional search, that evidence must also be excluded as ‘fruit of the poisonous tree.’ *Id.* at 487-88.” *Eisfeldt* at 640.

Similarly, in *State v. Henry*, 80 Wn.App. 544, 910 P.2d 1290 (1996), the Court held that, in the course of a traffic stop where the officers believed that the driver was more nervous than normal, these facts were insufficient to justify a *Terry* search because

it is not unusual for drivers to be unable immediately to find their vehicle’s registration and proof of insurance. And “most persons stopped by law enforcement officers display some signs of nervousness.” *State v. Barwick*, 66 Wn.App. 706, 710, 833 P.2d 421 (1992). . . . Therefore, at the time Deputy Small escalated the routine traffic stop into a *Terry* stop, he had no objectively reasonable basis for the search. The detention was not a legitimate *Terry* stop.

Id. at 552. Accordingly, the drugs found on the defendant were suppressed. *Id.*

D. Both Charges Against the Defendant Should be Dismissed for Lack of Admissible Evidence.

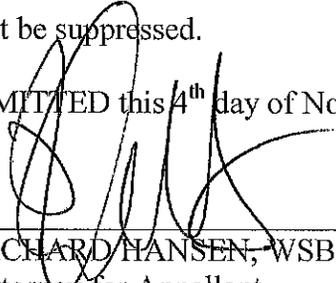
If the evidence is suppressed, there is no independent evidence from which a reasonable finder of fact could find the Defendant guilty beyond a reasonable doubt and the charges should therefore be dismissed with prejudice. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d (1980); *State v. Knapstad* 107 Wn.2d 345, 729 P.2d 48 (1986); and *Jackson v. Virginia*, 443 U.S. 307 (1979).

V. CONCLUSION

Roger Wright, a young African American man, was lawfully driving his car when Officer Gregorio pulled him over for “a suspicious vehicle stop” due to the fact that he was driving a Lexus in an area that “has been a hot spot for car prowls and vehicle thefts.” Mr. Wright had no obligation to have his headlights turned on within half an hour of sunset, and there was no reason to believe it had been stolen. This stop was obviously not justified and was clearly a pretext for an unlawful search.

Accordingly, the officer had no right to arrest him and search his vehicle and all the evidence must be suppressed.

RESPECTFULLY SUBMITTED this 4th day of November, 2008.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

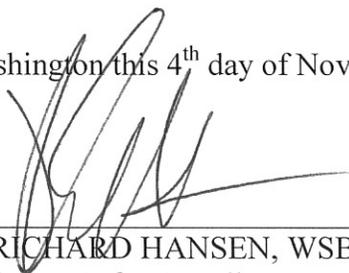
On the 4th day of November, 2008, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Appellate Division
King County Prosecutor's Office
516 Third Ave., W554
Seattle, WA 98104

And mailed to Appellant:

Roger Sinclair Wright
3208 - 25th Ave. S.
Seattle, WA 98144

DATED at Seattle, Washington this 4th day of November, 2008.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

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