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NO. 86610-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

GILBERTO CHACON-ARREOLA, Respondent.

MEMORANDUM OF AMICI CURIAE  
WASHINGTON STATE PATROL AND  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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## I. INTEREST OF AMICI CURIAE

The Washington State Patrol (WSP) enforces criminal and traffic laws throughout the State of Washington. One of WSP's primary missions is to prevent accidents, injury, and death on the state's highways. This mission includes enforcement of all traffic laws, including those related to vehicle equipment standards. WSP has a substantial interest in the outcome of this case because of the strong link between deterring driving under the influence of drugs and alcohol and the prevention of injury and death. The Court of Appeals in this case has found that it is unconstitutional to stop a driver for a violation of the traffic code, if the officer is aware of a report that the driver may be "drunk driving." This principle, if upheld, diminishes WSP's ability to protect the public by preventing accidents, injuries, and death on the state's highways.

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for providing advice to the duly elected sheriff. RCW 36.27.020. WAPA is interested in cases, such as this, which can provide clarity in an area of law that has become increasingly murky. This, in turn, can empower police officers to protect both the constitutional rights of suspects and the motoring public.

## II. ISSUES PRESENTED

Twelve years ago this Court ruled that a detective who is investigating a drug offense may not stop a suspect for a traffic violation, when the purpose of such a stop is to further the investigation of the drug offense. *See State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). In the intervening years, this Court has not explained how the “pretext doctrine” is to be applied to a patrol officer who is engaged in the routine enforcement of the traffic laws. . As a result, the lower courts have issued inconsistent opinions that provide little or no guidance to police officers, prosecutors, and trial courts.

Should this Court accept review of the Court of Appeals decision and determine how the "pretext doctrine" applies to patrol officers engaged in routine enforcement of the traffic laws?

## III. AMICI CURIAE'S STATEMENT OF FACTS

Mattawa City Police Officer Anthony Valdivia is a patrol officer whose primary duties include the enforcement of traffic laws. RP 16-17. Officer Valdivia regularly enforces the prohibition upon modifying exhaust systems to increase their noise level found in RCW 46.37.393. RP 21-22, 34, 37-38, 45. Officer Valdivia stops vehicles that display modified exhaust systems when he can do so without engaging in unsafe driving and when another call or violator demands his immediate attention. RP 38-40, 42, 44-45.

Officer Valdivia was traveling in the same direction as Gilberto Arreola and was behind Arreola's vehicle on the day in question due to a citizen's report that Arreola may be driving drunk. RP 19-21. Officer Valdivia immediately turned on his lights to stop Arreola once the excessive loudness of Arreola's exhaust system was revealed when Arreola accelerated to make a left turn. RP 21, 41, 45. The purpose of this stop was the noise violation. RP 22, 43.

When Officer Valdivia turned on his vehicle's lights to stop Arreola's vehicle, Officer Valdivia did not know Arreola's identity and he did not harbor any expectation or desire to locate drugs or evidence of a non-traffic-related offense. RP 24, 26, 47. Officer Valdivia did not make the stop with the expectation that Arreola would be arrested for driving while under the influence of intoxicants or drugs. RP 36, 39, 41, 46. Officer Valdivia treated the stop the same as any other infraction stop until he observed evidence of Arreola's impairment. RP 23-25. Once impairment was observed, Officer Valdivia administered field sobriety tests and ultimately arrested Arreola for driving while under the influence of intoxicants.

#### IV. ARGUMENT

##### A. CURRENT APPELLATE COURT DECISIONS PROVIDE INCONSISTENT GUIDANCE TO OFFICERS REGARDING THE ENFORCEMENT OF TRAFFIC LAWS

Division Three's opinion in this case highlights the disparate analyses to evaluate whether a patrol officer's enforcement of the traffic code constitutes a pretextual stop. While Division Three in *State v. Arreola*, 163 Wn. App. 787, 260 P.3d 985 (2011), *State v. Myers*, 117 Wn. App. 93, 69 P.3d 367 (2003), *review denied*, 150 Wn.2d 1027 (2004), and *State v. Montes-Malinda*, 144 Wn. App. 254, 182 P.3d 999 (2008), focused on the officer's single motivation to stop the vehicle, other appellate decisions have recognized that a patrol officer need not ignore observed traffic violations just because the officer suspects other criminal activity.

In *State v. Ming Hoang*, 101 Wn. App. 732, 6 P.3d 602 (2000), *review denied*, 142 Wn.2d 1027 (2001), Division One found that a traffic enforcement officer did not conduct a pretextual stop when, after observing suspected drug dealing, the officer stopped the vehicle based on a failure to signal. In that case, the Court reasoned "[u]nder *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code so long as enforcement of the traffic code is the actual reason for the stop." *Id.* at 742 (citation omitted).

*Arreola's* reasoning also contradicts a recent Division Three opinion regarding a stop by a traffic enforcement officer. In *State v. Weber*, Division

Three rejected the argument that since a trooper “was looking for DUIs at the time” of the incident, the stop for a traffic infraction was pretextual. 159 Wn. App. 779, 784, 247 P.3d 782 (2011).<sup>1</sup> In determining that the stop met constitutional muster, Division Three focused on the officer’s traffic enforcement duties:

The trooper was doing his job as a patrol officer. While he was always on the lookout for lawbreaking, including people driving under the influence, that fact does not mean that everyone [the trooper] stops is the subject of a pretext stop. It is expected that patrol officers are looking out for improper activity.

*Id.* at 790-91 (emphasis in original).

Accordingly, *Arreola* conflicts with *Ming Hoang* and *Weber*’s logic that a traffic enforcement officer may stop a vehicle based on an observed traffic infraction even though the officer suspects the driver may have violated other laws. This inconsistency provides unclear guidance to *lower* courts and presents significant operational impacts for law enforcement agencies tasked with enforcing the traffic code and keeping Washington’s roadways safe. Due to this inconsistency, a patrol officer, who suspects impaired driving while observing a blatant traffic code violation, , must either make the stop risking that it may be later held "pretextual" or decline to enforce the traffic code. This is an untenable situation for lower courts, law enforcement officers, and citizens who travel on Washington’s roadways.

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<sup>1</sup>*Arreola* noted that *Weber* focused on “the fact that the officer was not conducting an investigation *unrelated to traffic offenses*.” 163 Wn. App. at 798 (citation omitted) (internal quotations omitted) (emphasis in original).

B. PRETEXT REQUIRES A SHOWING THAT AN ULTERIOR MOTIVE PROMPTED AN OFFICER TO DEPART FROM REASONABLE POLICE PRACTICES

Washington is one of a handful of state which have held that their state constitutions prohibit "pretext" traffic stops.<sup>2</sup> See, e.g., *State v. Heath*, 929 A.2d 390 (Del. Super. 2006);<sup>3</sup> *State v. Ochoa*, 146 N.M. 32, 206 P.3d 143 (2008). Other states have discussed what makes a traffic stop a pretext, without actually adopting the doctrine. See, e.g., *Chase v. State*, 243 P.3d 1014 (Alaska App. 2010); *Nease v. State*, 105 P.3d 1145 (Alas. App. 2005). None of these jurisdictions have adopted Division Three's "only reason" rule.

The general rule among jurisdictions that will consider challenges under the doctrine of pretext searches is that the defendant must prove that the officer's "ulterior motive" prompted the officer to depart from reasonable police practices. See, e.g., *Chase*, 243 P.3d at 1019; *Heath*, 929 A.3d at 403; *Ochoa*, 206 P.3d at 155-156. Under this rule, a patrol officer's stop of a vehicle to enforce an equipment violation that the officer personally observed will not be invalidated simply because the officer may also be concerned that the vehicle's driver may be impaired. See, e.g., *Nease*, 105 P.3d at 1150 (police officer's stop of a vehicle for a broken brake light was not improper under the pretext search doctrine simply because the officer's primary

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<sup>2</sup>These state court decisions are in contrast with the federal rule adopted in *United States v. Whren*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996),

<sup>3</sup>Not every Delaware Court agrees with the *Heath* court's determination that the state Constitution provides greater protection from pretext stops than the protection afforded by the Fourth Amendment as set forth in *Whren*. See generally *State v. Rickards*, 2 A.3d 147, 150-152 (Del. Super. 2010), *aff'd*, 2011 Del. LEXIS 23 (Del., Jan. 12, 2011).

subjective motivation for making the stop was to investigate his suspicion that the driver was intoxicated).

In fact, few if any traffic stops made by a patrol officer in a marked vehicle will fail as pretextual when the officer's usual duties include traffic enforcement. See, e.g. *State v. Daniel*, 665 So.2d 1040 (Fla. 1995). The exceptions involve an officer's stop for a statute under circumstances when literal compliance with the statute's requirements are impossible,<sup>4</sup> a patrol officer is making a stop solely at the behest of a non-patrol officer,<sup>5</sup> or when the officer's interpretation of the traffic law is unreasonable or incorrect.<sup>6</sup> None of these factors are present in the instant case.

To enable the lower courts to distinguish between pretext and non-pretext stops, this Court should hold defendants to their burden of proving that absent the unrelated or "hunch" purpose a reasonable police officer would not have made the stop.

The defendant meets this burden by showing that: (1) he was stopped only for a traffic violation; (2) he was later arrested for and charged with a crime unrelated to the stop; (3) the crime or evidence of the crime was discovered as a result of the stop; (4) the traffic stop was merely a pretextual purpose, alleging that the officer had a hunch about, or suspected the defendant of, a non-traffic related offense unsupported by reasonable suspicion; and (5) the pretext can be inferred, at least, when the suppression hearing evidence is presented.

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<sup>4</sup>See, e.g., *Heath*, 929 A.2d at 405.

<sup>5</sup>See, e.g., *Daniel*, 665 So.2d at 1043, citing *United States v. Valdez*, 931 F.2d 1448 (11th Cir. 1991); *Ochoa*, 206 P.3d at 156-157.

<sup>6</sup>See, e.g., *Daniel*, 665 So.2d at 1044-46.

The salient question presented is whether defendant could meet his burden through inter alia: (1) evidence of the arresting officer's non-compliance with written police regulations; (2) evidence of the abnormal nature of the traffic stop; (3) testimony of the arresting officer that his reason for the stop was pretextual; (4) evidence that the officer's typical employment duties do not include traffic stops; (5) evidence that the officer was driving an unmarked car or was not in uniform; and (6) evidence that the stop was unnecessary for the protection of traffic safety. The above six factors are not exhaustive, but merely "suggested ways for the court to get a view of the totality of the circumstances surrounding the stop. If the defendant fails to meet his burden, then the initial traffic stop is not shown to be purely pretextual, in which event it would be constitutional. However, if the defendant meets his burden, pretextualism is presumed. In that event the State would have an opportunity to offer evidence in rebuttal, the final step of this test.

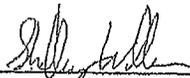
*Heath*, 929 A. 2d at 403 [Footnotes omitted].

Here, the trial court judge clearly considered the factors identified in *Heath* and correctly reached the conclusion that Arreola had not meet his burden of proving that the traffic stop was "purely pretextual." Division Three's rejection of the trial court judge's decision in favor of a "single motivation rule" provides little or no guidance to law enforcement and will chill the enforcement of traffic laws to the detriment of public safety.

V. CONCLUSION

WSP and WAPA respectfully request that this Court grant the State's petition for review.

Respectfully submitted this 6th day of December, 2011.

  
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