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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 7 PM 1:12

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 JARRAY F. WHITE)
 (your name))
)
 Appellant.)

No. 69064-7-1

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Jarray White, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See Attached

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: 2.4.13

Signature: WHITE JARRAY

NO. 69064-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

JARRAY WHITE,

Appellant.

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

The Honorable Joan E. DuBUQUE, Judge

STATEMENT OF ADDITIONAL GROUNDS

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A. ASSIGNMENT OF ERROR

1. The trial court erred when it denied appellants motion for a mistrial based upon unlawful search and seizure and detention of the appellant.
2. The trial court erred by not dismissing the case against White.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court error in not dismissing the case?
2. Did the State utilize a traffic infraction of failing to signal as pretext to initiate a traffic stop and engage in a wider general investigation?
3. Did Deputy Nishimura exceed the proper scope of traffic citation stop when he seized Mr. White by asking him to step out of the car?
4. Did Deputy Nishimura have sufficient basis to engage in a protective frisk of Mr. White?
5. Did the trial court error in denying Mr. White's motion for a mistrial?
6. Did the State error by providing an instruction that permitted the jury to consider Mr. White's past 1995 offenses to assess his credibility?
7. Did the Prosecutor's argument improperly shift the burden?
8. Did the trial court error by imposing Legal Financial Obligations (LFO'S)?

B. STATEMENT OF THE CASE

1. Charges, verdicts, and sentence

The State charge Jarray White with first degree unlawful firearm possession. CP 1-5. The jury found White guilty as charged, and the court sentenced him to a prison-based Drug Offender Sentence Alternative including 50.75 months of incarceration. CP 80-89.

This timely appeal follows.

2. Pertinent pretrial ruling

White moved before trial to exclude any reference to a DOC hearing at which an arresting officer testified. The State agreed the DOC hearing should simply be referred to as "another hearing". The trial court agreed. 3RP 338-40. The prosecutor later assured the court that she had instructed State's witnesses as to the court's rulings in limine. RP 343-44.

3. Trial testimony and violation of limine order

While on patrol, King County Sheriff's deputies Robert Nishimura and Joseph Eshom saw a Chevrolet El Camino fail to signal before turning left. 5RP 450-53. The deputies focused on the car in part because a similar car had avoided being pulled over a few night earlier by unexpectedly turning off the road. 5RP 479-83, 593-94. Nishimura made a U-turn and stopped the El Camino. 5RP 455.

White was the driver of the El Camino. According to the deputies White handed Nishimura his license, then reached into his right vest pocket. 5RP 459. Nishimura asked White what he was doing, and then asked him to stop, but White merely stared straight ahead. 5RP 459. Nishimura feared White was armed, so he asked him to get out of the car. White asked, "What did I do?" 5RP 460-61.

Nishimura grabbed White's arms and attempted to frisk him, but White pulled away and faced Nishimura with clenched fist. 5RP 461-62, 508. Nishimura grabbed White's collar and tried to force him to the ground, but White scrambled away and ran. 5RP 462, 513. As Nishimura and Eshom ran after him, White continued to put his hand into his pocket. 5RP 464.

Believing he was in danger, Nishimura yelled for white to stop and threatened to use his taser. 5RP 464. As Nishimura was preparing to shoot the taser darts at White, Eshom yelled "gun," for the first time, Nishimura noticed a gun in White's hand. 5RP 466, 513. Nishimura heard a skidding noise on the pavement; Eshom, on the other hand, saw the gun fly from White's hand and hit a fence. 5RP 466, 520, 583.

White then went to the ground. The deputies approached and when they tried to handcuff White, he struggled. 5RP 466, 468. Nishimura tased White again, which allowed the officers to handcuff him. 5RP 469. White defecated in his clothing at some point during the struggle and later vomited.

5RP 472, 533-34. Nishimura denied that was taser - induced, but Eshom testified to the contrary. 5RP 471-72, 609.

Nishimura acknowledged on cross examination that he could face criminal charges for improperly using force against an arrestee. 5RP 527. Eshom found a loaded semi-automatic pistol in the bushes near the fence. 5RP 470, 586. The gun and ammunition were tested for prints, but no useable prints were found. 4RP 418-23; 5RP 639.

While cross-examining Nishimur, defense counsel sought to impeach the deputy with his testimony from an earlier hearing. Counsel asked for a sidebar to make sure Nishimura knew not to refer to the hearing as a "DOC" hearing. At the sidebar, Nishimura was instructed, consistent with the order in limine, immediately after cross-examination resumed, the following exchange occurred:

Q. All right, Deputy. So let's get back to that question. Do you recall testifying in an earlier hearing related to this matter?

A. Is this the DOC hearing you're asking about? If it's on a court hearing, I recall a 3.6 hearing a couple of weeks ago.

5RP 521.

Cross examination continued, but after the jury was excused for a recess, White moved for a mistrial. 5RP 556. Pointing out that counsel failed to make a contemporaneous objection, the court denied the motion. 5RP 558-59. Defense counsel explained she did not object because she did not want to highlight the deputy's misconduct. 5RP 559.

White testified that he was on his way to a friend's house when he was stopped by police for failing to signal. 6RP 707. White denied failing to signal. 6RP 722. When White told Nishimura he had indeed signaled, the deputy became upset. Nishimura asked for White's driver's license and walked off. He then returned to the car and, without provocation, asked White if he had a gun. 6RP 716-17. White denied reaching into his vest pocket. 6RP 719.

Nishimura and Eshom frisked White but found only a cell phone. 6RP 721. White began to feel apprehensive about the officer's behavior. 6RP 724. Eshom confirmed White's fear when he punched White in the back of the head. 6RP 724. Feeling isolated and vulnerable on the empty streets, White fled and yelled for help. 6RP 725. Shortly thereafter he felt his body hit with taser darts, lost control of his muscles, and fell to the ground. 6RP 730.

Nishimura continued to tase White although White was on the ground and not resisting. 6RP 731. The deputies kept White facing away from some activity they did not want him to see. 6RP 733-34. White later saw Nishimura carrying something in a plastic bag. Nishimura told Eshom, "[L]ook what I got." 6RP 736.

4.

CLOSING ARGUMENT

The prosecutor argued Mr. White had attempted to inject confusion into what was a straightforward possession case. She pointed out that, as the instruction indicated, the jury need not decide the case "beyond all doubt." 8RP 781.

Its got to be based on....evidence or lack of evidence....Its not mere speculation. The instructions talk about an objective and reasonable examination of the evidence. The instructions talk about leaving passion or prejudice aside in deciding this case...But what the instructions do not tell you and what you're not required to do is to check your common sense at the door. Its your collective, objective reasoning. Its your collective, reasonable basis and reasonable examination of the evidence. That's what a reasonable doubt is. 8RP 781. (Emphasis added).

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED MR. WHITE'S MOTION TO DISMISS THE CASE

The trial court has the inherent power to dismiss a prosecution prior to trial when it is apparent that the State has insufficient evidence to take the case to a jury. State v. Knapstad, 41 Wn.App. 781, 706 P.2d 238 (1985). In Knapstad, the court adopted the standard which asks whether, when viewing the evidence in light most favorable to the prosecution, there is substantial evidence by which a rational juror could conclude that the elements of the crime have been met beyond a reasonable doubt.

See also State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Fairness and judicial efficiency both require that where such evidence is lacking, a procedure be made available to the court to dismiss the prosecution prior to trial for insufficient evidence. In the present case, White request the court to apply Knapstad standard in order to determine whether the State had sufficient evidence to establish a prima facie case of unlawful possession of a firearm, first degree. Mr. White is not asking this court to assume a role as a fact finder. However, White asks this court to find insufficient evidence as it is not possible for the State to prove guilt of unlawful possession of a firearm, first degree doubt as a matter of law.

In order to sustain a conviction for this charge, the State must prove Mr. White has been convicted of a serious offense, as defined in RCW 9.41.010. As stated above, it is White's understanding , based on a verbal representation by Deputy Prosecuting Attorney Brian Wynne, that the state would not be proceeding with the allegation that Mr. White has been convicted of assault second degree given that his prints could not be individualized to the judgment and sentence in that case.

The "Statute governing unlawful possession of a firearm requires a constitutionally valid predicate conviction". State v. Lopez, 107 Wn.App. 270, 27 P.3d 237 (2001). In the case at bar, the State has alleged Mr. White has been convicted of burglary first degree, which Mr. White was convicted of in a 1995 case.

There is no indication in that court file that Mr. White was ever given notice he had lost his firearm possession right due to that conviction. This renders that conviction invalid as a predicate offense as the court is required, by statute, to provide oral or written notice to Mr. White of the loss of this right under RCW 9.41.047.

In *State v. Minor*, a juvenile respondent was charged with unlawful possession of a firearm based upon a predicate conviction of burglary. *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008). The appellate court reverse the respondent's conviction for unlawful possession of a firearm as the predicate offense failed to meet the statutory notice requirement and affirmatively misled the juvenile as to the loss of firearm rights. In the case, there was no check in the box next to the paragraph prohibiting firearm possession, and the court did not orally notify the respondent. *Id.*

Due process requires the State bear the burden of persuasion beyond a reasonable doubt of every essential element of a crime. *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983). In the case at bar, the State cannot prove a constitutionally valid conviction beyond a reasonable doubt. Mr. White asks this Court to dismiss as no evidence exist to support the first element of the charge the State has brought. Accordingly, dismissal is appropriate.

PURSUANT TO CrR 3.6 TO SUPPRESS THE FIREARM AS MR. WHITE
WAS UNLAWFULLY SUBJECTED TO A PRETEXTUAL TRAFFIC STOP.

Under Article I, section 7 of the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Warrantless searches and seizures are "per se" unreasonable under both the State and Federal constitutions. *State v. Walker*, 136 Wn.2d 678, 682 (1998). Similarly, Federal court hold, "searches conducted outside judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment-subject only to a few specifically establishing an exception to the warrant required by a preponderance of the evidence. *U.S. v. Vasey*, 834 F.2d 782, 785 (9th. Cir. 1987).

Pretextual stops are illegal in Washington, and are a Article I, section 7 of the Washington State Constitution. See, *State v. Ladson*, 138 Wn.2d 343. 979 P.2d 833 (1999); *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962).

The stop of a motor vehicle based solely on suspicion that a traffic infraction has been committed must be justified by probable cause. See *State v. Chelly*, 94 Wn.App. 254, 259 (1999)(traffic stop for infraction reasonable only if based upon probable cause).

Even if the officer articulates a suspicion that technically amount to probable cause to initiate a stop, the court must consider whether the stop was pretextual. "[P]olice officer may not use routine traffic stops as basis for generalized, investigative detentions or searches." State v. Henry, 80 Wn.App. 544, 553 (1995).

"Of concern to our Supreme Court in Ladson, in light of our constitution's broader privacy guarantee, was the extensiveness of traffic regulations, such that 'Virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter.'" State v. Arreola, 163 Wn.App. 787, 260 P.3d 985 (2011), quoting Peter Shakow, Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United State, Am. J. Crim. L 627, 633 (1997).

The preeminent Washington case on pretextual stops, Ladson, considered "whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless search which would not otherwise be permitted absent the 'authority of law' represented by a warrant," and the Ladson court concluded that these type of infractions should not justify such an intrusion. Ladson, 138 Wn.2d at 352.

"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." *Id.* at 351, 979 P.2d 833. The determination of whether a stop was pretextual depends both on objective and subjective factors, and includes an inquiry into the actual motivations of the particular officer.

State v. Ladson, *supra*. Evidence obtained through an illegal pretext stop must be suppressed. *Id.* at 359-60. Thus, the police may not circumvent the warrant by using a traffic infraction as an excuse to detain a citizen and search for evidence of an unrelated offense. *State v. Ladson*, 138 Wn.2d 343 (1999); *State v. Davis*, 35 Wn.App. 724, 726-27 (1983), review denied, 100 Wn.2d 1039 (1984).

See also *State v. Schoemaker*, 11 Wn.App. 187, 192 (1974), rev'd on other grounds, 85 Wn.2d 207 (1975) (Subterfuge and pretext are not treated favorably when they conflict with constitutional rights); *State v. Michaels*, 60 Wn.2d 638, 644 (1962).

"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." Arreola, 163 Wn.App. at 793-94. A relevant factor is the officer's assignment and duties at the time of the stop.

State v. Montes-Malindas, 144 Wn.App. 254, 261, 182 P.3d 999 (2008)(patrol officer was surveying suspicious van when infraction was observed). Also relevant is whether or not the officer cites the offender for the traffic infraction. State v. Mihn Hoang, 101 Wn.App. 732, 742, 6 P.3d 602 (2000).

In the case at hand, the deputies were driving in a residential area of Skyway. The deputies' report does not indicate that the failure of the El Camino to signal impeded traffic in any way. Moreover, it appears the officers followed Mr. White for approximately half a mile before initiating a traffic stop.

Finally, the officers never issued an infraction for failing to signal, and it appears that process was never begun as Mr. White was asked to step from the vehicle almost immediately.

Even assuming the deputies are accurately reporting their assertions that Mr. White failed to signal, the inquiry is whether that infraction was being engaged in a wider criminal investigation.

Here, it cannot be established that these officers, either subjectively or objectively were genuinely motivated by enforcing the traffic code. Rather, the deputies swiftly initiated a wider investigation and immediately perceived all of Mr. White's behavior as threatening which does not support the proposition that the officers always viewed the stop as one to simply enforce traffic code.

THE COURT SHOULD HAVE SUPPRESSED THE FIREARM AFTER MR. WHITE WAS UNLAWFULLY SEIZED WHEN HE WAS ASKED TO STEP OUT OF HIS VEHICLE BY DEPUTY NISHIMURA.

The deputies exceeded the scope of a lawful traffic stop when Deputy Nishimura asked Mr. White to step out of the vehicle, thus seizing him without probable cause. Restraint amounting to seizure that exceeds a Terry stop must be supported by probable cause even if no formal arrest is made. *State v. Hudson*, 124 Wn.2d 107, 112 (1994); *Dunaway v. New York*, 442 U.S. 200, 208 (1979). Probable cause exist where the facts and circumstances within the arresting officer's knowlegde are sufficient to warrant a reasonable caution in believing that a crime has been committed and that the person seized committed the crime.

State v. Gluck, 83 Wn.2d 424 (1974). Probable cause must be based on the fact known at or before the time of arrest. State v. Reyes, 98 Wn.App. 923, 931 (2000)(Quoting State v. Gillenwater, 96 Wn.App. 667, 670 (1999)). Subsequent events or discoveries cannot retroactively justify a seizure without a warrant, the seizure must be justified in both its inception and its scope. State v. Avila-Avina, 99 Wn.App. 9, 14, 991 P.2d 270 (2000), overruled on other grounds.

Factors relevant in evaluating whether the extent of the intrusion requires probable cause include: The purpose of the seizure, the amount of physical intrusion upon the individual's liberty, and the length of the detention. Id. A community caretaking seizure is limited to the time it takes officers to address the original reason for the stop. "The non-criminal investigation must end when reasons for initiating an encounter have been fully dispelled." State v. Kinzy, 141 Wn.2d 373, 395 (2000).

See also State v. DeArman, 54 Wn.App. 621, 774 P.2d 1247 (1989) (once officer realized car that had been stopped was not disable, the justification for stopping the motorist ceased); State v. Markgraf, 59 Wn.App. 509, 798 P.2d 1180 (1990)(dazed look did not justify asking for Id, despite initial reasonable community caretaking interaction).

In the case at bar, Deputy Nishimura did not have probable cause to believe a crime had been committed when he asked Mr. White to step out of the vehicle. At that point, even if one is to believe Deputy Nishimura's entire account, there was absolutely no reason to believe Mr. White had committed a crime. When a person is stopped for a traffic violation, "The officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction." RCW 46.61.021 (2).

It does not appear Deputy Nishimura at all began the process of issuing a traffic citation, so it is unclear why officer safety should be an issue as the officer were not engaged in any official duties that suddenly were threatened by Mr. White. Deputy Nishimura uses the assertion that Mr. White was reaching in his pockets and staring straight ahead to warrant seizing Mr. White.

Washington case law makes clear that this scant evidence does not warrant a seizure. Mere nervousness or confusion will not support a community caretaking seizure. *State v. Markgraf*, 59 Wn.App. 509, 798 P.2d 1180 (1990), overruled on other grounds, (dazed look during community caretaking encounter did not justify extending the encounter); *State v. Coyne*, 99 Wn.App. 566, 995 P.2d 78 (2000).

(nervousness during interaction when police return property does not support a seizure), See also State v. Henry, 80 Wn.App. 910 P.2d 1290 (1995)(nervousness during traffic stop does not warrant expanding duration of seizure of nature of investigation). In this case, Deputy Nishimura did not have probable cause to expand the nature of the stop to seize Mr. White. Rather, the observations warrant additional pretext used by Nishimura to pull Mr. White from his vehicle.

MOTION TO SUPPRESS FIREARM SHOULD HAVE BEEN GRANTED

An officer performing a frisk must have cause to justify both the initial investigatory stop and the frisk during the stop. A frisk during an investigatory stop is constitutional if the 1) The initial stop must be legitimate, 2) A reasonable safety concern must exist to justify a protective frisk for weapons, 3) The scope of the frisk must be limited to the protective purpose. State v. Collins, 121 Wash.2d 168, 173 (1993).

Like the stop itself, a pat-down conducted in connection with a stop must be justified not only in its inception but also in its scope. State v. Hudson, 124 Wn.2d 107, 112 (1994).

"A valid weapons frisk is strictly limited in its scope to a search of the outer clothing; a pat-down to discover weapons which might be used to assault the officer." Hudson at 112.

The only justification for a frisk is officer safety. State v. Fowler, 76 Wn.App. 168, 172 (1994). Generalized concern about safety will not suffice. State v. Xiong, 164 Wn.2d 506, 514 (2008)(extending pat-down to search inside defendant's pocket illegal even though police "may legitimately have had some generalized concern about safety" because none of their concerns were specific to the defendant).

CONCLUSION

Mr. White was unlawfully stopped and then seized by Deputy Nishimura when he used an allegation of a traffic infraction to pull Mr. White over in the very early morning hours of August 24, 2011. Mr. White did not impede traffic when he allegedly failed to signal his turn, and indeed was in a remote residential area. The facts surrounding this stop make clear that Deputy Nishimura had a general desire to stop Mr. White and investigate his activities rather than simply to issue a traffic citation.

This essentially random stop and seizure of Mr. White cannot be tolerated under the Washington constitution and therefore the firearm later recovered after Mr. White was seized ought to be suppressed. Deputy Nishimura's violation of Mr. White's constitutional rights denied Mr. White of a fair trial. This court should reverse Mr. White's conviction and remand for a new trial.

Respectfully Submitted February 4, 2013.

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

Jarray F. White
Appellant.

NO. 69064-7-I

STATEMENT FOR ADDITIONAL
GROUNDS FOR REVIEW

**THE STATE ERRED BY PROVIDING AN INSTRUCTION
THAT PERMITTED THE JURY TO CONSIDER WHITE'S
PAST 1995 OFFENSES TO ASSESS HIS CREDIBILTY.**

White'S 1995 Burglary in the first degree and Assault in the second degree convictions were admitted for the sole purpose of satisfying the prior serious offense element of the firearm offense.

White's prior convictions had not been admitted under ER 609 which would have permitted the admission of such prior convictions where the trial court finds their probative value to outweigh the prejudicial effect. Here, there was no such weighing by the trial court as the convictions were not admitted to impeach the defendant.

At trial, the defense did not stipulate that White had previously been convicted of a "serious offense". The instructions were created by the State and given to the court. The court distributed the instructions to both attorneys. Jurors were given the following Instructions:

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and not for no other purpose.

This instruction should not have been given in this case and based on the fact jurors were permitted to consider White's past offenses to assess his credibility and not for no other purpose, he was prejudice to a significant degree, and this Court should reverse White's conviction and remand for a new trial.

**THE PROSECUTOR'S ARGUMENT IMPROPERLY
SHIFTED THE STATE'S BURDEN.**

White contends that the State shifted the burden of proof during its rebuttal argument. In doing so, the State committed misconduct resulting in prejudice beyond a reasonable doubt.

In its rebuttal the State argued that White did not file a complaint or hire an attorney to corroborate his own testimony that he was assaulted by deputies. This statement pre-White beyond a reasonable doubt because the jury could likely infer that White had the burden to prove that he was assaulted

Here, the State implied that White had to present evidence by stating that he did not produce corroborating evidence by failing to file a complaint or hire an attorney. White also argues that "the prosecutor's improper comments were not invited or provoked by defense counsel" because White did not 'unequivocally' suggest that a witness would have testified that he was assaulted to by deputies.

It is improper to imply that the defense has a duty to present evidence. State v. McKenzie, 157 WN.2d (2006). The remedy is to reverse and remand. White's attorney objected.

LEGAL FINANCIAL OBLIGATIONS (LFO'S)

White challenges the trial court's imposing LFO'S as part of his sentence. White argues that the record does not support the trial court's finding that he either has or in the future will have, the likely ability to pay LFO'S. State v. Bertrand No. 40403-6-2 Wash. App. Div.2 (2011).

The predicate offense court's failure to comply with former RCW 9.41.047(1)(2005)'s mandate to inform White that he was prohibited from possessing firearms- warrants reversal of his present conviction for unlawful possession of a firearm.

The State failed to allege a different predicate conviction in the charging information for the unlawful possession of a firearm charge and because White did not receive oral or written notice as RCW 9.41.047(1) requires, the jury never should have been permitted to consider his 1995 Burglary and Assault convictions as the predicate felony offenses.

The trial court erred by denying White's motion to suppress evidence seized following an illegal detention and search.