

NO. 69119-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DIANTRIE JEFFERSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State's suggestion that Mr. Jefferson's assignments of error should be disregarded is completely unfounded.

Mr. Jefferson's opening brief cogently assignments of error, together with issues pertaining to them, and argument supporting the assigned errors in accordance with the Rules of Appellate Procedure. The assignments of error are set forth in their own section. Op. Br. at 1-7; RAP 10.3(4). Mr. Jefferson then incorporated the assignments of error into his argument section, providing legal and factual bases for this Court to conclude that each assigned error is, indeed, erroneous. *E.g.*, Op. Br. at 22, 23 n.3, 23 n.4, 25 & n.5, 26.

Contrary to the State's apparent position, the Rules of Appellate Procedure do not require that the appellant include argument in support of the issues presented in the assignments of error section of the brief. *Compare* Resp. Br. at 9-11 *with* RAP 10.3(4), (6). The authority the State relies on merely provides that the appellant must support its assignments of error with argument in the body of the brief. *See* RAP 10.3(6); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Mr. Jefferson's assignments of error are amply supported by argument in the body of his opening brief and they should be reviewed by this

Court. *See, e.g.*, Op. Br. at 22, 23 n.3, 23 n.4, 25 & n.5, 26. The State's argument to the contrary is baseless.

2. Because the denial of Mr. Jefferson's suppression motion was based on a lower standard of proof, this Court should reverse the order.

As Mr. Jefferson pointed out in his opening brief, the trial court applied the lower preponderance of the evidence standard at the suppression hearing instead of the required clear and convincing evidence standard. Op. Br. at 18-19. The court found the State proved the constitutionality of its warrantless search of Mr. Jefferson only under the improper standard. *Id.*; CP 87 (CL 4(h) (applying preponderance standard)); 6/20/12 RP 59 (same); 6/20/12 RP 64 (noting the issue was a "close call").

Contrary to the State's argument, the clear and convincing evidence standard applies. As the State acknowledges, our Supreme Court has so held. Resp. Br. at 21 ("According to *State v. Garvin*, the State must show by clear and convincing evidence that a warrantless search or seizure meets an exception to the warrant requirements. 166 Wn.2d 242, 250, 207 P.3d 1266 (2009)."). In fact, just a year later, the Supreme Court applied the clear and convincing evidence standard again to an investigative seizure. *State v. Doughty*, 170 Wn.2d 57, 62,

239 P.3d 573 (2010). The State's reliance on a solitary dissent cannot overcome this binding precedent. Resp. Br. at 21 (relying on *Doughty*, 170 Wn.2d at 67 n.2 (Fairhurst, J. dissenting)).

Further, the State incorrectly labels this holding from *Garvin* as dictum. Resp. Br. at 21. Although in *Garvin* the Supreme Court stated the clear and convincing evidence standard applied to all exceptions to the warrant requirement, the case involved only the investigative detention, or *Terry*¹ stop, exception to the warrant requirement. 166 Wn.2d at 249-55. Thus the court's application of the clear and convincing evidence standard to the State's burden to show the lawfulness of an investigative detention was necessary to the outcome of the case and not dictum. *Bennett v. Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 318, 291 P.3d 886 (2013) (explaining statements are dicta if they do not relate to an issue before the court and are not necessary to the decision). That holding applied in *Doughty* and applies here because the State proffered the same exception to the warrant requirement—a warrantless investigative detention. *Doughty*, 170 Wn.2d at 62; see *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012) (warrantless traffic stops may fall under investigative

¹ *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

detention exception to warrant requirement); *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Moreover, application of the clear and convincing evidence standard to the investigative detention exception to the warrant requirement is legally sound. The clear and convincing evidence standard applies because “[w]arrantless disturbances of private affairs are subject to a high degree of scrutiny.” *Arreola*, 176 Wn.2d at 292. An intrusion of the right to privacy without a warrant is presumed unconstitutional unless the State proves the intrusion satisfies one of the limited exceptions to the warrant requirement. *Id.* (citing authority); *see* Const. art. I, § 7. These exceptions are jealously guarded. *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996). Beyond general concerns with warrantless intrusions of our right to privacy, the traffic code is ripe for manipulation. *E.g., Arreola*, 176 Wn.2d at 294-95; *Ladson*, 138 Wn.2d at 358 n.10. Requiring the State to prove a traffic stop satisfies an exception to the warrant requirement by clear and convincing evidence is essential to preserve our constitutional right to privacy.

The State next argues that if the trial court applied the wrong standard of proof, this Court should remand for clarification. Resp. Br.

at 22-23. The trial court's finding as to the standard of proof was perfectly clear. It applied the preponderance of the evidence standard. CP 87 (CL 4(h)); 6/20/12 RP 59. This Court is not precluded from conducting meaningful review of the standard applied. *See State v. Otis*, 151 Wn. App. 572, 577, 213 P.3d 613 (2009) (even in the total absence of written findings and conclusions, appellate court will decide issues raised on appeal where record is sufficient to facilitate review). Moreover, the court's conclusions plainly demonstrate that the State survived the suppression challenge only because the court applied a lower (but improper) standard of proof. The court concluded the decision was "a close call." 6/20/12 RP 64. That is the definition of the bare minimum required to succeed under the preponderance of the evidence standard. Under any higher standard of proof, such as clear and convincing evidence, the State fell short of proving a constitutional basis for the warrantless seizure. Therefore, there is no basis to remand to provide the trial court a new opportunity to "improve" its findings by applying a different standard of proof. Resp. Br. at 2; *cf. State v. Pruitt*, 145 Wn. App. 784, 794, 801, 187 P.3d 326 (2008) (findings entered after appeal filed were tailored to avoid reversal).

The trial court's application of the lower preponderance of the evidence standard requires reversal of the suppression order.

3. The State failed to demonstrate a constitutional basis supported its warrantless seizure of Mr. Jefferson; accordingly the resulting evidence should have been suppressed.

Regardless of the standard applied, the State failed to demonstrate that its stop of Mr. Jefferson was constitutionally sound. The evidence from the suppression hearing shows the police were interested in criminally-investigating Mr. Jefferson and used the traffic code, namely a seatbelt violation, to justify the otherwise unconstitutional warrantless seizure.

As the State conceded in oral argument before our Supreme Court in *Arreola*, the objective component of the pretext test is satisfied if records demonstrate that the officer or department does not usually stop an individual for the delineated infraction. Oral Argument, *State v. Arreola*, No. 86610-4 (May 22, 2012) at 9:20-10:03, available at <http://tvw.org>. Here, the officers' citation records show they did not often enforce any provision of the traffic code, let alone the seatbelt infraction asserted here. Pretrial Exhibit 2 at p.1 (Detective Olmstead issued no traffic infractions in 2011); Pretrial Exhibit 2 at p.1-3 (Detective Miller issued two traffic infractions in 2011); 6/18/12 RP

65-66 (Officer Rongen is a DOC Specialist and does not ever issue traffic citations); 6/18/12 RP 166-67 (Olmstead confirms accuracy of records). The two traffic infractions issued by Detective Miller in all of 2011 were for speeding and driving without a valid license. Pretrial Exhibit 2 at p.1-3. None were for seatbelt violations.

Further demonstrating the objectively pretextual basis for the seizure, these officers are employed to reduce gang-related crime and reduce repeat offenses by individuals currently or previously under DOC supervision, not to enforce the traffic code. Pretrial Exhibit 11 at p.2 (memorandum of understanding for Neighborhood Corrections Initiative); 6/18/12 RP 61 (Miller's testimony that, as part of the gang unit, he is "looking to bust bigger players"). Immediately prior to stopping Mr. Jefferson, the three officers were positioned at a gas station to ferret out criminal activity. 6/18/12 RP 12-15, 36. Not coincidentally, this is where they first encountered Mr. Jefferson.² 6/18/12 RP 88, 112, 121-22. Thus, the State's reliance on *State v. Nichols* for the proposition that "there was no evidence that these

² The State asserts the officers were not conducting "surveillance" of Mr. Jefferson. Resp. Br. at 17. However, DOC Specialist Rongen admitted he noticed Mr. Jefferson and his race while the officers were "ferreting" criminal activity in the gas station lot. 6/18/12 RP 5, 36, 88, 112, 121-22. Moreover, contrary to the State's assertion, an unconstitutional pretextual stop need not derive from police officers "following" the suspect. Resp. Br. at 1.

officers were performing anything other than their patrol duties when they stopped Jefferson” is unpersuasive. Resp. Br. at 18 (citing *State v. Nichols*, 161 Wn.2d 1, 162 P.3d 1122 (2007)).

As even these officers admit, stopping persons for suspected traffic infractions is a means to the end of locating individuals related to the officers’ gang enforcement and DOC parolee tasks. 6/18/12 RP 103-04, 159. That was their motivation for stopping Mr. Jefferson, a black previously-convicted felon. *See* 6/18/12 RP 21-23 (Miller not sure when he learned vehicle’s tabs were expired), 113, 161 (Olmstead not sure when he learned Jefferson was a convicted felon); 6/18/12 RP 88, 108-12, 118 (Rongen not sure whether he alerted other officers to Jefferson in gas station lot or whether he followed Jefferson’s vehicle out of the gas station).

The State concedes another basis for determining objectively the actual basis for an officer’s seizure of an individual: the questions that an officer posits when approaching the vehicle. Oral Argument, *State v. Arreola*, No. 86610–4 (May 22, 2012) at 43:00-27, available at <http://tvw.org>. This criterion likewise demonstrates the proffered seatbelt violation was mere pretext. Upon seizing Mr. Jefferson, Detective Olmstead promptly questioned him about the presence of

drugs and guns. 6/18/12 RP 114-15, 163, 188. This deviates from a standard traffic stop, during which the relevant questioning relates to the driver's license and vehicle registration. *E.g.*, Oral Argument, *State v. Arreola*, No. 86610-4 (May 22, 2012) at 43:00-27. Even more telling, Detective Olmstead did not have a ticket book with him when he approached Mr. Jefferson's vehicle. *See* CP 84 (FF 1(f)). Investigation of a suspected traffic infraction was not the officers' actual reason for seizing Mr. Jefferson without a warrant.

Under a totality of the circumstances review, additional factors demonstrate the suspected seatbelt violation was mere pretext for a criminal investigation. Although the officers claimed they stopped Mr. Jefferson because they suspected he was not wearing a seatbelt, the officers did not issue a citation for the alleged infraction. *See State v. Minh Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000) (failure to issue citation for infraction is among factors to be considered in pretext analysis), *review denied*, 142 Wn. 2d 1027, 21 P.3d 1149 (2001); Resp. Br. at 16 n.5 (acknowledging weight of evidence shows no citation issued); 6/18/12 RP 129-30, 166-67, 188.

The officers' testimony lacked credibility on several other bases. For example, Detective Miller testified he could not identify Mr.

Jefferson's race when he viewed Mr. Jefferson from the trailing Escalade. 6/18/12 RP 21. DOC Specialist Rongen, however, testified he could tell Mr. Jefferson was black. 6/18/12 RP 90-91. Moreover, even though Detective Miller denied being able to delineate race, he claimed he could tell that the outline of Mr. Jefferson's seatbelt hung straight down rather than crossing his body. 6/18/12 RP 15-16, 50-51. Similarly lacking in credibility, DOC Specialist Rongen admitted he had noticed Mr. Jefferson in the gas station and ended up following Mr. Jefferson out of the gas station parking lot, but he could not explain how he just happened to be behind Mr. Jefferson upon exiting the gas station. 6/18/12 RP 88-89, 112, 123-25. Such fortuitous happenstance is not credible.

Raising the likelihood that this stop was pretextual, the majority of other traffic stops initiated by Detective Olmstead were of black suspects like Mr. Jefferson. 6/18/12 RP 168-69; Pretrial Exhibit 19; *see* CP 27; Pretrial Exhibit 19 (40 percent of detectives' collective traffic stops were of black suspects); CP 27-28 (demonstrating this percentage exceeds the actual percentage of African-Americans in King County by a multiple of eight).

Finally, the stop was likely pretextual because failing to wear a seatbelt is not a violation that endangers public safety beyond the individual driver. 6/18/12 RP 40. The officers were unlikely to stray from their duty to “ferret serious crime” and “bust bigger players” merely to warn an otherwise innocent individual for failing to engage his seatbelt. 6/18/12 RP 5, 36, 61.

In sum, a look behind the officers’ proffered basis for the stop of Mr. Jefferson—a suspected seatbelt violation—to the objective and subjective circumstances of the seizure demonstrates it was mere pretext for a warrantless criminal investigation. *See Ladson*, 138 Wn.2d at 353; *Garvin*, 166 Wn.2d at 250; *State v. Montes-Malindas*, 144 Wn. App. 254, 261-62, 182 P.3d 999 (2008). Consequently, all evidence subsequently obtained, i.e. the gun that formed the basis of the unlawful possession of a firearm charge, should have been suppressed. *Ladson*, 138 Wn.2d at 357.

4. The trial court abused its discretion in excluding relevant evidence, rendering the court’s ruling even more tenuous.

As discussed in Mr. Jefferson’s opening brief, the threshold for relevance is low. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of

the action more probable or less probable than it would be without the evidence. ER 401. Moreover, during a bench trial, evidentiary rules are liberally applied. *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). Here, the trial court abused its discretion by refusing to review a video that tended to discredit the testimony of witnesses at the pretrial suppression hearing where there was no jury.

Mr. Jefferson sought to admit Pretrial Exhibit 20, a video of his van driving down a Seattle street as filmed from behind, to demonstrate the lack of visibility through the tinted rear windshield. 6/18/12 RP 194-96. Contrary to the officers' testimony, it is virtually impossible to make out the silhouette of a seatbelt through Mr. Jefferson's tinted rear windshield. *Compare* Pretrial Exhibit 20 *with* 6/18/12 RP 15-16, 50-51, 21, 90-91. Despite its plain relevance to the pretrial suppression issue, the trial court refused to consider the exhibit as "not relevant." 6/18/12 RP 194-96. The trial court abused its discretion by excluding and refusing to view Pretrial Exhibit 20.

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B. CONCLUSION

Because the State failed to prove its warrantless seizure of Mr. Jefferson was a valid traffic stop by clear and convincing evidence, the suppression order and resulting criminal conviction should be reversed.

DATED this 17th day of April, 2013.

Respectfully submitted,



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)	
Respondent,)	
)	NO. 69119-8-I
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)	
DIANTRIE JEFFERSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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