69607-6

69607-6

NO. 69607-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH KELLY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HILYER

BRIEF OF RESPONDENT

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A. ISSUES

1. An unconstitutional pretextual traffic stop occurs when a police officer relies on some legal authorization as a pretext to dispense with a warrant, when the only true reason for the seizure is not exempt from the warrant requirement. Here, detectives pursued and stopped a car upon discovering a title-transfer violation, and there is no evidence of any subjective motivation to stop the car for any other reason. Did the trial court properly conclude that there was no pretext, and the evidence subsequently recovered was therefore admissible?

2. An officer making a traffic stop may lawfully detain passengers for a reasonable period to determine their identity under certain circumstances, including when the passengers are not wearing seatbelts. Kelly was not wearing a seatbelt when the car in which he was a passenger was stopped. Did the trial court correctly conclude that the detectives had a reasonable basis to ask his name?

3. A limited, protective search of a vehicle is permissible if the officer reasonably suspects the presence of a weapon inside the vehicle, even if the occupants of the vehicle have been removed. Here, Detective Rurey saw a handgun in plain view in a

vehicle that would soon be returned to the owner. Did the trial court properly conclude that the detective lawfully secured the loaded gun for officer safety?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Kenneth Kelly with one count of Unlawful Possession of a Firearm in the First Degree. Clerk's Papers (CP) 1. Before trial, Kelly moved to suppress the firearm as the fruit of a pretextual traffic stop of the car in which he was a passenger, and because the officers lacked sufficient independent basis to seize him by requesting his identification. CP 30-47. After a CrR 3.5 and 3.6 hearing, the trial court denied Kelly's motion. CP 216-20; RP 202.[1] The court convicted Kelly after a stipulated facts bench trial, and imposed a mid-range 29-month sentence. CP 170-72, 208-15.

[1] The Verbatim Report of Proceedings consists of one volume encompassing the proceedings of 6/11, 9/11, 10/29, 10/30, 10/31, and 11/16/2012. Like Appellant, the State refers to the record by page number alone.

2. SUBSTANTIVE FACTS

On February 26, 2012, Seattle Police Department Detectives Robert Thomas and Joshua Rurey were working in full uniform in a patrol car bearing "subdued" markings.[2] CP 216 (FF 1); RP 15-16, 120-22. The detectives were assigned to the gang unit and were conducting an overtime "emphasis" patrol in South Seattle. RP 13-14, 120-21. As members of the gang unit, the detectives' duties are varied, and include driving through problem areas, conducting traffic or street stops, responding to 911 calls, conducting other types of criminal investigations and doing "general patrol, like a patrol officer would." Id. They routinely run license plate numbers "to look for criminal activity, see if cars have been reported stolen, if there are warrants associated with different plates and vehicles." RP 22; CP 217 (FF 4). Emphasis patrols entail "highly visible patrol activities," designed to make the officers' presence known and thereby reduce crime and violence. RP 121-22. Although gang unit detectives are not primarily concerned with enforcing traffic laws and seldom write tickets, they "investigate a wide variety of crimes" and are "still responsible for enforcing the law"; accordingly,

[2] The patrol car was a black Crown Victoria with a push bar and internal mounted lights. RP 15. The external decals are "silver/gray in color; they're not fully visible until hit by light, at which time they're very reflective." RP 122.

they stop people for traffic violations when they are able to and "as the opportunity arises." RP 17, 29-30, 81, 148; CP 216 (FF 2, 9).

After midnight, Detectives Thomas and Rurey noticed a black Mercedes parked along the roadway. RP 122. Neither detective recognized the Mercedes or its occupants from any gang-related or other criminal investigation. RP 30-32, 124; CP 217 (FF 6, 9). They observed the Mercedes pull away from the curb, unsuccessfully attempt a U-turn, back up in the street, and "speed away" southbound. RP 27, 122-23. The U-turn attracted the detectives' attention, and they ran the Mercedes's license plate. RP 26. The detectives discovered that the car had been sold more than 45 days before but the title had not yet been transferred, in violation of RCW 46.12.650(7) and SMC 11.22.025. RP 28, 126; CP 217 (FF 7).[3] Based on that information, Detective Thomas decided to turn the patrol car around and stop the Mercedes. RP 28-29, 112-13, 126; CP 217 (FF 8).

[3] The trial court's findings refer to RCW 46.12.101(6), the former statute concerning vehicle sales and transfers of title. Effective July 2011, that section was recodified as RCW 46.12.650. Subsection (7) of the new statute corresponds to the subsection cited by the trial court in its findings. Although worded somewhat differently, both versions provide that the failure to apply for transfer of ownership within forty-five days after the date of delivery of the vehicle is a misdemeanor. Former RCW 46.12.101(6); RCW 46.12.650(7).

By the time the detectives had turned around, they saw the Mercedes turn down another street at a high rate of speed and go out of their view. RP 28-29; CP 217 (FF 8). They followed the speeding car for over a mile, driving approximately 60 miles per hour to catch up. RP 33, 84, 127. During their short pursuit, detectives observed the Mercedes violate other traffic laws by failing to come to a complete stop at a stop sign and failing to signal before turning. RP 34-35, 128; CP 217 (FF 10). The detectives lost sight of the Mercedes on the winding downhill road, but caught up to it at a traffic light. RP 36. The car had stopped in the middle of a crosswalk, with its rear wheels on the "stop line" for its lane, another traffic infraction. RP 36. Through the untinted rear window, Detective Thomas "observed that the rear occupants were moving about. It appeared to me that they were looking behind them at our police vehicle and there was some sort of movement within the vehicle." RP 130. When the light turned green, the Mercedes turned left toward an I-5 on-ramp. RP 36, 131. Detective Thomas activated the emergency lights and stopped the car – "just 3 minutes after observing the initial criminal traffic violation and making the decision to initiate a traffic stop." RP 36, 131; CP 217 (FF 11).

Once the car stopped (in the middle of the lane of travel), the detectives again observed multiple occupants moving around inside, but could not tell how many people were inside the car or what they were doing. RP 38, 130-31; CP 217 (FF 12). For officer safety purposes, and consistent with their training, the two detectives approached the car from opposite sides: Detective Thomas walked up to the driver's side window and Detective Rurey, the passenger side. RP 39-40, 133; CP 218 (FF 13). Because there were several people in the car, it was dark outside, and the side windows were darkly tinted, Detective Thomas asked the driver to roll down the windows for officer safety. RP 42, 134; CP 218 (FF 14). The driver rolled down the windows on the driver's side, but not on the passenger side. RP 42, 134; CP 218 (FF 14). Detective Rurey therefore opened the rear passenger side so he could see inside and check for potential threats. RP 43; CP 218 (FF 14).

From their respective vantage points, the two detectives could see that the rear passengers were not wearing seatbelts, in violation of RCW 46.61.688(3).[4] RP 47-48, 88, 136, 155; CP 218

[4] "Every person sixteen years of age or older operating or riding in a motor vehicle shall wear the safety belt assembly in a properly adjusted and securely fastened manner." RCW 46.61.688(3).

(FF 15). Both of the rear passengers were also acting peculiarly. One of them was later identified as Kenneth Kelly. Kelly was "very rigid, he appeared nervous, he kept his hands flat on his legs, near his knees, not moving, was very quiet when spoken to." RP 44-45, 135. The other rear passenger was acting in a similar manner. RP 45; CP 218 (FF 19). Both were breathing quite heavily, which Detective Thomas found odd. RP 135.

Detective Thomas asked the driver for her license; she had no license or other identification. RP 138; CP 218 (FF 16). Because of the seatbelt violations and because they would need to release the car to a licensed driver after the traffic stop, the detectives attempted to identify the passengers. RP 48, 89, 139, 141, 170; CP 218-19 (FF 17, 24). All of the passengers claimed that they did not have drivers' licenses or identification, but gave their correct names.[5] RP 139; CP 218 (FF 17).

Meanwhile, Detective Rurey stood outside the car and used a flashlight to scan the interior for any sign of a weapon. RP 51; CP 218 (FF 20). Rurey asked the occupants "a couple times"

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[5] "The driver identified herself as Kadeidre Rials, the front passenger identified herself as Sekoiya Hill, the rear driver's side passenger identified herself as Danyelle Grayer and the rear passenger side passenger identified himself as the defendant, Kenneth Kelly." CP 218 (FF 18).

whether there were any weapons in the car, but received no definitive response. RP 58. One passenger responded, "Not that I know of." RP 58. Eventually, Rurey saw the butt of a handgun in the pocket on the back of the passenger side front seat immediately in front of Kelly and within Kelly's easy reach. RP 49, 69; CP 218 (FF 20). Rurey notified Detective Thomas and the two drew their own weapons and ordered those in the car to put their hands on the ceiling. RP 141-42; CP 218 (FF 21). Thomas called for backup and kept the occupants of the car at gunpoint. RP 143; CP 219 (FF 21).

When additional officers arrived, they began removing people from the car. RP 59-60, 144; CP 219 (FF 22). Kelly was the first to be removed; he was handcuffed and placed face down on the ground near the car. RP 60, 74; CP 219 (FF 22). While officers removed the other passengers and driver, Detective Rurey secured the loaded handgun. RP 75, 92-93, 144; CP 219 (FF 22, 23). He removed the weapon for safety because he was unsure whether all the occupants had been secured and because he anticipated that some of them would be returned to the car, either to wait out the investigation or drive away at its conclusion. RP 61-62. Detective Thomas obtained the driver's consent to

search the car for other weapons; none were found. RP 62, 144, 146.

At some point, one of the other detectives on the scene ran Kelly's name and discovered that he had been previously convicted of manslaughter, making it unlawful for him to possess a firearm. RP 75-76; CP 219 (FF 25). Kelly was arrested for unlawful possession of the firearm and taken to the police station. RP 76, 145; CP 219 (FF 25). Because neither the driver nor the remaining passengers had drivers' licenses, Detective Thomas called the driver's family and had someone pick them up and take care of the car. RP 144. Detective Thomas later cited the driver for failure to have a valid driver's license and insurance and for failing to signal her turn in advance. RP 174; CP 219 (FF 26).

C. ARGUMENT

1. THE TRAFFIC STOP WAS NOT PRETEXTUAL.

Kelly contends that the trial court should have suppressed the gun because police found it during an unconstitutional pretext seizure. Because the evidence establishes that the criminal traffic violation was the actual basis for the stop and the detectives'

conduct was objectively reasonable, the trial court correctly concluded that there was no pretext and admitted the evidence.

In reviewing the denial of a motion to suppress, the appellate court determines whether substantial evidence supports the trial court's factual findings and whether those findings support its conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Unchallenged findings are verities on appeal. Id. Conclusions of law are reviewed de novo. Id.

Brief investigatory "Terry" stops are well-established exceptions to the general rule that warrantless seizures are unconstitutional. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A Terry stop is justified when an officer has specific and articulable facts that give rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of

the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991). The totality of the circumstances includes factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Under article I, section 7 of Washington's constitution, warrantless traffic stops are constitutional as investigative stops when they are justified at their inception by a reasonable, articulable suspicion of either criminal activity or a traffic infraction and reasonably limited in scope. State v. Arreola, 176 Wn.2d 284, 292-93, 294, 290 P.3d 983 (2012). But traffic stops used as a ruse to conduct an unrelated, speculative investigation are unconstitutional. Arreola, 176 Wn.2d at 294 (citing State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999)). "A pretextual traffic stop occurs when a police officer relies on some legal authorization as 'a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.'" Id. To determine whether a given traffic stop is pretextual, courts "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." Ladson, 138 Wn.2d at 359.

Courts have found pretext where the evidence shows that officers suspected non-traffic criminal activity, then followed a vehicle waiting for its driver to commit a traffic infraction that would justify a stop in order to investigate their unrelated suspicions. In Ladson, for example, gang unit detectives recognized driver Richard Fogle from an unsubstantiated street rumor that he was involved with drugs. 138 Wn.2d at 346. The detectives then "tailed" Fogle's car for several blocks and while it refueled before stopping the car on grounds that Fogle's license plate tabs had expired five days earlier. Id. Because the officers' suspicions about Fogle's reputed drug activity were the motivation for finding a legal reason to stop his car, our supreme court held that the stop was unconstitutional and evidence discovered thereafter was inadmissible. Id. at 360.

The record also showed the deliberate use of a pretextual traffic stop in State v. Montes-Malindas, where an officer noticed suspicious activity by occupants of a van in a parking lot. 144 Wn. App. 254, 257, 182 P.3d 999 (2008). The officer decided to

surveil the van and even moved to a place where he could do so unseen by the van occupants. Id. When the van left the parking lot, the officer followed, noting that the van's headlights were off despite the darkness. Id. Although the driver soon turned the lights on, the officer initiated a stop for the headlight infraction. Id. The officer admitted that the suspicious activity in the parking lot was on his mind when he decided to pull the van over, approach from the passenger side, and speak with the passengers before the driver. Id. at 261. Under these circumstances, Division Three of this Court held that the stop was unlawful. Id. at 262. Our courts have similarly found pretext in State v. Myers, 117 Wn. App. 93, 69 P.3d 367 (2003), where an officer who suspected that a driver's license was suspended stopped the car for improper lane changes in order to verify the driver's status, and in State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173 (1999), where an officer watching a narcotics hot spot suspected that a driver had purchased drugs, followed the car for several blocks, and ultimately stopped the car for an improper turn.

In contrast, courts have found no pretext when the evidence indicates that an officer did not follow a vehicle *in order* to find an infraction, but instead observed an infraction, and thereafter

immediately pursued the offending car. In State v. Nichols, for example, a deputy sheriff observed a car cross double yellow lines and change lanes without signaling, and believed the driver was attempting to avoid driving in front of the patrol car. 161 Wn.2d 1, 4-5, 162 P.3d 1122 (2007). The deputy caught up to the vehicle, activated his lights, and eventually stopped the car. Id. at 5. Once stopped, the deputy ascertained that the driver's license was suspended and noticed that the passenger, Nichols, was not wearing a seatbelt. Id. Nichols was removed from the car, patted down for weapons, and eventually searched for drugs. Id. at 6.

On appeal, Nichols argued that his trial counsel was ineffective for failing to challenge the legality of the stop, which he maintained was a pretextual stop predicated on the deputy's belief that the driver was trying to avoid him. 121 Wn.2d at 7. Our supreme court rejected the claim, distinguishing cases like Ladson, DeSantiago, and Myers because "[i]n each of these cases officers suspected criminal activity and followed vehicles waiting for commission of a traffic infraction so the vehicle could be stopped." Id. at 12. In contrast, the deputy in Nichols, who was on routine patrol, "immediately pursued the vehicle after he saw what he believed to be several infractions and activated his lights as soon

as he caught up with it." Id. There was "no evidence that [the deputy] followed the vehicle *because* he suspected the driver was trying to avoid him." Id. at 11 (emphasis in original). Because the record did not support a finding of pretext, Nichols's counsel was not deficient for failing to raise the issue. Id. at 15.

As in Nichols, there is no evidence in this case that the detectives were suspicious of the Mercedes before they noticed its U-turn and became aware of the title-transfer violation. Both detectives testified extensively about their motivation in stopping the Mercedes.[6] Unlike Ladson, Montes-Malindas, Myers and DeSantiago, the officers were not investigating any other criminal activity and had no motive other than to contact the driver about the infraction. According to Detective Rurey, "When the car turned in front of us and we ran the plate, that was the reason [for the stop] right away, what happened in front of us. We had not been following it or observing the car in any way." RP 112-13. Similarly, Detective Thomas testified that he was not trying to follow the car to see if it would commit an infraction justifying a stop: "I already had the suspected crime, a failure [to] transfer title, which I intended to contact the vehicle for." RP 128. Because the evidence reveals no

[6] See RP 26, 28, 29, 30-32, 81, 112-13, 124-25, 128.

subjective intent to stop the car for reasons other than enforcing the traffic code, there was no pretext. See also State v. Weber, 159 Wn. App. 779, 247 P.3d 782 (2011) (no pretext where patrol officer stopped car after observing driver enter road without stopping before entering crosswalk and then start speeding); State v. Gibson, 152 Wn. App. 945, 219 P.3d 945 (2009) (no pretext where police did not follow car, looking for a traffic infraction, but instead saw driver turn without signaling and immediately stopped him); State v. Hoang, 101 Wn. App. 732, 6 P.3d 602 (2000) (no pretext where patrol officer "did not follow Hoang hoping to find a legal reason to stop him," but immediately stopped a car after observing it turn without signaling).

Kelly contends that other facts nonetheless demonstrate pretext. Although he does not articulate what the detectives' alleged hidden motivation might have been, he points out that the detectives were not traffic officers on routine patrol, but gang unit detectives on overtime emphasis patrol. He argues that this status makes it improbable that they were *solely* interested in enforcing the title-transfer law when they decided to initiate a stop. But that is not what the law requires.

Even a stop that is primarily motivated by an interest in investigating suspected non-traffic criminal activity is not necessarily invalid. In Arreola, our supreme court held that such "mixed motive" stops are not unconstitutional "so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction ... is reasonably necessary in furtherance of traffic safety and the general welfare." 176 Wn.2d at 298. Accordingly, there was no pretext in that case where an officer stopped a car for an altered muffler, even though the officer admitted that he was primarily motivated to investigate the driver for DUI. Id. at 300.

Thus, even if the detectives harbored some suspicion that the Mercedes was involved in gang or other criminal activity – a suggestion that is in no way supported by the record – this would simply make it a "mixed motive" traffic stop. Under Arreola, such a stop is constitutional as long as the title-transfer violation "for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop." 176 Wn.2d at 297. As in Arreola, the detectives' testimony is sufficient to establish this fact. See 176 Wn.2d at 300 (citing officer's testimony

that he made a conscious decision to pull over the vehicle for the muffler violation).

Further, while the detectives' affiliation with the gang unit may be significant in the pretext analysis, it is not dispositive. DeSantiago, 97 Wn. App. at 452 (finding it immaterial that officer was patrol officer and not a narcotics detective as in Ladson); Myers, 117 Wn. App. at 97 (whether an officer was on routine patrol is not dispositive). Here, both detectives explained that their gang unit assignment does not preclude other law enforcement duties. Detective Rurey testified that it was important for them to be familiar with traffic laws because they are "still responsible for enforcing the laws." RP 17. He explained that their duties as gang unit detectives are varied, and include making traffic stops. RP 13-14. Although gang activity is their primary focus, "we can't just let other crimes that, say, aren't gang related happen in front of us and just ignore them. You know, we still have the duty and responsibility to act upon that." RP 14. Detective Rurey agreed on cross examination that, though they do not always stop for minor infractions, they try to make a traffic stop if they are "able" at the moment. RP 81. Similarly, Detective Thomas indicated that he commonly makes traffic stops when he is not busy with more

pressing matters. RP 148. The fact that gang unit detectives do not take every opportunity to enforce the traffic code does not make their every traffic stop a pretext.[7] See Arreola, 176 Wn.2d at 289 (although officer did not always stop cars with altered mufflers, he would often initiate a stop "if already on the road and behind such a vehicle, so long as conducting the stop would not hinder a more pressing investigation").

Kelly also argues that evidence that the detectives seldom issue traffic citations since joining the gang unit "renders it highly unlikely that they consciously and actually determined that on February 26 they would be issuing their second citation" and presumably more likely that they stopped the car as a pretext. Brief of Appellant at 21. But the detectives both testified at length about the precipitous drop off in citations since joining the gang unit. Detective Rurey explained that he is "just not on the street as

[7] Kelly claims that "Detective Rurey admitted traffic code enforcement was not an independent basis for stopping vehicles like the one in which Mr. Kelly was travelling." Brief of Appellant at 22. That is not so. Rurey testified that he tries to make stops if he is able, but it would be "impossible" to stop every driver he observes committing a minor traffic infraction. RP 81. That does not establish, as Kelly contends, that Rurey's "actual motivation for stopping this vehicle *must have* extended beyond simply the traffic violation for which he does not regularly stop vehicles." Brief of Appellant at 23 (emphasis added).

much as I was when I was in patrol," and that even when he stops cars for traffic violations, "I find that ... a good citizen contact with somebody and giving someone a warning is frequently better than issuing them a citation." RP 106-10. Moreover, in determining whether a particular stop was pretextual, it is the officer's conduct on that occasion, and not his history, that is pertinent. Montes-Malindas, 144 Wn. App. at 262 (court's response to evidence of an officer's historic treatment of cars committing the same infraction is "'so what?' What is significant is what [the officer] did in this case") (quoting Myers, 117 Wn. App. at 97). In this case, Detective Rurey testified that they decided to stop the car because "if we could ... contact this person and inform them about the issue with the registration, give them a warning or ... investigate it appropriately, we should[.]" RP 30. Whether the detectives actually intended to cite the driver is immaterial.

Kelly also argues that the fact that the detectives did not immediately activate their lights and sirens to stop the Mercedes, and instead "snuck up on the vehicle at issue" indicates that that the detectives were looking to discover other criminal activity. Brief

of Appellant at 17-20. He cites Nichols for the proposition that whether an officer "immediately pursued the vehicle and activated his lights" is relevant to determining pretext. Brief of Appellant at 17-18 (citing Nichols, 161 Wn.2d at 10-11). In fact, the Nichols court observed that the officer "immediately pursued the vehicle and activated his lights *as soon as he caught up with it.*" 161 Wn.2d at 11 (emphasis added). That is exactly what happened here.

In this case, the detectives began pursuit immediately upon discovering the title-transfer violation. The delay between the discovery of the violation and the stop was only three minutes, during which time the detectives were simply attempting to catch up to the speeding car. RP 28-29, 32-34, 126-29. The Mercedes was already turning onto another road and out of the detectives' view by the time Detective Thomas turned the patrol car around to make the traffic stop. The car continued speeding, failed to stop at a stop sign, and proceeded down a winding, hilly road at a high rate of speed, such that the detectives temporarily lost sight of the car.

RP 28, 35-36, 128. It was not until the car stopped at a traffic light that the detectives caught up to it, and as soon as the light turned green, Detective Thomas activated the lights and conducted the stop.[8] RP 36, 130-31.

Thus, like in Nichols, the detectives' prompt effort to stop the Mercedes upon observing the traffic infraction indicates their subjective intent to stop the car for that reason. The delay in activating emergency lights until the detectives caught up with the car was reasonable and provides no evidence of pretext. Indeed, a stop is not necessarily pretextual even if the officer delays making the stop to document additional traffic infractions. In Weber, the state trooper observed the driver fail to stop at the crosswalk while leaving a parking lot. 159 Wn. App. at 784. The trooper did not immediately stop the car, but followed for three blocks to pace the car in order to determine its excessive speed. 159 Wn. App. at 784, 790 n.5. The court rejected the claim that the delay in making the stop was evidence that the stop was pretext. Id. Likewise, in

[8] Thomas explained that he did not activate the lights immediately upon discovering the infraction because "it's been my experience that it gives them the opportunity to flee or increase the rate of speed, the recklessness of the driving, and ... thus prevent contact with the police and further endanger[] the public." RP 127. Detective Rurey similarly testified that it is not prudent to activate the lights at a great distance from the target car because it "would have given that person, had they not wanted to stop, the opportunity to further flee, accelerate more, take evasive turns." RP 33-34.

this case the brief delay in effecting the traffic stop was reasonable and does not indicate pretext.

Finally, Kelly argues that the detectives' actions upon stopping the Mercedes also indicate that they were not actually motivated by the traffic infraction. He points out that the detectives approached on either side of the vehicle, that Detective Rurey opened the rear passenger door and looked inside with a flashlight before questioning any of the occupants, and that neither detective asked Kelly about his seatbelt even though the seatbelt violation was the justification for asking for his identification. In context, the detectives' conduct is objectively reasonable and provides no support for a finding of pretext.

Shortly before the stop, the detectives observed the Mercedes's occupants looking back at the patrol car and moving around in the car, but could not tell how many people were in the car. RP 38, 130. Their parallel approach to the vehicle is standard practice for officer safety. RP 39-40. Because the windows were tinted and the driver did not comply with Detective Thomas's request to lower them, Detective Rurey had to open the rear passenger door and use a flashlight to determine whether there were any weapons or other threats to officer safety. RP 39-43.

Before speaking with the passengers, both detectives noticed that the backseat passengers were not wearing seatbelts and were visibly nervous and behaving peculiarly. Detective Rurey asked twice whether there were any weapons in the car, and received no definitive answer. RP 58.

Meanwhile, Detective Thomas was conducting a standard traffic stop: he "expressed concern over the way [the driver] was driving and advised her that the reason she was contacted was the title transfer violation." RP 137. The driver soon confessed that she had no driver's license. RP 138. It was not until after the detectives learned that the driver had no license and the backseat passengers were violating the seatbelt law that the detectives tried to identify the passengers. RP 47-48, 141-42. Soon after the passengers identified themselves, Detective Rurey spotted the gun, which Kelly would not acknowledge, and detained the occupants until back-up arrived. RP 49-59.

This case is not like Montes-Malindas. There, the officer was suspicious of van occupants' activity in a parking lot, followed the van, and stopped it for driving without headlights even though

the van's lights were on by the time of the stop. 144 Wn. App. at 257. The officer testified that he approached the van from the passenger side because "the occupants would not expect such an approach and he could better see into the passenger area." Id. at 257-58. The officer also spoke first to the passengers, rather than the driver. Id. at 261. Division Three concluded that these facts, in addition to the officer's candid admission that his suspicions about the van occupants' earlier activity in the parking lot were "on his mind" when he decided to stop the van and conduct the stop as described above, "suggest[s] that the stop was premised on more than the driver's actions." Id. Unlike Montes-Malindas, there is no evidence that the detectives' conduct during this stop was unusual or motivated by the desire to investigate unrelated criminal activity.

Because the detectives' conduct was objectively reasonable under the totality of the circumstances and the evidence demonstrates the detectives' subjective motivation was to stop the Mercedes because of the title-transfer violation, the trial court correctly concluded that the traffic stop was not a pretext and the loaded gun recovered during the stop was admissible. This Court should affirm.

2. KELLY WAS NOT UNCONSTITUTIONALLY SEIZED.

Kelly argues in the alternative that the gun should have been suppressed because the detectives lacked reasonable suspicion to ask for his identification, which ultimately led to the revelation that he was not eligible to possess the firearm located in the seat pocket directly in front of him. Because the detectives had an independent basis to support the request, Kelly's argument fails.

A passenger in a car is unconstitutionally detained under article I, section 7 of Washington's constitution when an officer requests identification unless "'other circumstances give the police independent cause to question [the] passengers.'" State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (quoting State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980)). One such circumstance is where the passenger is not wearing a seatbelt, a traffic infraction. State v. Chelly, 94 Wn. App. 254, 260, 970 P.2d 376 (1999); RCW 46.61.688(3). When officers observe that passengers in a car stopped for other reasons are not wearing seatbelts, they have

"the authority to detain them for a reasonable period of time necessary to identify them." Id.; RCW 46.61.021(2).[9]

Because Kelly was not wearing a seatbelt when the detectives stopped the Mercedes for the title-transfer violation, the detectives could lawfully detain him for a reasonable period of time to obtain his identification.

Kelly argues, however, that the detectives "had no reason to suspect that [he] was not wearing a seatbelt while the vehicle was in motion" and contends that the movement that detectives noticed as the vehicle came to a stop suggests that the passengers removed their seatbelts only after the vehicle had been seized. Brief of Appellant at 25-26. But the question whether the request for identification was legitimate does not turn on whether the passenger in fact violated the law; rather, police are justified in requesting information from a passenger if they possess an "articulable suspicion of criminal activity." State v. Brown, 154 Wn.2d 787, 796, 117 P.3d 336 (2005) (citing Rankin, 151 Wn.2d at

[9] "Whenever any person is stopped for a traffic infraction, 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).

699). Here, the evidence provides articulable suspicion that Kelly violated the seatbelt law.

Detective Thomas testified that he observed the seatbelt violations as he walked up to the car. RP 155. He did not see movement consistent with removing seatbelts during his approach or once he was at the door. RP 163-64. He would have seen if the passengers removed their seatbelts between the traffic light and the time of the stop. Id. Further, if the passengers were removing their seatbelts when the detectives observed them "moving about" in the Mercedes when it was stopped at the traffic light, the passengers would still be in violation of the seatbelt law because the car continued driving after that point until it was stopped by the detectives. RP 164. Thus, the detectives had sufficient reason to believe that Kelly was committing his own traffic infraction, and therefore had authority to identify him and check for outstanding warrants. As in Chelly, where it also appears that the officer did not observe the passenger's failure to wear seatbelts until he stopped the car, this Court should conclude that the officer was justified in requesting identification in light of the seatbelt violation. 94 Wn. App. at 256, 260.

This case is not like State v. Allen, 138 Wn. App. 463, 157 P.3d 893 (2007), upon which Kelly relies. There, an officer stopped Peggy Allen for driving with a defective license plate light. Id. at 465-66. After obtaining her personal information, the officer learned that Peggy Allen was the petitioner in a no-contact order against Ryan Allen. Id. at 466. Lacking any information about the person against whom the order had been entered, the officer then asked the passenger for identification to determine whether he was Ryan. Id. The passenger gave a false name, but once she was removed from the car by the officer, Peggy identified him as Ryan. Id. at 466-67. The officer arrested Ryan for the no contact violation and searched the car, finding methamphetamine under the front passenger seat. Id. at 467. Division Two reversed Ryan Allen's conviction, holding that the officer lacked reasonable suspicion to ask for the passenger's identification. Id. at 471. "Without knowledge that the passenger provided a false name, [the officer] did not possess reasonable articulable facts to believe that the no-contact order referred to the passenger." Id. In contrast, here the detectives saw that the passengers were committing a traffic infraction by not wearing seatbelts. They therefore had reasonable articulable suspicion to ask for their identification.

In addition, the trial court concluded that "the fact that the driver of the Car did not possess a valid driver's license provided another lawful basis to ask the passengers in the Car for identification." CP 220 (CL 7). Although Kelly assigns error to the conclusion, he does not support the claim with argument or authority. Appellants waive assignments of error that they fail to argue in their opening appellate briefs. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6) (appellant's brief should contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record").

Nevertheless, the trial court's conclusion is supported by the facts and law. The detectives did not attempt to identify the passengers until after they learned that the driver had no driver's license. RP 141. Since the driver could not move the Mercedes from its position blocking access to the interstate, the detectives had to find someone to whom they could release the car, or impound it. Detective Thomas testified that they "didn't want the vehicle to be left there, blocking the roadway," but after speaking to the cooperative driver, "I didn't feel it was necessary to impound her vehicle and put her through further hardship." RP 144-45.

Determining whether any of the passengers could lawfully drive the car away thus provided a second "independent basis to support the request" for Kelly's identification. Rankin, 151 Wn.2d at 699; cf. State v. Mennegar, 114 Wn.2d 304, 787 P.2d 1347 (1990) ("As part of a police officer's 'community caretaking function,' an officer may ask a passenger if the passenger wishes to drive an intoxicated driver's vehicle from the scene. If the passenger consents, the officer may appropriately determine if the passenger has a valid driver's license prior to allowing the passenger to drive the intoxicated passenger's vehicle"), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 645, 870 P.3d 313 (1994).

3. THE DETECTIVES PROPERLY SEIZED THE GUN FOR OFFICER SAFETY.

Kelly also contends that the gun should have been suppressed because the detectives lacked a lawful basis for seizing the gun without a warrant. There appear to be two bases for this claim. First, Kelly argues that the officers had no basis to ask for his identification, and without his identification, they had no reason to know that the gun was contraband. Brief of Appellant at 27-28.

As argued above, the detectives had sufficient grounds to ask for Kelly's identification, so this argument fails.

Second, Kelly argues that the gun should have been suppressed as the result of an unlawful search incident to arrest. Kelly did not make this argument below, and for good reason: the gun was not found or seized during a search incident to arrest. Rather, as the trial court concluded:

> Within several minutes of the initial stop, Detective Rurey saw the gun in plain view without any intrusive or unlawful search. Detective Rurey never entered the car prior to seeing the gun. The use of the flashlight and Detective Rurey's movement outside of the Car to get the best view possible of the interior of the car was not an unlawful search.

CP 220 (CL 9). Kelly does not assign error to this conclusion. If the gun was discovered in plain view, it was admissible on that basis.[10] State v. Seagull, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981) (under plain view doctrine, evidence inadvertently

[10] Arguably, the gun was actually discovered in "open view" rather than "plain view." The open view exception applies to an officer's observation from a nonconstitutionally protected area. State v. Seagull, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981). Thus, "if an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car." Kennedy, 107 Wn.2d at 10. Detective Rurey was outside of the car when he saw the gun; however, he had removed a barrier to his view by opening the car door when the driver neglected to roll down the tinted windows as requested. If, by opening the car door, the detective intruded into a constitutionally protected area, then the "plain view" exception would apply. Under that exception, when an intrusion is justified, as it was here for officer safety, an object of obvious evidentiary value that is in plain view and discovered inadvertently may be lawfully seized. Id. Since the trial court found that the gun was discovered in plain view, the State analyzes the issue under that doctrine.

discovered by an officer after a lawful intrusion into otherwise private area is admissible).

If reaching into the car to remove the loaded gun can be characterized as a search at all, it was a protective search for officer safety. Under the Fourth Amendment, a protective search of an automobile, "limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." Michigan v. Long, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (cited with approval in Arizona v. Gant, 556 U.S. 332, 346-47, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)). Similarly, under article I, section 7 of the Washington Constitution, officers may conduct a limited protective search of the passenger compartment of an automobile during a stop for a minor traffic infraction if the officer "reasonably suspects the presence of a weapon inside the vehicle[.]" State v. Larson, 88 Wn. App. 849, 850-51, 946 P.2d 1212 (1997). This is so even when the driver was outside the vehicle and no passengers were inside. Id. at 856.

In determining whether the search was justified by officer safety concerns, a court evaluates "the entire circumstances" surrounding the Terry stop. State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). For example, if a suspect made a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed. Kennedy, 107 Wn.2d at 12 (a valid protective search was made when the officer witnessed the driver lean forward in a way that looked like he was hiding something in the front seat of the car); Larson, 88 Wn. App. at 857 (when an officer following a speeding driver saw him lean toward floorboard, the officer properly searched inside the area of the furtive movement); cf. Glossbrener, 146 Wn.2d at 679 (officer's initially reasonable safety concern based on the driver's furtive movement seen before stopping the car was no longer objectively reasonable at the time of the search because of intervening actions of both the officer and the driver).

A protective search may be reasonable even if the driver and passengers have been removed from the vehicle, if the officer reasonably suspects the presence of a weapon in the vehicle and anticipates that its occupants will be allowed to return. In Larson, the driver was stopped for a minor traffic infraction, and the officer

observed him making furtive movements. 88 Wn. App. at 851. The officer directed Larson out of his truck, patted him down, and stuck his head in the truck, where he discovered drugs. Id. This Court held that this limited intrusion was justified for officer safety, notwithstanding the fact that the driver had been removed from the vehicle, because the officer reasonably anticipated that the driver would have to return to the vehicle to retrieve documents during the stop. Id. at 857. "Because Larson would then have had access to any weapon he might have concealed inside before getting out, the protective search to discover such a weapon was not unreasonably intrusive." Id. See also Gant, 556 U.S. at 352 (Scalia, J., concurring) ("In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed").

The circumstances of this case would justify a limited protective search for weapons. The detectives observed the rear seat passengers look back at the police car and start moving about in the car immediately before the traffic stop, then noticed the same passengers were exceedingly nervous during the contact. The stop occurred late at night in a poorly lit area, and the two detectives

were initially outnumbered by the Mercedes' occupants. And when Detective Rurey asked about weapons in the car, he received noncommittal responses. These circumstances alone would have supplied reasonable grounds to conduct a limited protective search for weapons. But then Rurey actually saw the butt of a gun in plain view, while standing at the open passenger side rear door. Since Rurey knew the Mercedes' occupants would likely be returned to the car, the fact that they had been temporarily removed and handcuffed did not dispel his objectively reasonable safety concern. See State v. Chang, 147 Wn. App. 490, 195 P.3d 1008 (2008) (reasonable safety concern remained after suspect was handcuffed outside car because police had information that he had a gun but they had not located it on his person and would be returning the car to the driver); State v. Glenn, 140 Wn. App. 627, 636, 166 P.3d 1235 (2007) (same). Rurey was therefore entitled to "search" the area for weapons, and the gun he recovered was admissible.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Kelly's conviction for Unlawful Possession of a Firearm in the First Degree.

DATED this 26th day of September, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KENNETH KELLY, Cause No. 69607-6 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 26th day of September, 2013

L Brame

Name
Done in Seattle, Washington