

FILED
COURT OF APPEALS (DND)
STATE OF WASHINGTON
2014 MAY 28 PM 4:46

Supreme Court No.: 90440-5
Court of Appeals No.: 69607-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH KELLY,

Petitioner.

FILED
JUL - 1 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

PETITION FOR REVIEW

Marla L. Zink
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT IN SUPPORT OF GRANTING REVIEW 4

 1. The lower courts’ failure to exclude evidence seized as the
 result of a traffic stop that was pretext for a warrantless
 criminal investigation should be reviewed by this Court..... 5

 a. Pretextual seizures violate the Washington Constitution..... 5

 b. Here, the Court of Appeals found no constitutional
 infirmity with law enforcement’s traffic stop, but a
 review of the totality of the circumstances demonstrates
 the stop was pretextual 7

 2. The Court should also grant review of whether the police
 had reasonable suspicion to ask Mr. Kelly for identification
 when they had no evidence that he was not wearing a
 seatbelt while the vehicle was moving..... 15

E. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Arreola, 176 Wn.2d 284, 290 P.3d 983 (2012) passim

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010)..... 7

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) 7

State v. Nichols, 161 Wn.2d 1, 162 P.3d 1122 (2007) 9

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004) 15

Washington Court of Appeals Decisions

State v. Allen, 138 Wn. App. 463, 157 P.3d 893 (2007) 15

State v. Bliss, 153 Wn. App. 197, 222 P.3d 107 (2009)..... 16

State v. Martinez, 135 Wn. App. 174, 143 P.3d 855 (2006) 7

State v. Montes-Malindas, 144 Wn. App. 254,
182 P.3d 999 (2008) 8, 9, 13

Constitutional Provisions

Const. art. I, § 7 5

U.S. Const. amend. IV 5

Statutes

RCW 46.61.688 16

Rules

RAP 13.4 1, 2

Other Authorities

Patricia Leary & Stephanie Rae Williams, *Toward a State
Constitutional Check on Police Discretion to Patrol the Fourth
Amendment’s Outer Frontier: A Subjective Test for Pretextual
Seizures*, 69 Temp. L. Rev. 1007 (1996)..... 5

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Petitioner Kenneth Kelly, appellant below, requests this Court grant review of the decision of the Court of Appeals in *State v. Kelly*, No. 69607-6-I, filed April 28, 2014. *See* RAP 13.4(b). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. As this Court has held, courts cannot simply accept an officer's stated basis for effectuating a traffic stop but must look to subjective and objective factors to determine whether the stop was pretext for a speculative, warrantless criminal investigation. Where a review of the totality of the circumstances demonstrates the traffic stop of the vehicle in which Mr. Kelly was traveling was actually motivated by intent to conduct a speculative criminal investigation, should the Court accept review because the Court of Appeals opinion conflicts with the decisions of this Court, a significant constitutional issue is presented and the public has substantial interest in proper enforcement of the traffic code? RAP 13.4(b)(1), (3), (4).

2. The detectives who stopped the vehicle contend they suspected Mr. Kelly violated the requirement that passengers wear a safety belt while riding in a vehicle, but the detectives only observed

Mr. Kelly once the vehicle was stopped. Should the Court grant review of whether the request for identification from Mr. Kelly was unlawful, raising a significant constitutional question of substantial public interest? RAP 13.4(b)(3) & (4).

C. STATEMENT OF THE CASE

Just after midnight on February 26, 2012, Kenneth Kelly was one of three passengers in a black Mercedes driven by Kadeidre Rials; he was seated on the rear passenger side. Exhibit 7; RP 14-15, 122, 139-40. Ms. Rials made a u-turn near a surreptitiously-marked police vehicle occupied by Gang Patrol Unit Detectives Joshua Rurey and Robert Thomas. RP 13-16, 83-84, 114-15, 119, 121-24. Their suspicions aroused by the u-turn, the detectives checked the license plate of the vehicle and learned that a sale had occurred but transfer of title had not been registered within 45 days. RP 24-28, 122-26. The detectives claim they decided to stop the vehicle on that basis at that time. RP 28-30, 148. Nonetheless, they followed the vehicle for over a mile and during several minutes without activating emergency lights or sirens or otherwise signaling the vehicle to stop. RP 29-37, 42, 127, 151-52. The vehicle drove for more than a mile through dark streets at a speed the detectives considered to be excessive, yet the detectives

merely followed surreptitiously. RP 29-37, 54-55, 128-32, 151-52; *see* Exhibit 2 at 00:00 to 01:00. Eventually, they activated the emergency lights and stopped the vehicle. RP 36-39, 131-32; Exhibit 2 at 01:00 to 01:15. As it was stopping, the detectives noticed movement by the backseat passengers. RP 38-39, 130-31; CP 218 (FF 12).

Detective Thomas approached the driver and Detective Rurey approached the passenger's side. RP 40-42, 133; Exhibit 2 at 01:30 to 01:49. While Detective Thomas spoke with the driver, Detective Rurey opened the rear passenger door, turned on his flashlight and scanned the vehicle. RP 42-44, 50-52, 87-92, 136-38. Eventually, the detectives noticed the rear passengers were not wearing seatbelts and asked them to identify themselves. RP 88-91, 136, 152-53, 157, 159-60, 164. Mr. Kelly provided his full name and date of birth. RP 47-48. Then, almost four minutes after approaching the vehicle, Detective Rurey noticed what looked like the butt of a gun in the rear seat pocket in front of Mr. Kelly. RP 49, 52-54, 141-42; Exhibit 2 at 05:10. The detectives drew their guns and called for backup. RP 52-54, 57-59, 141-43.

When backup officers arrived, Mr. Kelly was removed from the vehicle, laid on the ground facing away from the vehicle and

handcuffed. RP 59-61, 144; Exhibit 2 at 06:51 to 08:00; Exhibit 3 at 02:16 to 02:44. The other occupants were also secured and removed from the area around the Mercedes. *Id.*; Exhibit 3 at 02:16 to 04:00. After the occupants were handcuffed, Detective Rurey removed the gun from the vehicle. RP 61, 74, 91-92; Exhibit 3 at 02:16 to 04:00. Mr. Kelly was then moved to the back of a patrol vehicle and it was determined he had a prior conviction that prevented him from possessing a firearm. RP 63, 145; Exhibit 3 at 04:20 to 04:35.

The State charged Mr. Kelly with unlawful possession of a firearm. CP 1. He moved to suppress the evidence obtained, arguing that the stop was pretextual and that the investigation of his identification and the search and seizure of the gun were unlawful. CP 30-151. The court denied the motion and Mr. Kelly was convicted after a stipulated bench trial. CP 170, 208-20.¹ The Court of Appeals affirmed. Appendix A.

D. ARGUMENT IN SUPPORT OF GRANTING REVIEW

1. The lower courts' failure to exclude evidence seized as the result of a traffic stop that was

¹ A copy of the Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence are attached hereto as an appendix and can also be found at CP 216-20. On appeal, Mr. Kelly assigned error to several of the findings and conclusions. *See Op. Br.* at 1-6.

**pretext for a warrantless criminal investigation
should be reviewed by this Court.**

- a. This Court's decisions make clear that pretextual seizures violate the Washington Constitution.

Article I, section 7 of the Washington Constitution more broadly protects the “private affairs” of each person than does the Fourth Amendment. Const. art. I, § 7; U.S. Const. amend. IV; *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). “Under article I, section 7, the right to privacy is broad, and the circumstances under which that right may be disturbed are limited.” *Arreola*, 176 Wn.2d at 291. Thus, “[w]arrantless disturbances of private affairs are subject to a high degree of scrutiny.” *Id.* at 292.

Article I, section 7 prohibits law enforcement from conducting a traffic stop based on pretext. *E.g.*, *Ladson*, 138 Wn.2d at 358. “Pretext is, by definition, a false reason used to disguise a real motive.” *Id.* at 359 n. 11 (quoting Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 Temp. L. Rev. 1007, 1038 (1996)). “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 requirements.” *Arreola*, 176 Wn.2d at 294 (quoting *Ladson*, 138 Wn.2d at 358). In short, the “police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.” *Ladson*, 138 Wn.2d at 349. This State’s “constitution requires we look beyond the formal justification for the stop to the actual one.” *Id.* at 353. Traffic stops are ripe for being abused as the “legitimate” basis for a pretextual, warrantless seizure. Our courts must ensure that the police exercise discretion, but do not abuse it, in determining which traffic infractions require police attention and enforcement efforts. *See Arreola*, 176 Wn.2d at 294-95.

To determine whether a traffic stop was pretextual this Court looks to a totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his or her behavior. *Arreola*, 176 Wn.2d at 296-97; *Ladson*, 138 Wn.2d at 359. The objective review is aimed at rooting out cases where “police officers . . . simply misrepresent their reasons and motives for conducting traffic stops.” *Arreola*, 176 Wn.2d at 297 (citing Samuel Walker, *Taming the System* 45-46 (1993) (which notes that imposition

of the exclusionary rule led to an increase in the “number of officers claiming the defendant had dropped narcotics on the ground”).

The State bears the heavy burden of proving the legality of a warrantless seizure by clear and convincing evidence. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). An appellate court reviews the constitutionality of a warrantless stop de novo. *Arreola*, 176 Wn.2d at 291; *State v. Martinez*, 135 Wn. App. 174, 179, 143 P.3d 855 (2006). In the event of a pretextual stop, all subsequently obtained evidence from the stop must be suppressed. *Ladson*, 138 Wn.2d at 357.

- b. Here, the Court of Appeals found no constitutional infirmity with law enforcement’s traffic stop, but a review of the totality of the circumstances demonstrates the stop was pretextual.

This case does not present the type of mixed-motive stop subject to *Arreola*’s actual, conscious and independent analysis. In *Arreola*, the officer admitted two bases for his traffic stop of the defendant: a constitutional basis and a non-constitutional motive. 176 Wn.2d at 289. Here on the other hand, the detectives admitted only a constitutional basis but the objective and subjective circumstances call into question whether that basis was the detectives’ actual motive for initiating the stop

Although Detectives Thomas and Rurey testified they decided to stop the vehicle only upon suspicion of failure to register the vehicle under new ownership, this Court should grant review to remind the lower court's that they must look beyond the reason proffered by the detectives to determine whether it was the actual basis for the stop. *Ladson*, 138 Wn.2d at 353; *State v. Montes-Malindas*, 144 Wn. App. 254, 260, 182 P.3d 999 (2008). "Pretext is no substitute for reason." *Ladson*, 138 Wn.2d at 356. Here, a review of the totality of the circumstances demonstrates the State did not prove the seizure was based upon suspected violation of the traffic code.

First, the detectives testified that Detective Thomas decided to stop the vehicle for a suspected failure to report a sale as soon as the return on the license plate indicated that violation. RP 24-29, 122-26, 148; *see* CP 3 (certification of probable cause). Yet the detectives followed the vehicle for several minutes and over a mile rather than initiate a stop. *See* Exhibit 1, Slides 1-6 (showing extensive route traveled). The stop was not initiated until three minutes and over a mile of travel later, at excessive speed through dark streets. *E.g.*, RP 32-37, 42, 127-28, 131-32, 151-52. This delay strongly indicates that the report of sale violation was not the "actual" basis for the stop, but

that the detectives were looking to discover other criminal activity. *See State v. Nichols*, 161 Wn.2d 1, 10-11, 12, 162 P.3d 1122 (2007) (lack of pretext demonstrated where upon viewing traffic violation the officer “immediately pursued the vehicle and activated his lights”).

Moreover, the State’s evidence did not show why an “element of surprise” would have been important if the actual basis for the detectives’ stop was traffic code enforcement. RP 33-34. Detective Rurey testified they did not want to announce, “Hey, we’re coming down the street and, you know, maybe we’re going to try and stop you.” RP 33; *see* RP 83-84. Again, this circumstance indicates the detectives were searching for possible criminal activity beyond the suspected registration violation. *See Montes-Malindas*, 144 Wn. App. at 257-58 (finding pretext where officer later explained he approached vehicle from passenger side because the occupants would not expect it and it would allow him to better see into the passenger area).

Another salient fact is that these detectives do not work general patrol. They both serve as detectives in the Gang Unit of the Seattle Police Department. RP 13, 119. Their duties involve “of course focusing on gangs, yes, being the gang unit.” RP 13. Traffic stops are not their priority. RP 19 (“My main focus isn’t traffic citations or

traffic enforcement.”). However, Detective Rurey uses the traffic code as a means of contacting people. RP 17-18. He explained that his gang duties include “proactively looking for gang activity and things related to gangs.” RP 78-79, 114-15; *accord* RP 146-48 (Thomas testifies about their proactive searches for criminal activity). He tries to stay focused on gang issues, not to get “sidetracked” by unrelated issues. RP 78-80. He also used to enforce the traffic code regularly when he served as a standard patrol officer over three years ago. RP 13, 17-18. This bears striking resemblance to the gang unit detectives in *Ladson*, who “explained they do not make routine traffic stops while on proactive gang patrol although they use traffic infractions as a means to pull over people in order to initiate contact and questioning.” *Ladson*, 138 Wn.2d at 346; *see id.* at 358 n.10 (“we note a fundamental difference between the detention of a citizen by gang patrol officers aimed at discovering evidence of crimes, which is usually ‘hostile,’ and a community caretaking stop aimed at enforcement of the traffic code”).

The detectives were serving in their role as gang unit detectives on the night of February 25 and the early morning February 26, 2012. RP 14, 114-15. They were traveling in their black Ford Crown Victoria

police car, which has internal mounted police lights and subdued decals on the sides that are reflective only when lights hit them. RP 14-16. The vehicle differentiates them from patrol officers and “maybe, you know, [allows them to] get a little bit closer to criminal activity before maybe a bright-blue police car with big, you know, lights on the top could.” RP 16.

Even more tellingly, the detectives were on an overtime “emphasis” shift when they encountered the vehicle at issue here. RP 21, 121. Detective Thomas explained, “There was a lot of violence going on earlier that year so we were working as an emphasis patrol during that time.” RP 121. He testified they sought to make themselves, the police, visible, and yet they snuck up on the vehicle at issue here rather than activate their lights when they first decided to stop it. In fact, the testimony showed that on this emphasis patrol, “It doesn’t serve a purpose for us to sneak around or anything like that, we want to be very visible and try and reduce crime and thus violence by making our presence known.” RP 121-22. In fact, the detectives had recently recovered three handguns in the Central District and were running license plates on vehicles in south Seattle “Looking for criminal activity, see if cars have been reported stolen, if there’s

warrants associated with different license plates and vehicles. Those types of reasons.” RP 21-24, 79-80. In other words, when they came upon the vehicle at issue here, they were attempting to uncover criminal activity, not to enforce the traffic code.

The time and location of the stop further indicates the detectives’ conscious objective was to uncover suspected criminal activity. It was the middle of the night—the detectives checked the vehicle’s license plate at 12:42 a.m.—and the detectives were working an overtime shift in south Seattle on proactive patrol to ferret out criminal activity. RP 32, 146-48.

Further, objective evidence of the detectives’ citation records shows they did not often enforce the traffic code. In the last two years, while serving on gang duty, Detective Rurey had issued no citations and Detective Thomas had issued only one prior to this incident. RP 104-06, 109-11, 164, 167. On the other hand, when previously serving as general patrol officers, the detectives each issued at least 180 tickets in a two-year period. RP 97-101, 166. The fact that the detectives have issued one citation in their three plus years serving on the gang unit renders it highly unlikely that they consciously and actually determined that on February 26 they would be issuing their second citation for the

vehicle in which Mr. Kelly was traveling. RP 104-06. A report of sale violation is not a particularly dangerous offense requiring police intervention to ensure public safety. *See Arreola*, 176 Wn.2d at 298-99 (“if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual”); *Montes-Malindas*, 144 Wn. App. at 262 (considering that suspected infraction posed little risk of endangerment in determining stop was pretextual). Further, Detective Rurey could not even recall the violations for which citations had been issued here. RP 77.

Put simply, in light of the objective evidence, it is implausible these detectives traveled at a high rate of speed for over a mile, through a dark residential area, without activating emergency lights (despite being on a proactive emphasis patrol) merely on suspicion of a failure to transfer title. Detective Rurey admitted traffic code enforcement was not an independent basis for stopping vehicles like the one in which Mr. Kelly was traveling. Rather, he testified he would “possibly” initiate a stop if he witnessed any number of minor traffic violations, recognizing, “I mean, I can’t say that we stop every car for every

violation that we ever see.” RP 81; *see Arreola*, 176 Wn.2d at 298-99 (discussing relevance of whether officer generally would stop other vehicles for same infraction), 300 (holding important the unchallenged finding that officer would have stopped vehicle “if he wasn’t suspicious of a DUI”). Thus, his actual motivation for stopping this vehicle must have extended beyond simply the traffic violation for which he does not regularly stop vehicles.

The detectives’ actions upon stopping the vehicle further indicated they were not actually motivated by the suspected traffic infraction. *See* RP 39-40. The detectives approached on either side of the vehicle, and Detective Rurey stopped at the rear door. RP 39-40, 42-43, 50, 87-88, 133-34. Although he had no particular concern for safety, he opened the rear door so he could see inside the vehicle. RP 43. At first, Detective Rurey did not question the occupants; rather he shone his light inside the car repeatedly and leaned into the door he opened. Exhibit 2 at 01:30 to 02:00. Later, however, he decided to ask Mr. Kelly his name “to see what happened from there.” RP 48. Even at that point, after having purportedly noticed Mr. Kelly was not wearing a seatbelt, Detective Rurey was not really interested in resolving that suspected traffic violation but in finding more serious

criminal violations. As he testified, his suspicions were rising and he had a feeling there was a gun or other contraband in the vehicle. RP 88-91.

In sum, the totality of the circumstances demonstrate the detectives' purported basis for stopping the vehicle in which Mr. Kelly was traveling was mere pretext for a warrantless criminal investigation. This Court should grant review of this significant constitutional issue of substantial public import and provide guidance for the lower courts in their review of traffic stops where law enforcement claims only one motive for the stop but the evidence points to a different, unconstitutional motive.

2. The Court should also grant review of whether the police had reasonable suspicion to ask Mr. Kelly for identification when they had no evidence that he was not wearing a seatbelt while the vehicle was moving.

Law enforcement may not request identification from passengers for investigative purposes unless there is an independent basis that justifies that request. *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004). An articulable suspicion of criminal activity is such an independent basis. *Id.* at 699; *State v. Allen*, 138 Wn. App. 463, 469, 157 P.3d 893 (2007). To satisfy the independent basis

requirement, the detective must be able to identify specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009).

There was no reason to suspect that Mr. Kelly was not wearing a seatbelt while the vehicle was in motion, and the Court of Appeals offers none. RP 151-52; Slip Op. at 12; *see* RP 27-31. After the detectives stopped the vehicle, they noticed the rear passengers were not wearing seatbelts. RP 47-48, 152-53. As the vehicle came to a stop, the detectives testified they saw movement in the backseat. RP 38-39; CP 218 (FF 12). But, the specific and articulable facts demonstrate only that the passengers were not wearing their seatbelts after the vehicle had been stopped by law enforcement. A reasonable inference from the evidence may be that the passengers began to remove their seatbelts once the vehicle had been seized—perhaps these were the movements the detectives saw in the backseat. But failing to engage a seatbelt while the vehicle is stopped is not criminal activity that can form an independent basis for requesting identification. *See Bliss*, 153 Wn. App. at 204; RCW 46.61.688 (infraction not to wear seatbelt while operating or riding in motor vehicle). Indeed, Detective

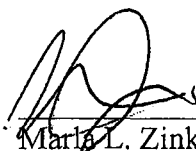
Rurey's actual basis for asking for identification was "to see what happened from there." RP 48. Such conduct is unconstitutional and cannot be endorsed. *See Allen*, 138 Wn. App. at 463, 466-67, 47-72 (officer could not ask passenger for identification after learning driver was protected person in a no contact order where officer had no reason to presume passenger was object of order).

E. CONCLUSION

The Court should grant review to determine the legality of the pretextual traffic stop and the subsequent request that Mr. Kelly identify himself because these are significant constitutional issues of substantial public interest. Review of the Court of Appeals decision on the first issue, the validity of the traffic stop, is also warranted because it conflicts with this Court's decisions holding the lower courts must evaluate the objective and subjective bases for the stop.

DATED this 27th day of May, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

2014 APR 28 AM 10: 23

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 69607-6-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
KENNETH DAJION KELLY,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>April 28, 2014</u>
_____)	

COX, J. — Kenneth Kelly appeals his conviction for unlawful possession of a firearm, contending the trial court erred by denying his motion to suppress evidence of the firearm. Because the stop of the vehicle in which he was a passenger was not pretextual, he was lawfully seized, and the firearm within his reach was also lawfully seized, we affirm.

In the early morning of February 26, 2012, Seattle Police Detectives Josh Rurey and Robert Thomas were patrolling the streets in a patrol car bearing subdued markings on its side. The detectives, in full uniform, were assigned to the gang unit.

As the detectives traveled northbound on 51st Avenue South, a Mercedes sedan with tinted side windows drew their attention when it conducted a U-turn in

No. 69607-6-1/2

front of them. At approximately 12:42 a.m., Detective Rurey entered the Mercedes' license plate number into his computer. He learned that the title to this recently sold vehicle had not been transferred within the requisite 45 day time limit.¹ The detectives decided to turn their patrol car around and stop the Mercedes for this traffic violation. However, while the detectives were obtaining the information from their computer, they lost sight of the Mercedes.

Once the detectives turned around to follow the Mercedes, they saw that the vehicle had driven a significant distance in a short amount of time. It was apparent to them that the vehicle had been traveling at a high rate of speed over the posted speed limit. Although the detectives drove over the speed limit as they pursued the Mercedes, they were initially unable to close in on the vehicle.

At approximately 12:45 a.m., the detectives caught up to the Mercedes when it stopped at a traffic light. The detectives pulled up behind the vehicle at the light. When the traffic light turned green, Detective Thomas activated the patrol vehicle's emergency lights. The Mercedes turned left at the intersection and came to a stop.

Detective Thomas headed toward the driver's side of the Mercedes to speak to the driver while Detective Rurey approached the passenger's side. At this time, the driver voluntarily opened the driver door. But because of the tinted windows and the dark outdoor surroundings, the detectives could not see into the interior of the vehicle. As a result, to ensure officer safety, Detective Rurey opened the rear passenger door and Detective Thomas asked the driver to roll

¹ Former RCW 46.12.101(6); RCW 46.12.650(7).

No. 69607-6-I/3

down the vehicle's windows. The driver rolled down the window on the driver's door. From their vantage points, the detectives observed two occupants in the back seat of the vehicle, a driver, and a front seat passenger. Kelly was one of the two passengers in the back seat. The detectives did not recognize the occupants.

The detectives noticed that Kelly and the other back seat passenger were not wearing seat belts. Detective Rurey consequently asked them to identify themselves. Kelly provided his name and date of birth.

Meanwhile, Detective Rurey stood outside of the Mercedes and scanned its interior through the open rear passenger door to look for potential threats. With his flashlight he noticed an object in the front passenger seat's back pocket that he immediately recognized as the handle of a handgun. It was situated directly in front of Kelly and within his reach. Detective Rurey drew his weapon, alerted Detective Thomas, and ordered the occupants to place their hands on the ceiling. The detectives then called for backup units.

When additional gang unit officers arrived at the scene, they removed the occupants from the Mercedes. They first took Kelly out of the vehicle, lay him on the ground, and handcuffed him. Detective Rurey then reached into the vehicle and removed the gun.

Once the detectives learned that Kelly had been previously convicted of manslaughter, they arrested him for unlawful possession of a firearm. The detectives did not arrest anyone else. Detective Thomas later cited the driver for traffic violations.

No. 69607-6-1/4

The State charged Kelly with one count of unlawful possession of a firearm in the first degree. Pursuant to CrR 3.6, Kelly moved to suppress all evidence against him, arguing that Detectives Rurey and Thomas conducted an unlawful search and seizure. Kelly contended that he was unlawfully seized because the stop was pretextual, that the detectives lacked sufficient justification to request his identification, and that the detectives' discovery of the gun was the result of an unconstitutional search.

The trial court denied Kelly's motion to suppress and entered written findings of fact and conclusions of law, incorporating by reference its oral findings and conclusions. Kelly then waived his right to a jury trial and agreed to a trial on stipulated evidence. Based on this evidence, the trial court found Kelly guilty of unlawful possession of a firearm.

Kelly appeals.

SUBSTANTIAL EVIDENCE

Kelly assigns error to twelve of the trial court's twenty-six findings of fact entered following the CrR 3.6 hearing. None are persuasive.

We review the trial court's findings of fact for substantial evidence.² Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.³

After a careful review of the record, we hold that the challenged findings are supported by substantial evidence, including abundant testimony provided by

² State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006).

³ State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

No. 69607-6-1/5

Detectives Rurey and Thomas at the suppression hearing. We reject the arguments to the contrary.

PRETEXTUAL TRAFFIC STOP

Kelly contends that the trial court erred by concluding that the detectives conducted a lawful traffic stop and that the stop was not pretextual. We disagree. The evidence established that the detectives' decision to initiate the traffic stop was motivated by the transfer of title violation:

Article I, section 7 of the Washington Constitution prohibits unreasonable seizures.⁴ A warrantless seizure is per se unreasonable.⁵ Evidence obtained in violation of this constitutional provision must be suppressed, and evidence obtained as a result of any subsequent search must also be suppressed as fruit of the poisonous tree.⁶

However, a warrantless seizure is valid if it falls within the scope of one of the narrowly drawn exceptions to the warrant requirement.⁷ Investigatory detentions, including warrantless stops for traffic infractions, are a recognized exception.⁸ Law enforcement officers may conduct a warrantless traffic stop if they have a reasonable and articulable suspicion that a traffic violation has occurred or is occurring.⁹ The State bears the burden of proving by clear and

⁴ State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

⁵ State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

⁶ Kennedy, 107 Wn.2d at 4 (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

⁷ Ladson, 138 Wn.2d at 349-50.

⁸ State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997); State v. Duncan, 146 Wn.2d 166, 174-75, 43 P.3d 513 (2002).

⁹ Ladson, 138 Wn.2d at 349.

No. 69607-6-I/6

convincing evidence that a warrantless seizure falls within an exception to the warrant requirement.¹⁰

But where the asserted basis for a traffic stop is a pretext for a warrantless investigation, the stop violates article I, section 7 of the Washington constitution.¹¹ A traffic stop is pretextual if a law enforcement officer makes the stop “not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.”¹² In this situation, the 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.’”¹³

In determining whether a 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.”¹⁴ We review de novo whether a stop is pretextual.¹⁵

Here, the totality of the circumstances demonstrates that the traffic stop was not pretextual. After hearing extensive testimony, the trial court found that “Detectives Rurey and Thomas decided to make a traffic stop as a result of the title transfer violation” and that “[t]he decision to initiate the traffic stop was

¹⁰ State v. Diluzio, 162 Wn. App. 585, 590, 254 P.3d 218, review denied, 272 P.3d 850 (2011); State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

¹¹ State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

¹² Ladson, 138 Wn.2d at 349.

¹³ State v. Arreola, 176 Wn.2d 284, 294, 290 P.3d 983 (2012) (quoting Ladson, 138 Wn.2d at 358).

¹⁴ Ladson, 138 Wn.2d at 358–59.

¹⁵ Arreola, 176 Wn.2d at 291.

No. 69607-6-I/7

motivated by [the traffic] violation and observation.”¹⁶ These facts reflect the detectives’ subjective intent to stop the Mercedes because of the traffic violation.

Additional evidence indicates that when the detectives followed the Mercedes, they were not investigating any criminal activity other than the traffic violation. According to the detectives’ testimony, other than the transfer of title violation, nothing led them to believe that the occupants were involved in criminal or gang-related activities. Moreover, at the time the detectives entered the license plate into the computer and decided to stop the vehicle, they did not recognize the Mercedes or its occupants from any gang-related or criminal investigations in which they had been involved. Nor did the detectives recognize the occupants once they were able to observe them after making the stop. Furthermore, during the pursuit, the detectives had no information about the identity of the vehicle’s occupants and did not take steps to obtain such information.

Nevertheless, Kelly claims that the detectives’ delay in initiating the stop—rather than immediately stopping the vehicle upon discovering the transfer of title violation—indicates that they were, in actuality, searching for criminal activity unrelated to the traffic violation. We disagree.

Washington courts have found pretext where law enforcement officers follow a vehicle to search for the commission of criminal conduct.¹⁷ But that did not happen here. The detectives decided to make the stop immediately upon

¹⁶ Clerk’s Papers at 217.

¹⁷ See, e.g., Ladson, 138 Wn.2d at 346; State v. Montes-Malindas, 144 Wn. App. 254, 257, 182 P.3d 999 (2008); State v. DeSantiago, 97 Wn. App. 446, 450-51, 983 P.2d 1173 (1999).

No. 69607-6-1/8

their discovery of the title transfer violation. Any delay in stopping the Mercedes was attributed to its excessive speed as it traveled down the street and outside of the detectives' view. Even when the detectives sped down the street, they were initially unable to catch up with the Mercedes. Only when the Mercedes stopped at a traffic light were the detectives in a position to make the traffic stop, approximately three minutes after they decided to investigate the transfer of title violation.

Indeed, the facts here are similar to those in Nichols. There, the law enforcement officer "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."¹⁸ The supreme court rejected the defendant's claim that the stop was pretextual.¹⁹ In so doing, the court distinguished the facts in that case from Ladson, DeSantiago, and Myers, cases in which courts determined pretext existed.²⁰ In those cases, the court explained, the stops were pretextual because the "officers suspected criminal activity and followed vehicles waiting for commission of a traffic infraction so the vehicle could be stopped."²¹ Like Nichols and unlike the pretext cases, the detectives here began to pursue the Mercedes immediately after discovering the transfer of title violation. They activated their emergency lights as soon as they caught up to the Mercedes at the intersection. This stop was not pretextual.

¹⁸ Nichols, 161 Wn.2d at 12.

¹⁹ Id.

²⁰ Id. at 11-12 (citing Ladson, 138 Wn.2d at 346; DeSantiago, 97 Wn. App. at 452; State v. Myers, 117 Wn. App. 93, 97, 69 P.3d 367 (2003)).

²¹ Nichols, 161 Wn.2d at 12.

Kelly next asserts that, because the detectives were gang unit officers and not general patrol officers, they were actually looking for criminal activity. In so contending, Kelly attempts to draw parallels between the gang unit officers in Ladson and the detectives here. This argument is unpersuasive.

In Ladson, the gang unit officers who conducted the traffic stop admitted to following the vehicle in order to look for a reason to stop it.²² Because the officers' suspicion about the driver's rumored drug involvement was the actual motivation for finding a legal reason to stop him, the supreme court held that the stop was pretextual.²³

Kelly's reliance on Ladson is misplaced. As discussed above, the detectives did not pursue the Mercedes to search for criminal activity. Nor did they harbor any gang-related suspicions that motivated the traffic stop. Notwithstanding these factual discrepancies between Ladson and the present case, Kelly's argument fails for two reasons.

First, whether the detectives were gang unit officers and not patrol officers is not considered a dispositive factor in determining whether a traffic stop is pretextual.²⁴ The detectives provided substantial evidence evincing that their responsibilities as gang unit officers include routine patrol duties and traffic enforcement. Detective Rurey testified that although his focus is on gang-related activity, his responsibilities are varied and include traffic enforcement, responding to 911 calls, and conducting criminal investigations that are not gang related. On

²² Ladson, 138 Wn.2d at 346.

²³ Id. at 346, 360.

²⁴ See Myers, 117 Wn. App. at 97; DeSantiago, 97 Wn. App. at 452.

cross-examination, Detective Rurey explained that when he observes minor traffic violations, he generally aims to conduct a traffic stop if he is able to do so. Detective Thomas's testimony confirmed that gang unit detectives' duties are not limited to gang-related investigations. He testified that he stops people for traffic violations "[a]s the opportunity arises." Therefore, in light of the totality of the circumstances, the detectives' association with the gang unit does not render the traffic stop pretextual.

Second, Kelly next asserts that because the detectives rarely issue traffic citations since joining the gang unit, the stop was pretextual. But the detectives' testimony proves the contrary.

Detective Rurey testified at the suppression hearing that when he was a patrol officer, he issued many more citations because he had recently graduated from the police academy and hoped to gain experience, and because traffic enforcement was his only duty at the time. Detective Rurey also testified that his position in the gang unit encompasses a wider range of responsibilities and, therefore, he issues fewer citations. Moreover, according to Detective Rurey's testimony, his approach has changed. On the gang unit, he gives more warnings instead of tickets when he makes traffic stops. This is in part because he seeks "positive contact" with individuals when enforcing traffic laws. Therefore, that the detectives seldom issue citations does not indicate pretext.

Kelly argues, finally, that the detectives' actions once they stopped the car suggest that the stop was pretextual. He points to the fact that Detective Rurey opened the rear passenger door, shone his flashlight to see inside before

No. 69607-6-I/11

questioning the occupants, and later asked Kelly his name, looking for criminal activity. Again, we disagree.

The detectives' conduct reflects their intention to ensure officer safety. At the traffic light, the detectives observed occupants moving around through the Mercedes' rear untinted window. But because of the dark surroundings and the tinted windows, when approaching the vehicle, the detectives were unable to verify how many occupants were inside or determine what they were doing. The detectives did not know whether the occupants possessed weapons or posed a threat to the detectives' safety. Consequently, Detective Rurey opened the passenger door. When he noticed that Kelly and the other rear seat passenger were not wearing seatbelts, he asked for their names. The detectives' actions are not indicative of an attempt to investigate criminal activity unrelated to the traffic violation.

Under the totality of the circumstances surrounding the traffic stop, we hold that the detectives, both objectively and subjectively, were motivated by the need to investigate the traffic violation. The traffic stop was not a pretext.

SEIZURE OF KELLY

Kelly argues in the alternative that Detective Rurey's request for his identification while Kelly was a passenger in the traffic stop was an unlawful seizure. He argues further that the firearm evidence should be suppressed. We disagree.

"Under article I, section 7... passengers are unconstitutionally detained when an officer requests identification 'unless other circumstances give the

No. 69607-6-I/12

police independent cause to question [the] passengers.”²⁵ Such circumstances include the failure to wear a seat belt, a traffic infraction.²⁶ Moreover, “[w]henver 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.”²⁷

Here, during the traffic stop, the detectives noticed that Kelly was not wearing a seat belt. Their reasonable suspicion that Kelly committed this infraction gave the detectives independent cause to question him. According to Detective Rurey’s testimony, he requested Kelly’s identification because he “was committing his own, independent law violation.” The detectives therefore had the authority to detain Kelly for a reasonable period of time in order to identify him. Kelly was not unlawfully seized.

SEIZURE OF FIREARM

Kelly contends that the detectives had no lawful basis to seize the firearm. We disagree and hold that the seizure of the gun was lawful.

Kelly first argues that Detective Rurey had no basis to request Kelly’s identification, and without such identification, he would not have known that the gun was contraband. As we already discussed in this opinion, Detective Rurey lawfully requested Kelly’s identification. Thus, this contention is meritless.

Kelly next asserts that that the seizure of the gun was a result of an unlawful search incident to arrest. Kelly did not make this argument to the trial

²⁵ 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)).

²⁶ State v. Chelly, 94 Wn. App. 254, 259-60, 970 P.2d 376 (1999); RCW 46.61.688(3).

²⁷ RCW 46.61.021(2).

court. Instead, in an unchallenged conclusion of law, the trial court justified the seizure under the plain view exception:

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 a 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.^[28]

By stating that Detective Rurey saw the firearm "in plain view without any intrusive or unlawful search" the trial court misapplied the plain view doctrine, mistaking it for the open view doctrine. "Whereas a 'plain view' situation involves an officer viewing an item *after a lawful intrusion into* a constitutionally protected area, 'open view' involves an observation from a nonconstitutionally protected area."²⁹ Thus, a lawful seizure of the evidence observed in plain view "must turn on the legality of the intrusion that enable[d the detective] to perceive and physically seize the property in question."³⁰

Here, Detective Rurey intruded upon a constitutionally protected area when he opened the rear passenger door. But such an intrusion is permissible within the scope of a proper Terry stop.

A proper Terry stop permits police officers to conduct a limited protective search of the passenger compartment.³¹ The protective search of a vehicle must be predicated on an officer's reasonable suspicion that the suspect is dangerous

²⁸ Clerk's Papers at 220 (emphasis added).

²⁹ Kennedy, 107 Wn.2d at 10.

³⁰ Id., at 9 (quoting Texas v. Brown, 460 U.S. 730, 737, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)).

³¹ State v. Larson, 88 Wn. App. 849, 850-51, 946 P.2d 1212 (1997); see Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

No. 69607-6-1/14

and may gain access to a weapon in the vehicle.³² Additionally, the “protective search for weapons must be objectively reasonable, though based on the officer’s subjective perception of events.”³³ The existence of an objectively reasonable concern for officer safety is determined by evaluating the entire circumstances of the stop.³⁴

Detectives Rurey and Thomas conducted a limited protective search that was justified by their concern for safety. When approaching the Mercedes, the detectives’ view of the interior was obstructed, precluding their ability to assess any possible threat from the passengers inside. Given the detectives’ concerns for safety, opening the door was objectively reasonable. Thus, this intrusion was proper. Furthermore, Detective Rurey immediately recognized the handgun that was within Kelly’s reach.³⁵ Seizing that firearm was lawful.

The trial court did not err by denying Kelly’s motion to suppress.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Schwallen, J.

Becker, J.

³² State v. Glossbrener, 146 Wn.2d 670, 680-81, 49 P.3d 128 (2002).

³³ Larson, 88 Wn. App. at 853-54.

³⁴ Glossbrener, 146 Wn.2d at 679.

³⁵ See State v. Hatchie, 161 Wn.2d 390, 395, 166 P.3d 698 (2007) (“A plain view search is legal when the police (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity.”).

APPENDIX B

FILED
SUPERIOR COURT OF WASHINGTON

NOV 16 2012

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KENNETH KELLY,

Defendant,

No. 12-1-01365-5 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on October 29th and 30th, 2012 before the Honorable Judge Bruce Hilyer. After considering the evidence submitted by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

FINDINGS OF FACT:

1. On February 26, 2012 Detective Robert Thomas and Detective Joshua Rurey were working in full uniform and in a marked patrol car as detectives for the Seattle Police Department's Gang Unit.
2. While their emphasis was to investigating gang related criminal activity, both Detective Thomas and Detective Rurey were authorized to, and did, investigate violations of all laws including traffic laws.
3. During the two years that Detectives Rurey and Thomas worked in the Patrol Unit of the Seattle Police Department immediately before joining the Gang Unit, they wrote approximately 180 to 200 citations into Seattle Municipal Court. During the two years immediately preceding the stop of the car Kenneth Kelly was riding in on the night of

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

February 26, 2012 while working in the Gang Unit, they wrote approximately 2 citations into Seattle Municipal Court.

4. It is a common practice of Detectives Rurey and Thomas while on patrol to run license plate numbers in their computer data base investigating possible violations of law such as outstanding arrest warrants, stolen vehicle reports, and criminal traffic violations and infractions irrespective of a car's suspected involvement in gang related criminal activity.
5. On February 26, 2012 at approximately 12:42 a.m. Detective Thomas and Detective Rurey were driving northbound in their marked patrol car in full uniform in the 9300 block of Renton Ave. South. Both Detectives saw a 1993 black Mercedes 4 door sedan with WA lic # 715WHJ make a "U-Turn" and begin to drive southbound on Renton Ave.
6. Neither Detective Thomas nor Detective Rurey recognized the car from their work as Gang Unit Detectives and neither could see how many occupants were in the car nor could they identify any of the occupants in the car because the car had darkly tinted side windows.
7. At approximately 12:42 a.m. Detective Rurey ran the license number 715WHJ in his database and discovered that the car had a report of sale dated December 11, 2011 but had not had a corresponding transfer of title made as required by RCW 46.12.101(6) and SMC 11.22.025. Detectives Rurey and Thomas knew this to be a misdemeanor criminal traffic offense.
8. By the time Detective Rurey and Thomas received the information back regarding the violation of RCW 46.12.101(6) and SMC 11.22.025 they had made a U-Turn and saw the black Mercedes turning onto 51st Avenue and travelling at a high rate of speed estimated to be at least 50 mph far in excess of the posted speed limit. ~~Based upon this information,~~ Detectives Rurey and Thomas decided to make a traffic stop. *AS A RESULT OF THE TITLE TRANSFER VIOLATION. (BLW)*
9. At the time Detectives Rurey and Thomas decided to initiate a traffic stop of the black Mercedes, neither was engaged in an investigation of criminal activity related to the black Mercedes or its occupants separate and apart from the violation of RCW 46.12.101(6) and SMC 11.22.025, ~~and speeding.~~ The decision to initiate the traffic stop was motivated ~~only~~ by this violation and observation. *WHETHER OBSERVED SPEEDING WOULD HAVE RESULTED IN A TRAFFIC STOP APART FROM THE TITLE VIOLATION*
10. Detectives Rurey and Thomas were able to see the Mercedes make a right turn onto S. Ryan Way travelling westbound. The Detectives saw that the Mercedes failed to use its turn signal and failed to make a complete stop at the stop sign. These are both citable traffic infractions.
11. Finally, at approximately 12:45 a.m., just 3 minutes after observing the initial criminal traffic violation and making the decision to initiate a traffic stop, Detectives Rurey and Thomas caught up to the black Mercedes when it came to a stop at a red light at the intersection of S. Boeing Access Rd and Martin Luther King Jr. Way S.. The black Mercedes stopped in the middle of the cross walk. When the light turned green, Detective Rurey and Thomas activated their emergency lights and stopped the black Mercedes for the traffic violation.

WAS NOT DETERMINED THE DETECTIVE CAN DETERMINE IF IT DO ALSO ENFORCE TRAFFIC LAWS, BY SEIZING VEHICLE ISSUE TICKETS

Blatt 4 0044

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

- 1 12. While effecting the traffic stop, Detectives Rurey and Thomas were able to see through the
2 rear window of the Mercedes and could see multiple occupants moving around inside the car.
3 Neither Detective was able to see how many people were inside the car or what they were
4 doing.
- 5 13. The driver of the Mercedes stopped the car in the middle of the travel lane at the entrance to
6 the on ramp to I-5 at Martin Luther King Jr. Way S. Detective Thomas approached the
7 driver's side window to speak with the driver and Detective Rurey approached the passenger
8 side.
- 9 14. Because there were multiple occupants in the car and the side windows were tinted,
10 Detective Thomas told the driver to roll down the windows for officer safety purposes. The
11 driver rolled down the windows on the driver's side but did not roll down the windows on the
12 passenger side so Detective Rurey opened the rear passenger door for officer safety purposes
13 so that he could see inside. Neither Detective entered the car.
- 14 15. Detective Thomas could see from his vantage point that the rear passengers were not wearing
15 seat belts in violation of RCW 46.61.688(3). Detective Rurey was able to make the same
16 observation from his vantage point.
- 17 16. Detective Thomas asked the driver for her license. The driver was not able to produce a
18 license and when asked by Detective Thomas if she had a valid license she stated that she did
19 not.
- 20 17. Both Detective Thomas and Detective Rurey then attempted to identify the passengers in the
21 car. Each told the detectives that they did not have identification with them but each gave
22 their correct name.
- 23 18. The driver identified herself as Kadeidre Rials, the front passenger identified herself as
24 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.
- 19 19. While identifying the occupants of the car, Detective Rurey observed that Kelly and Grayer
were acting nervous and appeared rigid and uneasy about the stop.
- 20 20. From his vantage point outside the open passenger side rear door, Detective Rurey was
visually scanning the interior for any sign that there might be a weapon. Detective Rurey
was using a flashlight because it was dark out. Detective Rurey did not enter the passenger
compartment of the car in order to do this. From where Detective Rurey stood outside the
car he saw the butt of a handgun which he recognized as a gun based upon his experience and
training located in the pocket on the back of the passenger side front seat immediately in
front of where the defendant Kelly was seated and within easy reach of Kelly.
- 21 21. Detective Rurey stated "gun" to Detective Thomas. Both Detectives immediately drew their
service weapons and ordered all occupants to place their hands on the ceiling of the car.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 Detective Thomas radioed for backup while they kept the occupants of the car in place at gun
2 point.

3 22. Once back up officers arrived, Kelly was removed from the car and placed into handcuffs
4 and on the ground just outside the car. While officers were removing and handcuffing the
5 other occupants, Detective Rurey removed the handgun from the car and secured it in his
6 patrol car for officer safety purposes while they continued to investigate.

7 23. At the time Detective Rurey removed the handgun from the car, the occupants were not all
8 handcuffed. While all the occupants were outside of the car, they were still within reach of
9 the passenger compartment including Mr. Kelly who was on the ground just outside the rear
10 passenger side door where the handgun was located.

11 24. At the time that Detective Rurey removed the handgun from the car, he and Detective
12 Thomas were still investigating the traffic offenses committed by the driver and passengers
13 and would be returning the car to its owner upon completion of the investigation for the
14 traffic offenses.

15 25. The defendant Kelly was secured in a patrol car while Detectives ran his name through their
16 data base and learned that he had a prior conviction for Manslaughter making it unlawful for
17 him to possess a firearm. Kelly was taken into custody and transported to the police station

18 26. Detective Thomas issued a citation to the driver of the car for No Valid Driver's License-
19 Valid ID, no Proof of Insurance, and Turn Signal Distance in Advance. The car was returned
20 to its owner at the end of the traffic stop.

21
22
23
24
CONCLUSIONS OF LAW:

1. The stop of the black Mercedes Benz WA Lic. # 715WHJ (the Car) by Detective Rurey and Detective Thomas was a lawful traffic stop.
2. Neither Detective Rurey nor Detective Thomas used the traffic law violations as a pretext to stop the Car for an unrelated criminal investigation or purpose.
3. Detective Rurey's and Detective Thomas's conduct once the Car was stopped did not exceed the permissible scope of the lawful traffic stop.
4. Given all the observations of the Detectives as they stopped and approached the Car, including the tinted windows which limited the officers ability to see what was going on inside the car, the number of occupants, the time of night and the movement and behavior of the occupants of the Car, it was lawful for Detective Thomas to ask the driver to roll down the windows for the purposes of securing the scene of the stop and to ensure officer safety.

- 1 5. Similarly, it was lawful for Detective Rurey to open the rear passenger side door so he could
2 see inside the passenger compartment for officer safety purposes because the window on the
3 passenger side had not been rolled down and he could not otherwise see what the occupants
4 were doing.
- 5 6. The observation of the detectives that the rear seat passengers were not wearing seatbelts
6 established a lawful basis for the officers to request identification from the rear seat
7 passengers.
- 8 7. The fact that the driver of the Car did not possess a valid driver's license provided another
9 lawful basis to ask the passengers in the Car for identification.
- 10 8. Irrespective of the basis for the request for identification of the rear passengers in the Car, the
11 seizure of the gun was lawful.
- 12 9. Within several minutes of the initial stop, Detective Rurey saw the gun in plain view without
13 any intrusive or unlawful search. Detective Rurey never entered the car prior to seeing the
14 gun. The use of a flashlight and Detective Rurey's movement outside of the Car to get the
15 best view possible of the interior of the Car was not an unlawful search.
- 16 10. The gun was lawfully seized for officer safety purposes.
- 17 11. The defendant's motion to suppress the gun is denied.

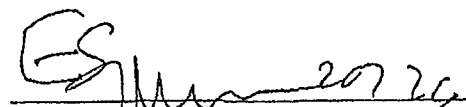
18 In addition to the above written findings and conclusions, the court incorporates by
19 reference its oral findings and conclusions.

20 Signed this 16 day of November, 2012.

21 
22 JUDGE BRUCE HILYER

23 Presented by 

24 Roger Davidheiser WSBA #18638
Senior Deputy Prosecuting Attorney


Erick Spencer, Attorney for Defendant

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69607-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Jennifer Joseph, DPA
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 28, 2014