

69607-6

69607-6

NO. 69607-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH KELLY,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 7

D. STATEMENT OF THE CASE ..... 8

E. ARGUMENT ..... 11

    1. Because the purported traffic stop was pretext for a criminal investigation, the evidence recovered should have been suppressed ..... 11

        a. Pretextual seizures violate the Washington Constitution.... 11

        b. A review of the totality of the circumstances demonstrates the traffic stop was pretextual ..... 16

        c. Because the traffic stop was a pretextual seizure, the evidence recovered during the stop should have been suppressed ..... 24

    2. Alternatively, the evidence should have been suppressed because the search violated Mr. Kelly’s constitutional right to privacy..... 24

        a. The evidence should have been suppressed because the police did not have an independent basis to ask for identification from Mr. Kelly, a passenger in the stopped vehicle ..... 25

        b. The evidence should be suppressed because the police lacked a lawful basis for seizing the gun without a warrant..... 27

        c. On either of these bases, the gun should have been suppressed and the conviction should be reversed..... 33

F. CONCLUSION ..... 34

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<i>State v. Arreola</i> , 176 Wn.2d 284, 290 P.3d 983 (2012) .....	passim
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	33
<i>State v. Doughty</i> , 170 Wn.2d 57, 239 P.3d 573 (2010).....	15
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993 (2005) .....	33, 34
<i>State v. Garvin</i> , 166 Wn.2d 242, 207 P.3d 1266 (2009) .....	15
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	25
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996) .....	28
<i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	28
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	passim
<i>State v. Loewen</i> , 97 Wn.2d 562, 647 P.2d 489 (1982) .....	11
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007) .....	18
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	30
<i>State v. Rankin</i> , 151 Wn.2d 689, 92 P.3d 202 (2004) .....	25
<i>State v. Smith</i> , 119 Wn.2d 675, 835 P.2d 1025 (1992).....	29
<i>State v. Snapp</i> , 174 Wn.2d 177, 275 P.3d 289 (2012).....	28, 29
<i>State v. Valdez</i> , 167 Wn.2d 761, 224 P.3d 751 (2009).....	30
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982) .....	33
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984) .....	24, 25
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009) .....	28, 33

### Washington Court of Appeals Decisions

<i>State v. Allen</i> , 138 Wn. App. 463, 157 P.3d 893 (2007).....	25, 26, 27
<i>State v. Bliss</i> , 153 Wn. App. 197, 222 P.3d 107 (2009).....	25, 26
<i>State v. Byrd</i> , 162 Wn. App. 612, 258 P.3d 686, <i>review granted</i> 173 Wn.2d 1001, 268 P.3d 942 (2011) .....	31
<i>State v. Lennon</i> , 94 Wn. App. 573, 976 P.2d 121 (1999).....	11
<i>State v. MacDicken</i> , 171 Wn. App. 169, 175, 286 P.3d 413, <i>review granted</i> 177 Wn.2d 1004, 300 P.3d 416 (2012) .....	32
<i>State v. Martinez</i> , 135 Wn. App. 174, 143 P.3d 855 (2006) .....	15
<i>State v. Montes-Malindas</i> , 144 Wn. App. 254, 182 P.3d 999 (2008).....	15, 17, 18, 22

### United States Supreme Court Decisions

<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009) .....	30, 31
<i>California v. Acevedo</i> , 500 U.S. 565, 111 S. Ct. 1982, 114 L.Ed.2d 619 (1991) .....	29
<i>Chimel v. California</i> , 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) .....	28, 31
<i>Katz v. United States</i> , 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) .....	28
<i>Thornton v. United States</i> , 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) .....	30
<i>United States v. Chadwick</i> , 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977) .....	29, 30

**Decisions of Other Courts**

*United States v. Turner*, 926 F.2d 883 (9th Cir. 1991)..... 29

**Constitutional Provisions**

Const. art. I, § 7 ..... passim  
U.S. Const. amend. IV ..... 11, 24, 30

**Statutes**

RCW 46.37.390 ..... 15  
RCW 46.61.021 ..... 12  
RCW 46.61.688 ..... 4, 26

**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)..... 13

A. SUMMARY OF ARGUMENT

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. This is the clear mandate of article I, section 7. Yet, the police violated this precept in several regards when they stopped the vehicle in which Kenneth Kelly was riding as pretext for a criminal investigation, asked Mr. Kelly for identification without an independent basis and seized evidence from the vehicle when the occupants were secured and not within reaching distance.

B. ASSIGNMENTS OF ERROR

1. In the absence of substantial evidence, the trial court erred in finding that Detective Robert Thomas and Detective Joshua Rurey “were working in full uniform and in a marked patrol car” because it fails to recognize the detectives’ testimony that their vehicle bore surreptitious decals and the emergency lights were contained internally. CP 216 (Finding of Fact (FF) 1).<sup>1</sup> In this regard, the trial court’s additional reference to the patrol car as “marked” similarly should be modified. CP 217 (FF 5).

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<sup>1</sup> 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.

2. In the absence of substantial evidence, the trial court erred in finding that “While their emphasis was to investigating [sic] gang related criminal activity, both Detective Thomas and Detective Rurey were authorized to, and did, investigate violations of all laws including traffic laws” because it does not conform with the objective evidence that the detectives had issued one traffic citation in two years serving on the Gang Unit and is unsupported in the additional ways argued herein. CP 216 (FF 2).

3. In the absence of substantial evidence, the trial court erred in finding that “During the two years immediately preceding the stop of the car Kenneth Kelly was riding in on the night of February 26, 2012 while working in the Gang Unit, [the detectives] wrote approximately 2 citations into Seattle Municipal Court” because the evidence shows the detectives had issued only one citation prior to the one issued to the driver of the vehicle in which Mr. Kelly was riding. CP 216-17 (FF 3).

4. In the absence of substantial evidence, the trial court erred in finding that “It is a common practice of Detectives Rurey and Thomas while on patrol to run license plate numbers in their computer data base [sic] investigating possible violations of law such as outstanding warrants, stolen vehicle reports, and criminal traffic violations and

infractions irrespective of a car's suspected involvement in gang related criminal activity." CP 217 (FF 4). As argued herein, the evidence does not show the investigation of traffic violation was independent of any criminal investigation.

5. In the absence of substantial evidence, the trial court erred in finding that "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. The decision to initiate the traffic stop was motivated by this violation and observation." CP 217 (FF 9).

6. In the absence of substantial evidence, the trial court erred in finding that "When the light turned green, Detectives Rurey and Thomas activated their emergency lights and stopped the black Mercedes for the traffic violation." CP 217 (FF 11).

7. In the absence of substantial evidence, the trial court erred in finding that "The driver rolled down the windows on the driver's side" as the video at Exhibit 2 (01:35 to 01:42) shows the driver's side door open fully to Detective Thomas. CP 218 (FF 14).

8. In the absence of substantial evidence, the trial court erred in finding that “Detective Thomas could see from his vantage point that the rear passengers were not wearing seatbelts in violation of RCW 46.61.688(3). Detective Rurey was able to make the same observation from his vantage point.” CP 218 (FF 15).

9. In the absence of substantial evidence, the trial court erred in entering finding of fact 19. CP 218.

10. In the absence of substantial evidence, the trial court erred in finding, “Once the back up [sic] officers arrived, Kelly was removed from the car and placed into handcuffs on the ground just outside the car. While officers were removing and handcuffing the other occupants, Detective Rurey removed the handgun from the car and secured it in his patrol car for officer safety purposes while they continued to investigate.” CP 219 (FF 22).

11. In the absence of substantial evidence, the trial court erred in finding, “At the time Detective Rurey removed the handgun from the car, the occupants were not all handcuffed. While all the occupants were outside of the car, they were still within reach of the passenger compartment including Mr. Kelly who was on the ground just outside

the rear passenger side door where the handgun was located.” CP 219 (FF 23).

12. The trial court erred in concluding, “The stop of the black Mercedes Benz WA Lic. # 715WHJ (the Car) by Detective Rurey and Detective Thomas was a lawful traffic stop.” CP 219 (Conclusion of Law (CL) 1).

13. The trial court erred in concluding, “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.” CP 219 (CL 2).

14. The trial court erred in concluding, “Detective Rurey’s and Detective Thomas’s conduct once the Car [sic] was stopped did not exceed the permissible scope of the lawful traffic stop.” CP 219 (CL 3).

15. The trial court erred in concluding, “The observation of the detectives that the rear seat passengers were not wearing seatbelts established a lawful basis for the officers to request identification from the rear seat passengers.” CP 220 (CL 6).

16. The trial court erred in concluding, “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).

17. The trial court erred in concluding, “Irrespective of the basis for the request for identification of the rear passengers in the Car, the seizure of the gun was lawful.” CP 220 (CL 8).

18. The trial court erred in concluding, “The gun was lawfully seized for officer safety purposes.” CP 220 (CL 10).

19. The trial court erred in concluding, “The defendant’s motion to suppress the gun is denied.” CP 220 (CL 11).

20. The trial court erred in concluding that the evidence obtained from the traffic stop should not be suppressed due to the pretextual nature of the stop.

21. The trial court erred in denying Mr. Kelly’s motion to suppress. CP 220 (CL 11).

22. The incorporation of the trial court’s oral findings was erroneous as not supported by substantial evidence. CP 220.

23. The incorporation of the trial court’s oral conclusions of law was erroneous. CP 220.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Warrantless seizures are prohibited with a few jealously-guarded exceptions, including brief investigative stops based on a reasonable, articulable suspicion of criminal activity or a traffic infraction. If a traffic stop is effectuated for a speculative criminal investigation but a lawful reason, such as enforcement of the traffic code, is used to justify it, the stop is pretextual, the stop violates the Washington Constitution, and all resulting evidence must be suppressed. Where a review of the totality of the circumstances, including subjective and objective factors, demonstrates the traffic stop of the vehicle in which Mr. Kelly was traveling was actually motivated by intent to conduct a speculative criminal investigation, must the resulting evidence be suppressed?

2. A police officer may not ask vehicle passengers for identification without an independent, articulable suspicion of criminal activity. The detectives 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 and after they viewed movements from the passengers

consistent with removing a seatbelt. Was the request for identification from Mr. Kelly unlawful?

3. A warrantless search incident to arrest is unlawful unless the arrestee is unsecured and within reaching distance of the area searched. Where Mr. Kelly was secured in handcuffs, was under the control of several officers, and could not reach into the rear seat pocket, was the warrantless seizure of the gun from the seat pocket unlawful?

#### D. 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. Exhibit 7; RP 14-15, 122, 139-40. Mr. Kelly was seated in the rear seat on the passenger (right) side. Exhibit 7; RP 140. 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. 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 later testified Detective Thomas decided to stop the vehicle on that basis at that time. RP 28-30, 148. However, the detectives actually 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 followed surreptitiously nonetheless. RP 29-37, 54-55, 128-32, 151-52; *see* Exhibit 2 at 00:00 to 01:00. The detectives eventually activated the emergency lights and the Mercedes pulled to the right and stopped. RP 36-39, 131-32; Exhibit 2 at 01:00 to 01:15. As the vehicle 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, where Mr. Kelly was sitting, 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. 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 two 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. Then, Mr. Kelly was then moved to the back of a patrol vehicle. RP 63; Exhibit 3 at 04:20 to 04:35. From the identification Mr. Kelly had provided, it was determined Mr. Kelly had a prior conviction that prevented him from possessing a firearm. RP 145.

The State charged Mr. Kelly with unlawful possession of a firearm. CP 1. Mr. Kelly moved to suppress the evidence obtained, arguing that the stop was pretextual and that the investigation of Mr. Kelly's identification and the search and seizure of the gun were unlawful. CP 30-151. The court denied the motion on all grounds and Mr. Kelly was convicted after a stipulated bench trial. CP 170, 208-20.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

**1. Because the purported traffic stop was pretext for a criminal investigation, the evidence recovered should have been suppressed.**

a. Pretextual seizures violate the Washington Constitution.

Under both the federal and state constitutions, warrantless searches and seizures are unreasonable per se unless an exception applies. *State v. Loewen*, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); *State v. Lennon*, 94 Wn. App. 573, 579, 976 P.2d 121 (1999). However, 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).<sup>2</sup> “Under article I,

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<sup>2</sup> Article I, section 7 provides: “INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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.

A traffic stop made without a warrant is constitutional only if based upon at least a reasonable articulable suspicion of criminal activity or a traffic infraction, and only if reasonably limited in scope. *Arreola*, 176 Wn.2d at 292-93 (citing *State v. Ladson*, 138 Wn.2d 343, 350, 351-52, 979 P.2d 833 (1999) and RCW 46.61.021(2) among other authorities). “The use of traffic stops must remain limited and must not encroach upon the right to privacy except as is reasonably necessary to promote traffic safety and to protect the general welfare through the enforcement of traffic regulations.” *Id.* at 293. A traffic stop must be justified at its inception and reasonably limited in scope “based on whatever reasonable suspicions legally justified the stop in the first place.” *Id.* at 294.

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.

The traffic code is extensive and complicated and it is commonly accepted that it is both impossible and undesirable to fully enforce it. *Arreola*, 176 Wn.2d at 294; *Ladson*, 138 Wn.2d at 358 & n.10. "Virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter." *Ladson*, 138 Wn.2d at 358 n.10. Thus, traffic stops are ripe for being abused as the "legitimate" basis for a pretextual, warrantless seizure. The courts must ensure that the police exercise—but not abuse—

discretion in determining which traffic infractions require police attention and enforcement efforts. *See Arreola*, 176 Wn.2d at 294-95.

Washington courts look to a totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his or her behavior to determine whether a traffic stop was pretextual. *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 Washington Supreme Court’s recent decision in *Arreola* supplemented this test in the case of mixed-motive traffic stops. A mixed-motive traffic stop is one “based on both legitimate and illegitimate grounds.” *Arreola*, 176 Wn.2d at 297-98. In that case, the officer admitted he followed a vehicle that matched the description of a possible driving under the influence (DUI) in progress, did not observe any signs of DUI, but observed the vehicle had an altered exhaust in

violation of RCW 46.37.390. *Id.* at 288-89. At that point the officer pulled over the vehicle and seized the driver, observed signs of alcohol use, and discovered the driver had outstanding warrants, on which basis he arrested the driver. *Id.* The Supreme Court held that such a mixed-motive traffic stop is not unconstitutionally pretextual so long as the lawfully-based motive for the stop was actual, independent and conscious. *Id.* at 298-300. Both subjective intent and objective circumstances must be considered in determining whether there was an actual, independent and conscious legal basis for the stop in addition to the unconstitutional, pretextual basis. *Id.* at 300.

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). Findings of fact are reviewed for substantial evidence, which is “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” *State v. Montes-Malindas*, 144 Wn. App. 254, 259, 182 P.3d 999 (2008). In the event of a pretextual stop, all

subsequently obtained evidence from the stop must be suppressed.

*Ladson*, 138 Wn.2d at 357.

- b. A review of the totality of the circumstances demonstrates the traffic stop was pretextual.

Arguably, 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. However, the Court need not determine the reach of *Arreola* here because an analysis of the totality of the circumstances demonstrates the traffic stop here was pretextual in violation of article I, section 7 either because the detectives' proffered basis was not actual, conscious and independent from the unlawful motive or because a general review of the objective and subjective reasons for the stop demonstrate pretext was the actual motive.

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 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; *Montes-Malindas*, 144 Wn. App. at 260. “Pretext is no substitute for reason.” *Ladson*, 138 Wn.2d at 356. In looking beyond the proffered basis for the stop, this Court’s review must include both an objective and subjective review of the totality of the circumstances. 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 followed the vehicle for several minutes and over a mile. *See* Exhibit 1, Slides 1-6 (showing extensive route traveled). 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). And yet the detectives followed the vehicle rather than initiate a stop. 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) (finding relevant to lack of pretext that upon viewing traffic violation 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 reporting 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 (Rurey testifies, “My main focus isn’t traffic citations or traffic enforcement.”). However, Detective Rurey is

familiar with the traffic code as a means of contacting people. RP 17-18. Detective Rurey similarly explained 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 late in the night of February 25, 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 purportedly first decided to stop it. RP 121-22 (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.”). 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. RP 32. And the detectives were working an overtime shift in south Seattle on proactive patrol to ferret out criminal activity. RP 146-48.

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.

- c. Because the traffic stop was a pretextual seizure, the evidence recovered during the stop should have been suppressed.

All evidence subsequently obtained from a pretextual stop must be suppressed. *Ladson*, 138 Wn.2d at 357. After seizing the vehicle, the detectives discovered a gun within Mr. Kelly's reach. This evidence should have been suppressed in the subsequent trial for unlawful possession of a firearm. Mr. Kelly's resulting conviction should be reversed. *See* RP 9 (State's recognition it had no case to pursue absent firearm).

**2. Alternatively, the evidence should have been suppressed because the search violated Mr. Kelly's constitutional right to privacy.**

As discussed, a warrantless search is per se unconstitutional. U.S. Const. amend. IV; Const. art. I, § 7; *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the heavy burden of demonstrating a warrantless search or seizure falls into one of the few

“jealously and carefully drawn” exceptions to the warrant requirement. *Williams*, 102 Wn.2d at 736. The State lacked a basis for asking Mr. Kelly for identification and for seizing the gun after the occupants of the vehicle were removed and restrained. This Court reviews the reasonableness of a search or seizure de novo. *State v. Hoffman*, 116 Wn.2d 51, 97-98, 804 P.2d 577 (1991).

- a. The evidence should have been suppressed because the police did not have an independent basis to ask for identification from Mr. Kelly, a passenger in the stopped vehicle.

Law enforcement officials 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).

Detective Rurey had no reason to suspect that Mr. Kelly was not wearing a seatbelt while the vehicle was in motion. RP 151-52; *see* RP

27-31. As the vehicle came to a stop, the detectives testified they saw movement in the backseat. RP 38-39; CP 218 (FF 12). After the detectives stopped the vehicle, they noticed the rear passengers were not wearing seatbelts. RP 47-48, 152-53. 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 at best marginally connected with the claimed seatbelt violation. As he testified, he decided to ask Mr. Kelly his name “to see what happened from there.” RP 48.

This case is similar to *Allen*, 138 Wn. App. 463. There, the officer stopped a vehicle driven by Peggy Allen for a traffic infraction; Ryan Allen was Peggy’s passenger. *Id.* at 466. The officer discovered

through a records check that Peggy Allen was the protected person in a no contact order but the officer had no information about the person against whom the order had been entered, including the gender or a description of that person. *Id.* at 466. Nevertheless, the officer asked the passenger for identification. *Id.* After a false name was provided, further questioning revealed that Ryan Allen was the passenger and that the no contact order had been entered against him. *Id.* at 466-67. Because the officer had no reason to suspect that the passenger was the person named in the no contact order, this Court held that the officer had no reason to ask for the passenger's name and no reason to arrest Mr. Allen. *Id.* at 471-72.

Like in *Allen*, Detective Rurey lacked an independent basis to request identification from Mr. Kelly. That evidence should have been suppressed.

- b. The evidence should be suppressed because the police lacked a lawful basis for seizing the gun without a warrant.

Because the police had no basis to ask for identification from Mr. Kelly, the police had no reason to know the gun was contraband

when it was in plain view. Thus the detectives had no basis to seize the gun once officer safety was secured.<sup>3</sup>

A search incident to lawful arrest is one of the “few specifically established and well-delineated exceptions” to the warrant requirement, and is conducted for the twin purposes of finding weapons the arrestee might use, or evidence the arrestee might conceal or destroy. *Chimel v. California*, 395 U.S. 752, 762–63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). A search incident to arrest is a limited exception to the warrant requirement based on officer safety concerns and the need to prevent the destruction of evidence. *State v. Snapp*, 174 Wn.2d 177, 187-88, 275 P.3d 289 (2012); *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). This exception to the search warrant requirement is narrowly drawn. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

“[A] search incident to arrest is valid. . . (1) if the object searched was within the arrestee’s control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did

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<sup>3</sup> There is no inevitable discovery exception to the warrant requirement under article I, section 7. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). Accordingly, the unlawfully obtained evidence cannot be saved by the driver’s subsequent consent to a search of the vehicle.

not render the search unreasonable.” *State v. Smith*, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992) (citing *United States v. Turner*, 926 F.2d 883, 887 (9th Cir. 1991)). “An object is, therefore, within the control of an arrestee for the purposes of a search incident to an arrest as long as the object was within the arrestee's reach immediately prior to, or at the moment of, the arrest.” *Smith*, 119 Wn.2d at 681-82.

Mere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the warrantless search. *United States v. Chadwick*, 433 U.S. 1, 15, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 571, 111 S. Ct. 1982, 114 L.Ed.2d 619 (1991); *see Snapp*, 174 Wn.2d at 189. “[W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, or no exigency exists.” *Chadwick*, 433 U.S. at 15. “Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or

destroy evidence, a search of that property is no longer an incident of the arrest.” *Id.* (internal quotations and citations omitted).

In *Arizona v. Gant*, the Supreme Court observed that the search incident to arrest exception had come to be regarded as ““a police entitlement rather than as an exception justified by the twin rationales of *Chimel*.”” 556 U.S. 332, 342, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 624, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (O’Connor, J., concurring in part)). The Court issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Gant*, 556 U.S. at 343; accord *State v. Patton*, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). In *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009), our Supreme Court reaffirmed that only the twin rationales of *Chimel* can justify a warrantless search incident to arrest:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of

arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained.

167 Wn.2d at 777.

For both justifications for the search incident to arrest exception to be present, the arrestee must be able to reach into the area that officers seek to search. *Gant*, 556 U.S. at 339. In other words, an officer may not conduct a warrantless search incident to arrest of an area or object if the officers have gained exclusive control of it. *Id.* “[A]n officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search.” *State v. Byrd*, 162 Wn. App. 612, 617, 258 P.3d 686, review granted 173 Wn.2d 1001, 268 P.3d 942 (2011) (oral arg. heard May 15, 2012) (citing *Gant*, 556 U.S. at 343; *Chimel*, 395 U.S. at 763-64, 768).

Here, the detectives had gained exclusive control of the vehicle, and the rear right seat pocket in particular. Mr. Kelly was restrained in handcuffs and on the ground away from the vehicle. *See* Exhibit 3 at 02:16 to 04:00. Likewise, the driver and two other passengers had been escorted away from the area of the vehicle in handcuffs. Exhibit 3 at 02:16 to 04:00. They were at times placed in the back of patrol vehicles. There were four armed and uniformed officers on the scene.

In light of these circumstances, Mr. Kelly was not within lunging distance of the gun. *See State v. MacDicken*, 171 Wn. App. 169, 175, 286 P.3d 413 (citing *United States v. Shakir*, 616 F.3d 315, 321 (3rd Cir. 2010)), *review granted* 177 Wn.2d 1004, 300 P.3d 416 (2012).<sup>4</sup> Nor should this jealously guarded exception to the warrant requirement be swallowed by the exceptional case where an arrestee has Houdini-like powers or isolated incidents twenty years ago where handcuffs failed. *See id.* at 175-76 & n.17.

In short, the narrow search incident to arrest exception to the warrant requirement does not apply because the occupants of the vehicle were secured, under the control of four armed police officers, and outside reaching distance of the rear seat pocket.

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<sup>4</sup> Oral argument in *MacDicken* is set for September 19, 2013. In that case this Court held that a warrantless search incident to a “high-risk” arrest satisfied article I, section 7 where the defendant was handcuffed in the custody of four police officers who were handling four individuals in the public parking lot of a hotel and the objects searched, two bags, were a car’s length away from the defendant. 171 Wn. App. at 172-73, 175-76. *MacDicken* is distinguishable from the case at bar because the traffic stop and subsequent seizure was not a “high-risk” arrest, Mr. Kelly was not only handcuffed but lying face down on the ground, and the location was more secure than a public parking lot (there were no pedestrians nearby). *See* RP 41 (nothing specific made officer concerned for safety). Moreover, for the reasons set forth *infra*, *MacDicken* was wrongly decided under article I, section 7. If the Court is nonetheless inclined to decide this case by relying on *MacDicken*, Mr. Kelly asks that the Court stay this case until *MacDicken* is final.

- c. On either of these bases, the gun should have been suppressed and the conviction should be reversed.

The exclusionary rule bars the State from presenting at trial evidence seized during an illegal search. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). In our state, “the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). “[W]henver the right is unreasonably violated, the remedy must follow.” *Id.*

Because the gun had been removed prior to the driver’s provision of consent to search, the unlawfully seized evidence cannot be saved under the independent source exception to the exclusionary rule. The gun was illegally obtained and removed from the vehicle prior to the consent search. Thus, unlike in *State v. Coates* and *Gaines* where the search warrants remained valid after illegally obtained information was excluded, here the gun was seized prior to obtaining any lawful basis for the search. *Gaines*, 154 Wn.2d at 717; *State v. Coates*, 107 Wn.2d 882, 886-89, 735 P.2d 64 (1987).<sup>5</sup> The search was

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<sup>5</sup> The exception in *Coates* and *Gaines* is construed narrowly. *Winterstein*, 167 Wn.2d at 634.

executed without authority of law in violation of article I, section 7.

*Gaines*, 154 Wn2d at 718.

In sum, because the gun was obtained in an unlawful warrantless search and Mr. Kelly's identity was illegally obtained, the evidence must be excluded. Mr. Kelly's subsequent conviction should be reversed.

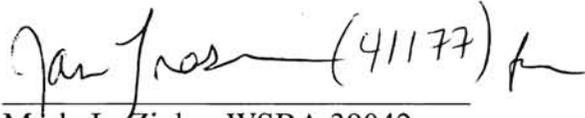
#### F. CONCLUSION

Pretext is "the triumph of form over substance; a triumph of expediency at the expense of reason. But it is against . . . our . . . general rule, which forbids search or seizure absent a warrant. Pretext is result without reason." *Ladson*, 138 Wn.2d at 351. Because the detectives' stop of the vehicle was pretextual, all subsequently obtained evidence should have been suppressed.

The trial court committed further legal error here by permitting the State to introduce evidence obtained unlawfully without a warrant. The detectives lacked a lawful basis to ask Mr. Kelly for identification and to search the vehicle for the gun. On each of these grounds, the subsequently obtained evidence should have been suppressed.

DATED this 15th day of July, 2013.

Respectfully submitted,



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

# **APPENDIX**

**FILED**  
KING COUNTY COURT

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 29<sup>th</sup> and 30<sup>th</sup>, 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

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

- 3 4. It is a common practice of Detectives Rurey and Thomas while on patrol to run license plate  
4 numbers in their computer data base investigating possible violations of law such as  
5 outstanding arrest warrants, stolen vehicle reports, and criminal traffic violations and  
6 infractions irrespective of a car's suspected involvement in gang related criminal activity.
- 7 5. On February 26, 2012 at approximately 12:42 a.m. Detective Thomas and Detective Rurey  
8 were driving northbound in their marked patrol car in full uniform in the 9300 block of  
9 Renton Ave. South. Both Detectives saw a 1993 black Mercedes 4 door sedan with WA lic #  
10 715WHJ make a "U-Turn" and begin to drive southbound on Renton Ave.
- 11 6. Neither Detective Thomas nor Detective Rurey recognized the car from their work as Gang  
12 Unit Detectives and neither could see how many occupants were in the car nor could they  
13 identify any of the occupants in the car because the car had darkly tinted side windows.
- 14 7. At approximately 12:42 a.m. Detective Rurey ran the license number 715WHJ in his  
15 database and discovered that the car had a report of sale dated December 11, 2011 but had  
16 not had a corresponding transfer of title made as required by RCW 46.12.101(6) and SMC  
17 11.22.025. Detectives Rurey and Thomas knew this to be a misdemeanor criminal traffic  
18 offense.
- 19 8. By the time Detective Rurey and Thomas received the information back regarding the  
20 violation of RCW 46.12.101(6) and SMC 11.22.025 they had made a U-Turn and saw the  
21 black Mercedes turning onto 51<sup>st</sup> Avenue and travelling at a high rate of speed estimated to  
22 be at least 60 mph far in excess of the posted speed limit. ~~Based upon this information,~~  
23 Detectives Rurey and Thomas decided to make a traffic stop. ~~As a result of~~  
24 ~~the title transfer violation.~~ **AS A RESULT OF**  
**THE TITLE TRANSFER VIOLATION.** **(BUILT)**
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 DETERMINATION  
ON THE TRAFFIC  
UNIT DO  
ALSO  
ENFORCE  
TRAFFIC  
LAW,  
BY SERVING  
ISSUE  
TICKETS

**Block 4**  
**5-0014**

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 2

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- 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 Sekoia 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.

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.

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23  
24  
CONCLUSIONS OF LAW:

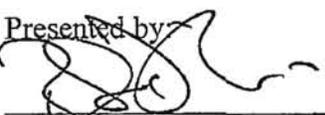
1. The stop of the black Mercedes Benz WA Lic. # 715WHJ (the Car) by Detective Rurey and Detective Thomas was a lawful traffic stop.
2. Neither Detective Rurey nor Detective Thomas used the traffic law violations as a pretext to stop the Car for an unrelated criminal investigation or purpose.
3. Detective 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.

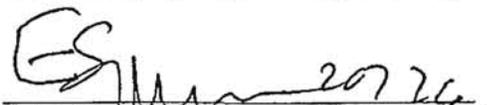
- 1 5. Similarly, it was lawful for Detective Rurey to open the rear passenger side door so he could  
2 see inside the passenger compartment for officer safety purposes because the window on the  
3 passenger side had not been rolled down and he could not otherwise see what the occupants  
4 were doing.
- 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

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69607-6-I
v.	)	
	)	
KENNETH KELLY,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] KENNETH KELLY 362641 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

COURT OF APPEALS  
STATE OF WASHINGTON  
JUL 15 PM 4:49

**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF JULY, 2013.

x \_\_\_\_\_ 

**Washington Appellate Project**  
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Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710