70015-4

70015-4

No. 70015-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LOUIS M. TRENARY,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

United States Supreme Court

Washington Supreme Court

Court of Appeals

Statutes

Other Authorities

A. SUMMARY OF ARGUMENT

Louis Trenary was stopped for an alleged signal infraction by plain clothed officers of the Lynnwood Police Department's Special Operations section. The unit targets major crimes and the officers were driving "looking to address criminal activity." Video from their car shows that Mr. Trenary's turn signal illuminated several times as he approached his turn. When reviewed under the totality of the circumstances then, the officers' stop, was not supported by reasonable suspicion of unlawful conduct sufficient to justify the intrusion. Furthermore, because the stop was done in the unbridled pursuit of more serious offenses for which there was not probable cause, rather than as an actual, conscious and independent cause, it was not a lawful mixed-motive traffic stop. Mr. Trenary's resulting convictions should be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in finding "The care was pulled over for a traffic infraction."

2. The trial court erred in concluding there was probable cause to believe Mr. Trenary committed a traffic infraction in

violation of RCW 46.61.305 and the stop was necessary to address the driving that was witnessed by the officers.

3. The trial court erred by concluding the stop of the car Mr. Trenary was driving was a lawful "mixed-motive traffic stop" rather than an unconstitutional pretext.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Trenary activated the turn signal of the car he was driving which illuminated four times as he approached a stop sign to turn right. RCW 46.61.305(2) requires the "signal of intention to turn ... shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning." Where Mr. Trenary signaled his intention to turn well beforehand and the turn signal illuminated four times as he approached the turn, did he substantially comply with the statute such that there was not reasonable suspicion he committed an infraction sufficient to justify the traffic stop?

2. Article I, section 7 of the Washington Constitution protects citizens from warrantless seizures under some pretext to avoid the warrant requirement. In determining if a law enforcement

officer's stop of a vehicle for a traffic infraction was a pretext to investigate other criminal activity, the court must look at the totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions. Does a de novo review of the totality of the circumstances demonstrate the stop of the vehicle for this alleged infraction was a pretext to fish for other unidentified criminal activity rather than an "actual, conscious, and independent cause?"

D. STATEMENT OF THE CASE

On March 16, 2012, Mr. Trenary was driving in Lynnwood shortly before midnight when Detective Koonce and Officer Olesen saw his vehicle approach the intersection of Butternut and Maple, and turn right. 1RP 3-5, 21-24.[1] The officers were part of a special operations unit dressed in civilian clothes driving a semi-marked car "proactively looking to address criminal activity."[2] 1RP 12-14, 30; CP 186.

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[1] The transcripts are contained in two volumes. Volume One contains the CrR 3.5 and 3.6 hearing and will be referred to as 1RP. The second volume contains the trial and sentencing hearing and will be referred to as 2RP.

[2] Detective Koonce explained that the Special Operations unit will:

The officers' testimony conflicted regarding the reason they stopped Mr. Trenary.[3] Judge Fair, therefore, relied on video from the patrol car shows his turn signal activate at point about 10 seconds before he is stopped. Pretrial Ex. 1; CP 185 (Findings of Fact 5, 6 & 7). The turn signal appears to turn on, then off, then on and off again. See Pretrial Exhibit 1 at 10 sec. A few seconds later the turn signal again illuminates, then goes off, then on and off again as Mr. Trenary approaches the stop sign. Id.

The officers stopped Mr. Trenary immediately after he turned the corner. 1RP 16; CP 186. Although Mr. Trenary exhibited no signs of impairment when contacted, the officers speculated that the "unusual driving behavior" they observed, at that time of night, could be a sign of impairment. 1RP 5, 19.

> ...collect information from sources. We do interviews at jails. We study crime patters. We do intelligence gathering, even just things like investigating who's in jail for what. We get reports from our agency and other agencies on major crimes in the area, try to effect arrest and gather information that will end those criminal activities. ... And we try to focus mostly on major felonies.

1RP 11-12.

[3] Officer Koonce also testified the driver's side tires touched or went over the center line, but Officer Olesen had no recollection of that and testified instead that the car did not come to a complete stop. 1RP 5, 23. As neither of these grounds were supported by the dashcam video, Judge Fair rejected both of them as a basis for the stop. CP 185-86.

Officer Koonce suspected Mr. Trenary had given him a false name so he was detained and subsequently arrested. 1RP 16, 27, 32; CP 186. A search of the car produced evidence of identity theft and forgery for which Mr. Trenary was prosecuted. 2RP 21, 34-49.

E. ARGUMENT

1. WHERE MR. TRENARY'S TURN SIGNAL ILLUMINATED AT LEAST FOUR SEPARATE TIMES AS HE APPROACHED HIS TURN, HE MET HIS STAUTORY OBLIGATIONS AND THE OFFICERS' LACKED REASONABLE SUSPICION SUFFICIENT TO JUSTIFY THE INTRUSION

a. The seizure in an automobile traffic stop requires reasonable suspicion of a violation. Traffic stops are constitutional as investigative detentions under WA Const. Art 1, sec 7 and the Fourth Amendment only if based on at least a reasonable suspicion of either criminal activity or a traffic infraction, and only if reasonable limited in scope.[4] State v. Snapp, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012); State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007).

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[4] WA Const. Art 1, sec 7 provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The Fourth Amendment provides that "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."

> 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 protect the general welfare through the enforcement of traffic regulations and criminal laws.

State v. Chacon Arreola, 176 Wn.2d 284, 293, 290 P.3d 983 (2012).

Officers must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants the intrusion." Snapp, 174 Wn.2d at 197, quoting Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A reasonable, articulable suspicion means there "is substantial possibility that criminal conduct has occurred or is about to occur." Snapp, at 198; State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); State v. Johnson, 128 Wn.2d 431, 454, 909 P.2d 293 (1996). The propriety of the stop is evaluated based on the totality of the circumstances. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

In Mr. Trenary's case, the totality of the circumstances demonstrated his substantial compliance with the statute. In the absence of a reasonable suspicion of a more serious breach of the

rules of the road, the traffic stop was an unlawful exercise of the officers' discretion.

b. The intermittent illumination of Mr. Trenary's turn signal failed to establish reasonable suspicion. The trial judge concluded there was probable cause to stop Mr. Trenary based on the officers perception of a violation of RCW 46.61.305. CP 186. The statute provides, in pertinent part:

> (1) No person shall turn or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.
>
> (2) A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.

RCW 46.61.305 (emphasis added). Giving an "appropriate signal" of the intention to turn is for the obvious purpose of notifying other motorists of that intention so they can govern themselves accordingly. Nystuen v. Spokane County, 194 Wash. 312, 319, 77 P.2d 1002 (1938).[5] Mr. Trenary provided that notice and the subsequent traffic stop was, therefore, unreasonable.

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[5] RCW 46.37.200(2) governs turn signals, in part by providing:

Judge Fair found that the "vehicle signal [came] on, then went off, came on again, then went off again." CP 185; Ex 1. The intermittent illumination of the signal lamp is seen clearly on the camera from the police car. Pretrial Exhibit 1 (beginning at approximately 10 seconds, then again at 14 seconds and finally again as Mr. Trenary pull around the corner at 20 seconds).[6]

Although Judge Fair concluded there was probable cause of a violation RCW 46.61.305, the statute does not define the phrase "given continuously." CP 186. "Continuous" is most commonly understood to mean "continuing without stopping: happening or existing without a break or interruption."[7] In this case, Mr. Trenary did signal his intention to turn right and convey to signal that intention. Obviously, turning the signal light on and leaving it illuminated is not effective and is not consistent with common

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> Any vehicle may be equipped and when required under RCW 46.37.070(2) shall be equipped with electric turn signals which shall indicate an intention to turn by flashing lights showing to the front and rear of a vehicle or on a combination of vehicles on the side of the vehicle or combination toward which the turn is to be made.....

[6] Officer Olesen asserted Mr. Trenary failed to signal at all and did not stop before turning. 1RP 29. The dashcam video contradicted both assertions and the trial court, therefore, did not find he failed to stop and specifically described the repeated illumination of the turn signal. CP 186-86.

[7] See http://www.merriam-webster.com/dictionary/continuous (last accessed 10-14-13).

practice. The statute cited by the trial court does not itself regulate the interval or frequency during which the light is required to flash, nor does it specifically regulate the interval between illuminations.[8] Where Mr. Trenary did signal his intention to turn such that his intention was clear to the officers in the following vehicle, any technical violation of the equipment provisions failed to justify the intrusion.

c. The narrow exception to the warrant requirement for traffic stops was not satisfied. "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..." Chacon Arreola, 176 Wn.2d at 293. To that end, each investigative traffic stop must be justified at its inception and must be limited in scope based on whatever suspicions justified the stop in the first place. Chacon Arreola, at 294, citing State v.

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[8] Washington Administrative Code 204-21-060 (Turn signal lamps) does provide in pertinent part:

> (1) Turn signal lamps visible to approaching or following drivers must:
> (a) Flash at a rate of sixty to one hundred twenty flashes per minute.
> (b) Flash in unison. Except that a turn signal consisting of two or more units mounted horizontally may flash in sequence from inboard to outboard. The lamps may either be extinguished simultaneously or lighted simultaneously.

Ladson, 138 Wn.2d at 350. This is necessary because we retain a substantial interest in privacy within our automobiles. City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988).

In light of the de minimus nature of the potential misconduct found by the trial court, the scope of any intrusion must be similarly minimal. See e.g. State v. Duncan, 146 Wn.2d 166, 177-78, 43 P.3d 513 (2002) (society will tolerate a higher level of intrusion for a more serious crime than it would for a lesser transgression). As the Washington Supreme Court has noted, full enforcement of the traffic laws "is both impossible and undesirable." Chacon Arreola, at 294. Police officers must exercise discretion in deciding which traffic rules to enforce and when. Id. at 295. The stop of Mr. Trenary represented an abuse of that discretion.

d. Evidence flowing from the unlawful detention should be suppressed. Where a traffic stop occurs outside the authority of law as it has been circumscribed by the constitutional protections of privacy, it requires suppression. State v. Ladson, 138 Wn.2d 343, 352-53, 979 P.2d 833 (1999). Evidence developed as a result of this

unlawful detention must be suppressed and the resulting convictions reversed.

2. MR. TRENARY'S RIGHTS UNDER ART. I, SEC. 7 OF THE WASHINGTON CONSTITUTION WERE VIOLATED BECAUSE THE STOP WAS A PRETEXT TO SEARCH FOR POTENTIAL CRIMINAL ACTIVITY RATHER THAN AN ACTUAL, CONSCIOUS AND INDEPENDENT EFFORT TO ADDRESS THE INFRACTION

a. Article I, section 7's protections against warrantless seizures are violated when a traffic stop is used as a pretext to avoid the warrant requirement. A warrantless seizure is per se unreasonable. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004); Ladson, 138 Wn.2d at 349. The warrant requirement is especially important for article I, section 7 analysis because "it is the warrant which provides the 'authority of law' referenced therein." Ladson, 138 Wn.2d at 350. Washington residents have a constitutionally protected interest against warrantless seizures being used as a pretext to dispense with the warrant requirement. Ladson, 138 Wn.2d at 358; Chacon Arreola, 176 Wn.2d at 294 ("A pretextual traffic stop violates article I, section 7 because it represents an abuse of a police officer's wide discretion in

determining the reasonable necessity of a traffic stop in a given case.").[9]

> Thus, a warrantless traffic stop based on mere pretext violates article I, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest.

State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007); Ladson, 138 Wn.2d at 358-59.[10]

b. The trial court failed to properly apply the mix-motive test of *Chacon Arreola*. Pretextual traffic stops, where an 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," remain unconstitutional under Article I, section 7. Chacon Arreola, 176 Wn.2d at 294, quoting Ladson, 138 Wn.2d at 358.[11] "[I]t is not enough for the State to show there was a

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[9] Under the Fourth Amendment, the police may stop a car for a traffic violation even if the traffic stop is a pretext to investigate unrelated criminal activity. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 1774-76, 135 L.Ed.2d 89 (1996).

[10] Terry requires the court to consider whether the officer's action (1) was justified at its inception and (2) reasonably related in scope to the circumstances which justified the interference in the first place. Terry v. Ohio, 392 U.S. at 20.

[11] In Ladson gang emphasis officers testified that while they did not make routine traffic stops on patrol, they utilized the traffic code to pull over people in order to initiate contact and questioning. Ladson, 138 Wn.2d at 346. The officers in Ladson were

traffic violation. The question is whether the traffic violation was the real reason for the stop." State v. Montes-Malindas, 144 Wn.App. 254, 261, 182 P.3d 999 (2008) (quoting State v. Meckelson, 133 Wn.App. 431, 437, 135 P.3d 991 (2006), rev. denied, 159 Wn.2d 1013 (2007)).

An investigative stop for traffic infraction is limited in scope. RCW 46.61.021(2); State v. Glossbrener, 146 Wn.2d 670, 676-77, 49 P.3d 128 (2002). The State, therefore, continues to have the burden of proving the warrantless search was constitutional and the scope was not excessive. In the case of mixed-motive traffic stops, this requires traffic law enforcement be an "actual, conscious, and independent cause of the traffic stop." Chacon Arreola, 176 Wn.2d at 297.

> In other words, despite other motivations or reasons for the stop, a traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is

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familiar with Ladson's co-defendant because of an unsubstantiated street rumor that he was involved in drugs, and accordingly stopped his vehicle on the grounds that his license plate tabs were expired. Id. They used this pretext to arrest Ladson's co-defendant and search Ladson. Id. The Washington Supreme Court reversed the conviction, holding the pretextual stop violated the Washington Constitution. Id. at 352-53.

> reasonably necessary in furtherance of traffic safety and the general welfare.

Chacon Arreola, 176 Wn.2d at 297-98.

As the Court noted, "The trial court should consider the presense of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason..." Id. at 299. While an officer should not be expected to ignore "an appropriate and necessary traffic stop," the record in Mr. Teneary's case demonstrated that this traffic stop was neither appropriate nor necessary. Id. at 993.

The trial court's rejection of two of the three bases the officers cited for the stop illustrates most clearly that traffic safety was neither the "actual," nor a "conscious" basis for the stop. While community safety may be an overarching concern for law enforcement, the fundamentally inconsistent bases cited by the officers for the stop and the speed at which they came upon Mr. Trenary belies the notion that such concerns were a "conscious" and "independent" basis for the stop. This was exactly what Chacon Arreola says we look to determine the sincerity of an officer's commitment to traffic safety. 176 Wn.2d at 299. Those bases were

rejected by Judge Fair and what was left was the wholly inadequate fig leaf of a potential equipment violation to cover the otherwise suspicionless search for criminal activity.

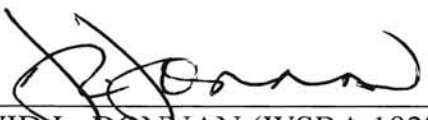
c. Mr. Trenary's conviction must be reversed. When the initial stop of a vehicle is truly pretextual, it is without authority of law, and any evidence seized as a result of the stop must be suppressed. Ladson, 138 Wn.2d at 359-60. Even voluntary consent to a search is vitiated by unlawful detention. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

Because the stop of the car for a traffic infraction was a pretext to search for evidence of other criminal activity, not an actual, conscious and independent basis, the items found in a search of the car should have been suppressed. Without this evidence, the State cannot prove either the identity theft or the forgery charges which must be reversed and remanded for dismissal. Ladson, 138 Wn.2d at 360; State v. DeSantiago, 97 Wn.App. 446, 453, 983 P.2d 1173 (1999).

F. CONCLUSION

Mr. Trenary requests this Court find that he was stopped without reasonable suspicion of an infraction sufficient to justify the intrusion and that his detention was otherwise and unconstitutional seizure for which he is entitled to relief.

Respectfully submitted this 21st day of October 2013.



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

STATE OF WASHINGTON, Respondent/Cross-appellant, LOUIS TRENARY, Appellant-Cross-respondent.	))))))))	NO. 70015-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF OCTOBER, 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:

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SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF OCTOBER, 2013.

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