96815-2

Court Of Appeals No. 76511-6-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent,

vs.

PAMELA E. BELL, Defendant/Petitioner.

PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON STATE SUPREME COURT

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A. Identity of Petitioner

Pamela E. Bell was seized and arrested by the Port of Seattle Police Department in February 2013 at the Seattle-Tacoma Int. Airport. The trial court denied her motion to suppress evidence and her subsequent conviction was affirmed on appeal by the King County Superior Court and Division One of the Court of Appeals.

B. Decision

Petitioner asks This Court to review and reverse the decision of the Court of Appeals, Division One, issued on December 3, 2018, which concluded in an unpublished opinion that she was lawfully seized.[1] The State's motion to publish was denied on January 11, 2019.[2]

Division One found that 1) the trial court's challenged factual finding was supported by substantial evidence; 2) the seizure was justified because the informant tip standing alone was reliable and; 3) officers corroborated the tip because they observed Ms. Bell "[dis]respecting marked lanes of traffic." Relying heavily on federal authority, Navarette vs. California, 572 U.S. ___, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014), for the proposition that DUI allegations necessarily justify stops on less than reasonable suspicion, the Panel concluded that under the totality of circumstances, offers were justified in seizing Ms. Bell.

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[1] A copy of the ruling is attached hereto as Appendix A.

[2] A copy of the Order Denying Publication is attached hereto as Appendix B.

C. Issues Presented for Review

Does the totality of circumstances test for warrantless seizures based on informant tips abrogate the necessity for source veracity and reliability?

Does Washington State constitutional law require a heightened standard of reliability than Fourth Amendment jurisprudence to satisfy Article 1, Section 7's prohibition against interference into individual privacy without authority of law?

D. Statement of the Case

On February 13, 2013, Ms. Bell was seized inside the toll plaza adjacent to Sea-Tac International Airport by Officer Leavengood of the Port of Seattle Police Department based on a telephone report from an anonymous individual of a potentially intoxicated driver attempting to leave the toll plaza. RP at 8.[3] Officer Leavengood did not know who the reporting party was or how the tip was received. Id.

Officer Leavengood, then a trainee,[4] responded to the dispatch and arrived several minutes later. RP at 8. He parked his marked patrol car outside the exit gate, and a toll booth employee pointed towards a vehicle parked off to the side of the toll lanes. RP at 9. The car was clear of the thru lanes, off to the side, not blocking a lane, intruding into a lane, or impeding other motorists. RP at 9-10.

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[3] "RP" refers to the certified verbatim report of proceedings from the June 20, 2014, motions hearing held in the King County District Court.

[4] Officer Leavengood was brand new to the department, having worked there less than a month at the time of the incident. RP at 4.

As the car began moving toward the exit lane where Officer Leavengood had parked, he (without speaking to anyone on scene) approached on foot and commanded the driver to stop. RP at 9-11, 25. The officer was attired in his regulation uniform, replete with badge, gun, duty belt, etc. RP at 25. Another officer arrived within a minute, opened the passenger side door, turned off the engine and took possession of the keys. RP at 13. Ms. Bell was subsequently removed from her vehicle and arrested for driving under the influence. RP at 17.

During the pretrial suppression motion, officers did not relate any individual experience or knowledge about the habits of cars passing through the exit zone. Neither officer suggested that a vehicle pausing on the side parking area was unusual, suspicious or prohibited.

The trial court concluded that although the telephone tip standing alone was unreliable, Ms. Bell's position to the side of the exit lanes corroborated criminal activity because that behavior was "not normal." This was sufficient, in the trial court's opinion, to create a reasonable suspicion of driving under influence.[5]

After the King County Superior Court affirmed, Division One granted Ms. Bell's petition for discretionary review and applied the "totality of circumstances" test endorsed by This Court in State vs. Z.U.E., 183 Wash.2d 610, 352 P.3d 796 (2015). The Court ruled that the tip constituted an eyewitness account corroborated by Ms. Bell's driving and that the officers were entitled to leeway

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[5] The trial court's opinion is attached hereto as Appendix C.

because of the exigency posed by driving under the influence allegations. Ms. Bell seeks further review.

E. Argument

RAP 13.4(b)(1) provides for review where the appellate court's decision conflicts with a decision of This Court; RAP 13.4(b)(2) similarly endorses review where the decision conflicts with prior appellate court rulings. Here, Division One's ruling conflicts with State of Washington vs. Z.U.E., 183 Wash.2d 610, 352 P.3d 796 (2015), and previous precedent, which found a seizure unlawful where, like here, police officers acted on an unreliable conclusory tip from an unknown informant without independently corroborating criminal activity.

In Z.U.E., dispatch received reports of a man carrying a gun "in ready position" in a local park. State vs. Z.U.E. 183 Wash.2d at 613. The first call contained a description of the suspect and his general location. Id. Multiple other callers reported an altercation in the area involving a young male with a gun in a light-colored vehicle. Yet another caller provided a detailed description of an underage female who handled the gun. At least one of the callers provided a name and contact information; others ranged from complete anonymity to name and phone number. State vs. Z.U.E. at 614.

When officers arrived, they did not locate the male but did see two females in the vicinity. After speaking to one witness in person, they concluded that one of them matched the description of the female in the telephone tip and initiated a seizure of her and her companions in a light-colored car, including Z.U.E., who was eventually arrested for obstruction and possession of marijuana.

State vs. Z.U.E. at 614-615. On appeal, the issue was whether the initial seizure was reasonable under the totality of circumstances.

Z.U.E. first reaffirmed that unknown citizen informants are not always entitled to a presumption of reliability, even where named. State vs. Z.U.E. at 622. In Ms. Bell's case, the singular caller was both unnamed and unknown. Both officers admitted they did not know who the reporting was. RP at 8. Like in Campbell vs. Department of Licensing, 31 Wash. App. 833, 644 P.2d 1219 (1982), *cited by* Z.U.E., the individual who pointed at Ms. Bell's vehicle was otherwise unknown. The Court of Appeals, however, suggested that source veracity is insignificant in the totality of circumstances approach announced in Z.U.E.[6]

Z.U.E. next reaffirmed that an informant tip must contain enough objective facts to justify the detention. State vs. Z.U.E. at 623. "Although we presume that Dawn reported honestly, the officers had no basis on which to evaluate the accuracy of her estimation. We follow our holding in Sieler and conclude that this 911 caller's assertion cannot create a sustainable basis for a Terry stop." State vs. Z.U.E., 183 Wash. 2d 610, 623, 352 P.3d 796, 802 (2015). Here, although the "factual basis prong" was wholly lacking (the caller offering nothing but the "possibly intoxicated" allegation), Division One found this immaterial based its assumption[7] that the caller had personal contact with Ms. Bell.

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[6] *See* Court of Appeals Decision at Page 8, Footnote 2.

[7] The caller offered no details about whether the reported observation was obtained first-hand or from afar.

In addition to the obvious undermining of Z.U.E., this conclusion conflicts with several other appellate rulings: "[A]n officer's information regarding the factual basis for the informant's conclusion that criminal activity has occurred is relevant to the totality of the circumstances analysis." State vs. Howerton, 187 Wash. App. 357, 367-68, 348 P.3d 781, 787, review denied, 184 Wash. 2d 1011, 360 P.3d 818 (2015) *citing* the Court of Appeals ruling in State vs. Z.U.E., 178 Wash. App. 769 (2014). An informant's "bare conclusion unsupported by any factual foundation" is insufficient to support an investigatory stop." Id. at 368-69 *citing* State vs. Sieler, 95 Wash.2d 43, 49 (1980).

Ms. Bell posits that This Court did not intend to eliminate these factors or minimize their importance in an overall reasonableness analysis. Although the absence of one or the other may not always be a *per se* bar to a lawful seizure, they remain critical pieces in evaluating reliability in informant tip cases. "[W]e acknowledge that both the 'veracity' and 'factual basis' prongs are helpful to the reliability inquiry but we decline to adopt a rule whereby each prong is treated as a necessary element." State vs. Z.U.E., 183 Wash.2d 610, 620,352 P.3d 796, 801 (2015).

Although State vs. Z.U.E offers a "flexible approach" requiring "an individualized review," it does not alter preexisting standards requiring sufficient "indicia of reliability" in an informant tip to justify police intrusions. Therefore, This Court should accept review to consider whether Division One properly accounted for these factors and to clarify that "veracity and factual basis" together continue to dictate the sufficiency of an informant tip.

The Court of Appeals also departed from established caselaw in ruling that the anonymous tip here was generated from an eyewitness account. State vs. Vandover, 63 Wash. App. 754, 822 P.2d 784 (1992), is instructive. In that case, "there was no indication on the record whether the anonymous informant...was an eyewitness to the event described. The only report there was 'a man in a gold colored Maverick was brandishing a sawed-off shotgun' in front of a restaurant in downtown Port Angeles." Vandover at 784-85. Vandover reminded that "officers may not presume that informants' tips are eyewitness accounts." State vs. Vandover, 63 Wash. App. 754, 822 P.2d 784 (1992).

Here, Division One speculated that the reporting party must have had some personal contact with Ms. Bell, but the record belies this assumption. Indeed, since the reporting party was unidentified and offered no factual support, the tip itself did not imply an eyewitness account. Compare, for example, with Navarette vs. California, 572 U.S. 393, 399 (2014), where the United States Supreme Court emphasized the importance of personal knowledge:[8]

> "By reporting that she had been run off the road by a specific vehicle—a silver Ford F150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." Navarette vs. California, 572 U.S. 393, 399 (2014).

The Court of Appeals here departed from the rule in Vandover that we may not assume an anonymous report is an eyewitness account. Since the "bare-bones" allegation of an intoxicated driver, without any supporting factual detail,

did not "necessarily imply" first-hand knowledge, the Court erred in according the tip enhanced reliability as an eyewitness account.[9]

Similarly, the toll employee's gesture toward Ms. Bell's vehicle offers little. As in State vs. Cardenas-Muratalla, 319 P.3d 811, 814-16 (2014) *citing* Florida vs. J.L., *supra*, "an informant's accurate description of a subject's readily observable location and appearance is reliable in that it can help the police correctly identify the person about whom the informant is speaking. Such a tip does not, however, 'show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.'"

Notably, Navarette also relied heavily on the fact that the report was received through the 911 system which, it held, enhanced reliability by providing an effective tracing mechanism.[10] The Court of Appeals here rejected the idea that the call was received through a business line, finding no support for that assertion in the trial court record.[11] Likewise, however, the record reveals no evidence that the report was received through the 911 system. Officers testified only that they

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[8] The Court compared its case with Florida vs. J. L., 529 U.S., at 271, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), where the tip "provided no basis for concluding that the tipster" had personal knowledge of the claimed behavior.

[9] To the extent the Court relied on the report of Ms. Bell "attempting to leave the toll plaza," as an eyewitness account, it erred because such an observation neither implies personal contact nor was it corroborated by Ms. Bell's position upon the officers' arrival.

[10] Navarette vs. California, 572 U.S. at 400-401.

were dispatched by their communications department and did not know who made the report, or how. Since the origin and manner of the call here is entirely unknown, reliance on the reliability of the 911 system is misplaced.

Next, Division One improperly expanded an officer's entitlement to subsume any observation, no matter how innocuous, into the category of "suspicious" or "criminal" behavior. For example, the Court determined that Ms. Bell's position to the side of the exit lanes became "incriminating" because officers had general experience in DUI investigations, without any connection between the two. This conclusion flies in the face of previous authority such as State vs. DeArman, 54 Wash. App. 621, 774 P.2d 1247 (1989), which rejected the idea that a vehicle momentarily paused in the roadway creates a reasonable suspicion of impaired driving. The idea that any observation, no matter how innocuous, necessarily morphs into corroborative conduct because officers have training in criminal investigations sets a dangerous precedent.

The Court further suggested that officers confirmed impairment because Ms. Bell experienced "difficulty respecting the marked lanes of traffic."[12] Apparently, Division One reached this conclusion based on the fact that she would have had to traverse other lanes to enter the open exit lane. This stretches common sense to the point of absurdity - if the area consisted of 12-15 exit lanes with Ms. Bell parked off to the side, and lane number 8 (presumably a middle lane position) had an open cashier, Ms. Bell would have had no option but to

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[11] Court of Appeals decision at Page 11.

[12] Court of Appeals decision at Page 12.

cross over the adjacent lanes to reach the toll booth; indeed, there was no other way out of the toll plaza. This neither illustrates a "disrespect for marked lanes of traffic" nor displays poor driving.

State vs. Carlson, 130 Wash. App. 589, 123 P.3d 891 (2005), established a more appropriate standard. There officers acted on a telephone report from a store manager who reported that two individuals were involved in suspicious activity because they each purchased items that could be used in the manufacture of methamphetamine. The shoppers' physical appearance was one factor that roused the suspicion of the manager (they were unkempt and poorly dressed), as was their entry together into the store followed by their immediate separation from one another.

Although police confirmed the reporting party's suspect description, they observed no unlawful activity. Carlson reiterated that innocuous activity, even to trained officers, does not support reasonable suspicion for a warrantless seizure. Carlson at 593. The Court's concern that lawful behavior could be mistaken for criminal activity without sufficient grounds is well-taken, as illustrated by the Court of Appeals' decision in Ms. Bell's case. *See Also* State vs. Hopkins, 128 Wash. App. 855, 117, P.3d 377 (2005) (suspect identification was insufficient corroboration where officers observed only innocuous activity).

Ultimately, officers did not observe criminal activity in this case and did not confirm the alleged illegal behavior of a "possibly intoxicated driver." The Court of Appeals' holding to the contrary should be reversed.

Finally, RAP 2.3(d)(2) authorizes review where a significant question of constitutional law is at issue. Division One implicitly expanded Z.U.E.'s sliding scale requiring less reliability for "exigent circumstances" associated with driving under the influence allegations even in circumstances far from the "imminent accident" at issue in Navarette vs. California, 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014). Ms. Bell's case presents the question of whether the Washington State Constitution requires a heightened standard than was applied by the majority's Fourth Amendment analysis in Navarette. In Z.U.E.,[13] This Court left this question open and Ms. Bell's case provides an appropriate opportunity to address it.

Washington State constitutional history and text support an analysis independent from Fourth Amendment jurisprudence when individual privacy rights are implicated. *See E.g.* State vs. Young, 123 Wash. 2d 173, 181, 867 P.2d 593, 597 (1994), which provided in-depth consideration of each relevant factor supporting an independent state constitutional framework.

"It is already well established that Article I, Section 7, of the State Constitution has broader application than does the Fourth Amendment of the United States Constitution." State vs. Ladson, 138 Wash.2d 343, 348, 979 P.2d

[13] Navarette addressed only the Fourth Amendment's reasonableness test; it did not consider the greater protections afforded to Washington citizens under Article One, Section Seven. "We do stress that although the Fourth Amendment framework guides our analysis here, article I, section 7 may require a stronger showing by the State to establish that the suspicion was reasonable under the circumstances." State vs. Z.U.E., 183 Wash. 2d 610, 621, 352 P.3d 796, 801 (2015).

833 (1999) (internal citations omitted). "Our Supreme Court has held that Article I, Section 7 'clearly recognizes an individual's right to privacy with no express limitations, and places greater emphasis on privacy than does the Fourth Amendment.'" Robinson vs. City of Seattle, 102 Wash. App. 795, 809, 10 P.3d 452, 459–60 (2000) (internal citations omitted).

In Navarette, specific allegations of dangerous driving - that the driver "ran the reporting off the roadway" prompted officers to seize the vehicle. As the Court noted, "a driver's claim that another vehicle ran her off the road, however, necessarily implies that the other car was driven dangerously...The 911 caller in this case reported more than a minor traffic infraction *and more than a conclusory allegation of drunk or reckless driving.* Instead, she alleged a specific and dangerous result of the driver's conduct." Navarette vs. California, 134 S.Ct. at 1691 (Emphasis Added). Thus, the Court relied heavily on an ongoing and **actual imminent danger** as justification for the seizure. The High Court cautioned, however:

> Unconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect. But a reliable tip alleging the dangerous behaviors discussed above generally would justify a traffic stop on suspicion of drunk driving. Navarette v. California, 572 U.S. 393, 402 (2014).[14]

Whether DUI allegations necessarily provide officers with the "authority of law" required to justify a seizure under Article 1, Section 7 requires a separate

analysis. Washington caselaw evaluates reasonableness in light of the level of reported public danger but no authority has decided DUI allegations in and of themselves justify warrantless seizures. Since tips involving weapons generally constitute the greatest threat to public safety, they provide a good analytical framework. For example, on a sliding scale of police reasonableness simple gun possession tips are treated differently from cases involving shooting, brandishing, etcetera. *See* State vs. Cardenes-Muratalla, 179 Wash. App. 307, 313 Ft.Nt. 12, 319 P.3d 811 (2014) for a detailed discussion of various firearms cases.[15]

State vs. Moreno, 173 Wash. App. 479, 294 P.3d 812 (2013), is one example where officers were justified in stopping a vehicle to investigate an informant tip because: 1) there were multiple 911 reports of *active gunfire*; 2) the reports identified a location only one block away just minutes before the seizure; 3) the officer had extensive previous experience in investigating gang related crimes, and in particular with gangs in that specific area; 4) the car was hurrying though a deeply rutted alleyway that normally necessitates slower travel.

Unlike cases such as Navarette and Moreno, Ms. Bell's circumstances did not involve an ongoing emergency or an imminent threat to human safety. When officers arrived on scene to investigate the tip, she was parked off to the side of

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[14] Likewise, the Court suggested that "conclusory allegation[s] of drunk or reckless driving" would not suffice. Navarette at 403.

[15] Division Three, in a recently published opinion, reaffirmed this distinction. *See* State vs. Tarango, issued 1-31-19, 35305-2-III.

the exit lanes in an enclosed area away from other cars; officers were not even sure if her ignition was engaged at that time. When Ms. Bell did begin moving, she did not rev her engine, slam on the accelerator and "peel out," cut off other cars, or drive in any erratic manner whatsoever. While there may have been other vehicles in the general vicinity, no evidence suggests they were endangered, or even impacted, in any way.[16]

Conversely, Officer Leavengood parked his vehicle just outside of the toll gate exit and had the opportunity to speak with the toll employee prior to contacting Ms. Bell; he chose not to. Importantly, officers did not express a belief that immediate action was based on any behavior by Ms. Bell.

Existing Washington caselaw such as Campbell vs. Department of Licensing, 31 Wash. App. 833, 644 P.2d 1219 (1982), suggests that a DUI allegation does not relieve the State from demonstrating the tip was reliable. In that case, a motorist flagged down an officer and pointed out another vehicle as a drunk driver. In response, the officer tracked down the suspect car and initiated a traffic stop.

Our courts invalidated the seizure because the tip was merely conclusory, concluding "[i]n the absence of any corroborative information or observation, a police officer is not authorized to stop a vehicle on the sole basis that a passing motorist points to a vehicle and announces that it is being driven by a drunk

[16] Analogously, in State vs. Jones, 186 Wash. App. 786, 347 P.3d 483 (2015), under a "totality of circumstances" approach, a seizure was invalidated where a *de minimus* lane crossing did not endanger other motorists.

driver." Campbell vs. State of Wash. Dep't of Licensing, 31 Wash. App. 833, 835, 644 P.2d 1219, 1220 (1982). Importantly, Campbell specifically held that potential danger to the public does not dispense with the necessity for the existence of specific facts supporting the allegation of criminal behavior. Id. at 837.

In sum, conclusory allegations of "possibly intoxicated" drivers do not release all safety mechanisms holding back the floodgates of overzealous police actions. "Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference." Navarette vs. California, *Justice Scalia dissenting,* 572 U.S. 393, 414 (2014). This Court should clarify that blanket DUI allegations do not *per se* invoke an exigency sufficient to override an otherwise unreliable informant tip under Article 1, Section 7.

G. Conclusion

Our state constitution prohibits warrantless seizures just such as occurred here. The telephone tip lacked source veracity and reliability, and officers failed to corroborate illegal activity. The narrowly-drawn warrant exception should not be extended to justify Ms. Bell's seizure. As the United States Supreme Court said in Gouled vs. United States, 255 U.S. 298, at 304, 41 S.Ct. 261, at 263, 65 L.Ed. 647:

> It has been repeatedly decided that these Amendments (the Fourth and Fifth) should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible of courts or by well-intentioned but mistakenly overzealous executive officers.

More appellate guidance is needed to ensure that the totality of circumstances approach does not abrogate established components of informant reliability. Therefore, Ms. Bell urges This Court to accept discretionary review and reverse.

DATED this 4th day of February, 2019.

Respectfully Submitted,

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PAMELA E. BELL, Petitioner.	DIVISION ONE No. 76511-6-I UNPUBLISHED OPINION FILED: December 3, 2018

DWYER, J. — Following a traffic stop, Pamela Bell was charged with and convicted of driving under the influence. On discretionary review, Bell avers that the trial court erred by denying her motion to suppress evidence gathered as a result of the stop, claiming that substantial evidence did not support the trial court's finding that her driving was abnormal, thus justifying the officers' decision to initiate an investigatory detention. Finding no error, we affirm.

I

On February 13, 2013, two officers of the Port of Seattle Police Department responded to a call concerning an intoxicated female driver "attempting to leave" the toll plaza outside the parking garage at SeaTac International Airport. The identity of the caller was unknown. The toll plaza consists of between 12 and 15 one-way lanes of traffic between the garage's exit and a series of toll booths. When Officer Ryan Leavengood and his police training officer arrived at the toll plaza, traffic within the plaza was moderate, with

between 15 and 20 vehicles either driving through the area or queuing at the toll booths.

Upon the officers' arrival, a toll booth employee gestured to them and pointed to a "small coupe style vehicle that was parked inside the toll plaza." The officers could not drive to the vehicle because their patrol car was parked on the other side of the one-way toll gates. The coupe style vehicle, which was operated by Bell, was near the southeast side of the toll plaza and was not in any lane of traffic. The officers, unable to tell if the vehicle's engine was running, walked toward the vehicle to speak with its driver. Officer Leavengood sought "to ensure that [Bell] was in fact not impaired before she took off through the toll plaza."

As Officer Leavengood approached, Bell's vehicle moved from the southeast side of the plaza and across several lanes into exit lane 8 or 9. Officer Leavengood told Bell to stop, and she did. A second patrol car, driven by Officer Raymond Blackwell, arrived at the scene from the parking garage and parked behind Bell's vehicle.

Officer Leavengood spoke with Bell and noticed signs that she was intoxicated. Bell agreed to perform voluntary field sobriety tests. After a poor performance on each test, she was placed under arrest.

The State charged Bell with driving under the influence (DUI) pursuant to RCW 46.61.502. Before trial, Bell moved to suppress evidence gathered from that which she alleged to be an unlawful stop. The district court held a hearing on this motion at which Officers Leavengood and Blackwell testified. Officer

Leavengood testified that he learned, from dispatch, that there was "an intoxicated driver attempting to leave the toll plaza." Blackwell testified that the officers were advised that an unnamed "toll plaza individual" had reported an intoxicated female driver in a vehicle with Alaska license plates. Both officers testified to their training and experience in identifying impaired drivers: Leavengood estimated that he had made between 50 and 60 investigations for DUI during his career, while Blackwell stated that he had made over 200 such investigations. Both officers testified that a driver's failure to obey lane markings is one indicator that the driver may be impaired.

The trial court issued a written order denying Bell's motion to suppress. In its order, the trial court noted that the officers acted in response to both the telephone call from the unidentified informant and the tip from the toll plaza employee who "flagged down" Leavengood and "pointed to the defendant's coupe style vehicle," and further, that "[w]hen Officer Leavengood and Officer Blackwell arrived, they observed the identified vehicle sitting inside the toll plaza area, but not moving. This is not normal behavior for vehicles approaching the toll plaza." The trial court concluded that, given that the officers saw Bell's vehicle "stopped in the toll plaza entrance in a location that is not designed or normally used for such stops," the officers had "sufficient corroboration of the toll worker's identification to justify an initial contact." Thus, the trial court denied Bell's motion.

Following a jury trial, Bell was found guilty of DUI. Bell, assigning error to the denial of her motion to suppress evidence, appealed the conviction to the

superior court, which affirmed. We subsequently granted Bell's motion for discretionary review.

II

Bell first assigns error to the trial court's factual finding that the initial, stationary position of her vehicle on the side of the toll plaza was "not normal behavior for vehicles approaching the toll plaza." This is erroneous, she asserts, because substantial evidence did not support the finding. We disagree.

In reviewing the denial of a motion to suppress, we determine whether the trial court's findings of fact are supported by substantial evidence. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is "sufficient . . . to persuade a fair-minded person of the truth of the stated premise." State v. Thetford, 109 Wn.2d 392, 396, 745 P.2d 496 (1987). Conclusions of law from an order pertaining to the suppression of evidence are reviewed de novo. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

The testimony offered at the pretrial hearing on Bell's motion to suppress gave the trial court a sufficient basis to conclude that parking at the edge of the toll plaza was not normal driving behavior. Officer Leavengood stated that the area in which Bell's car was parked was "outside of the garages" where other cars would park. Officers Leavengood and Blackwell both testified that the portion of the plaza wherein Bell was located did not contain any parking area, but, rather, contained between 12 and 15 lanes dedicated to through traffic. Officer Leavengood also testified that, at the time he arrived, between 15 and 20 cars were either "in line waiting to get out" of the plaza or "exiting the parking

structure on their way to the toll plaza," making Bell's stationary vehicle stand out.

Based on these observations, a fair-minded person could determine that the position of Bell's parked car, the only parked car in this location, was unusual.

Bell contends otherwise, presenting the narrative that she had momentarily stopped on a "shoulder" of the toll plaza. She offers that vehicles may often be found stopped on the shoulder of a roadway for innocent reasons, that the officers had likely seen vehicles in such positions before, and that "it is not difficult to imagine circumstances that would involve [this shoulder area's] regular use [for parked vehicles]." She also avers that Officer Leavengood did not have the "special training transforming the observation into suspicious behavior," and that Leavengood may not have been experienced enough in his position with the Port of Seattle Police to ascertain what was or was not unusual behavior for vehicles in this toll plaza.

Bell, however, does not point to any evidence beyond the realm of the hypothetical indicating that drivers regularly stopped on the side of the toll plaza before exiting. Nor does she present any authority indicating that a police officer cannot make determinations of driver and vehicle behavior on a roadway unless they have reached some minimum threshold level of familiarity with that particular road surface. Even if Officer Leavengood had not previously had the opportunity to see typical traffic flow in the toll plaza, he gained that opportunity when he arrived on the scene and saw various vehicles moving through in marked lanes while Bell failed to do so. Bell's claim about Leavengood's lack of

investigative detention must also connect the suspect to the particular crime that the officer is investigating. Z.U.E., 183 Wn.2d at 618.

The reasonableness of an officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008). This determination takes into account an officer's training and experience and "'commonsense judgments and inferences about human behavior.'" Lee, 147 Wn. App. at 917 (quoting Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)). "[C]ircumstances which may appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience." Samsel, 39 Wn. App. at 570-71; accord United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Pursuant to both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, reasonable suspicion may justify a detention even when a suspect is subsequently found to be innocent of any misconduct.

> It is well established that, "[i]n allowing [investigative] detentions, Terry accepts the risk that officers may stop innocent people." Wardlow, 528 U.S. at 126. However, despite this risk, "[t]he courts have repeatedly encouraged law enforcement officers to investigate suspicious situations." State v. Mercer, 45 Wn. App. 769, 775, 727 P.2d 676 (1986).

Lee, 147 Wn. App. at 918 (some alterations in original). Thus, when an individual's activity is consistent with criminal activity, even if it might also be consistent with noncriminal activity, a detention may be justified. Kennedy, 107 Wn.2d at 6; accord United States v. Arvizu, 534 U.S. 266, 274, 122 S. Ct. 744,

151 L. Ed. 2d 740 (2002). We have previously rejected the notion that incriminating police observations must be analyzed individually and severed from their context as being inconsistent with the totality of the circumstances analytical mandate. State v. Marcum, 149 Wn. App. 894, 907, 205 P.3d 969 (2009) (citing Arvizu, 534 U.S. at 274).

Our Supreme Court recently reiterated that the proper standard for determining whether police suspicion resulting from an informant's tip is sufficiently reasonable to support a Terry stop is the totality of the circumstances test. Z.U.E., 183 Wn.2d at 624. This test is distinct from the two-part reliability inquiry derived from Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), that is used to make determinations of probable cause for purposes of obtaining a search warrant.[2] Z.U.E., 183 Wn.2d at 624. Under a totality of the circumstances analysis, an informant's tip supports reasonable suspicion sufficient to justify an investigatory detention if it, in the context of all the available facts, "possesses sufficient 'indicia of reliability.'" State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (quoting Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

[2] The source's veracity and the basis of the informant's knowledge, the two "prongs" of the Aguilar-Spinelli test, are not treated as necessary elements that must be established under a "totality of the circumstances" inquiry. Z.U.E., 183 Wn.2d at 620. Bell appears to rely on the Aguilar-Spinelli two-prong test to assert that a source's veracity must be independently proven, even in a totality of the circumstances analysis. Her contention is based upon a misconstruction of the Supreme Court's holding in Z.U.E., which eschewed Aguilar-Spinelli's two-prong test in favor of the totality of the circumstances inquiry as applied in Lee and Marcum. Z.U.E., 183 Wn.2d at 620-21.

We determine whether an informant's tip possesses the required "indicia of reliability" by inquiring whether there exist (1) circumstances establishing the informant's reliability, or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion. Z.U.E., 183 Wn.2d at 618 (citing Sieler, 95 Wn.2d at 47; State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975)). "These corroborative observations do not need to be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts." Z.U.E., 183 Wn.2d at 618.

The danger presented to the public by the crime alleged is also part of the totality of the circumstances analysis. Courts have recognized that ongoing emergencies support broader law enforcement discretion than does suspicion of unlawful, but not imminently dangerous, activities. "An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not." State v. McCord, 19 Wn. App. 250, 253, 576 P.2d 892 (1978). "[T]he seriousness of the criminal activity reported by an informant can affect the reasonableness calculus which determines whether an investigatory detention is permissible." Sieler, 95 Wn.2d at 50 (citing Lesnick, 84 Wn.2d at 944-45).

Accordingly, "when a tip involves a serious crime or potential danger, less reliability may be required for a stop than is required in other circumstances." Z.U.E., 183 Wn.2d at 623. Z.U.E. specifically recognized impaired driving as an offense inviting such potential danger, based on the reasoning of Navarette v. California, 572 U.S. 393, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). In

Navarette, the informant was a 911 caller who reported that the suspect had run her off the road with his vehicle. 572 U.S. at 395. In response, a police officer followed the suspect's vehicle for several miles but did not observe any indication of impaired driving. Nevertheless, the Court held that the special danger presented by intoxicated drivers justified the suspect's investigative detention "because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences." Navarette, 572 U.S. at 404. Thus, the special danger posed by an impaired driver on a public roadway may be a significant factor in the totality of the circumstances informing an officer's reasonable, articulable suspicion.

The central issue herein is whether, under the totality of the circumstances, the anonymous informant's tips possessed the necessary "indicia of reliability" to justify Officer Leavengood's suspicion that Bell was driving under the influence of intoxicants. In fact, Officer Leavengood received two tips: first, information in the telephone call relayed through the Port of Seattle's police dispatch, and second, the gesture toward Bell's car by a toll booth employee on the scene. Bell avers that neither possessed the requisite indicia of reliability to justify the officers' subsequent actions. Bell emphasizes that the officers did not ascertain the identity of the individual who placed the call prior to making contact with Bell, that the officers had no indication that the tip was based on an eyewitness observation, and that no other details or facts supported the caller's report of drunk driving.

Neither officer spoke directly with the informant who placed the telephone call; as a matter of routine, both received the tip via the dispatcher. The record, however, indicates that the officers knew from the dispatch that the caller was a "toll plaza individual."[3] In the immediacy of the situation, with the possibility of an intoxicated driver about to enter a public highway, the police dispatcher conveyed the necessary information given by the informant to the officers for their response. Police are not required to distrust ordinary citizens who report crimes, and "'[c]ourts are not required to sever the relationships that citizens and local police forces have forged to protect their communities from crime.'" Lee, 147 Wn. App. at 919 (alteration in original) (quoting United States v. Christmas, 222 F.3d 141, 145 (4th Cir. 2000)).

Further, the observations relayed by the call implied that the informant was, in fact, an eyewitness to Bell's driving, as the informant identified Bell's gender and her car's Alaska license plates, while also communicating that Bell was "attempting," impliedly without success, to exit the toll plaza even as other traffic moved through the plaza normally.

Bell does not contend that the second tip was not reliable. It is not established in the record that the gesture was made by the same person who placed the telephone call, but it is plain that the second tip was based on eyewitness observation. Indeed, only two possibilities exist: either the toll booth employee who gestured toward Bell's vehicle was the *same* person who made

[3] Bell contends that the first informant called the police on a non-emergency line, with the implication that this rendered the informant less accountable than would a call to a 911 system. However, her citation to the record does not support this assertion, nor does any evidence elsewhere in the record indicate that a non-emergency line was used in lieu of 911.

the initial report *or* that employee was the *second* person to request police attention to Bell's driving. In either circumstance, the credibility of the initial report is enhanced.

Importantly, the employee who gestured at Bell's vehicle was a person known to the police—even if the officers did not know that person's name, the person was present before them and (as an employee at the toll booth) was easily identifiable. This also enhances the credibility of the report.

In disputing the reliability of the informants, Bell overlooks the fact that an informant's reliability need only be independently shown in the absence of a corroborating observation. Z.U.E., 183 Wn.2d at 618-19. The informant's tips herein did not lack corroboration. Officer Leavengood saw Bell's vehicle parked outside any lane of a multi-lane roadway, and not in an area designated for parking, while other vehicles were moving unimpeded through the toll plaza. Then, Leavengood saw Bell move from the side of this roadway into a lane. Both officers testified that there were between 12 and 15 lanes in the toll plaza, and Officer Leavengood stated that Bell was parked on the edge "past lane 12 or 15" and then moved into lane 8 or 9. Bell would have had to cross several lanes to get to this position, and Officer Leavengood would have seen her perform this maneuver. Based on his experience dealing with impaired drivers and his knowledge that such drivers often experience difficulty respecting marked lanes of traffic, the record shows that he had before him sufficient facts to corroborate the tip. Under the totality of the circumstances, the informant's tips possessed sufficient indicia of reliability to justify Leavengood's reliance thereon.

Bell lastly contends that her conduct presented no immediate danger to the public because her vehicle was in a secure, gated area and the exit was blocked by Officer Leavengood's patrol car. For several reasons, this in no way eliminates the danger posed to the public. First, Bell moved her vehicle on to a roadway with moving traffic. The other vehicles that the officers observed moving through the plaza at that time were all endangered by the presence of an impaired driver. Second, the toll plaza had between 12 and 15 lanes, and the fact that one lane was blocked by a patrol car would not have precluded Bell from using any of the other lanes to exit and access a more heavily trafficked public highway. The record shows that the police were aware of motorists who had driven directly through the toll gates and broken the swinging arms of the gates. Thus, it cannot be said that her impaired driving posed significantly less danger than is typical of other forms of the same offense.

The officers who detained Bell acted lawfully. The trial court did not err in denying the motion to suppress.

Affirmed.

We concur:

APPENDIX A

Appendix B

FILED
1/11/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PAMELA E. BELL, Petitioner.	DIVISION ONE No. 76511-6-I ORDER DENYING RESPONDENT'S MOTION TO PUBLISH OPINION

The respondent, State of Washington, having filed a motion to publish opinion, and the hearing panel having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore, it is hereby

ORDERED that the unpublished opinion filed December 3, 2018, shall remain unpublished.

FOR THE COURT:

Dwyer, J.

Appendix C

King County District Court
South Division, MRJC Courthouse

State of Washington	)	
	)	No. CPS017829
Plaintiff	)	
	)	
vs.	)	
	)	ORDER and FINDINGS
	)	ON CRIMINAL MOTION
	)	
BELL, PAMELA E	)	
Defendant	)	

This matter came before the court for motion hearing on June 20, 2014. The following exhibits were marked.

No	Description
A	Officer Leavengood Report (Refreshment only)
B	Constitutional Rights (admitted for purposes of this hearing)
C	DUI interview (admitted for purposes of this hearing)
D	Officer Blackwell Report (Refreshment only)

Findings of Fact

On February 13, 2013 at approximately 7:15pm, Officer Ryan Leavengood (OL) of the Port of Seattle Police Department received a dispatch from the Seattle Police Dispatcher that an intoxicated driver attempting to leave the SeaTac Airport toll plaza. There was a Training Officer (TO) in the vehicle with OL.

When OL arrived, he was flagged down by a Toll Plaza employee who pointed to the defendant's coupe style vehicle. Defendant's vehicle was parked directly inside the toll plaza on the south or east side, past lane 12 or 15 on the far right side. There were other vehicles in the area. According to OL, traffic was moderate with 15-20 vehicles waiting or exiting the parking structure.

OL parked outside the Toll Plaza. He walked through the vehicle turnstiles inside the Toll Plaza.

As he approached the defendant's vehicle it began to move and pull into toll lane 8 to leave. While defendant was still moving, OL approached the driver's side window on foot. OL identified himself and asked the defendant to "hold a second". OL asked the defendant to stop her vehicle. She responded in a slurred voice. Through the open window OL detected the odor of intoxicants coming from the defendant's mouth and from the passenger compartment of her vehicle. The defendant was alone in the vehicle.

Officer Raymond Blackwell (OB) had also responded to the scene in a separate vehicle. He testified that he had been advised by dispatch that an Alaska plated vehicle was blocking the toll plaza. He was not advised as to who had made that call.

Officer Blackwell came from inside the parking plaza. While OL's patrol vehicle was on the exit side of the Toll Plaza, OB's vehicle was on the entrance side. OB pulled his car behind the defendant's car, protecting OL and the defendant's vehicle from other traffic. OB described the vehicle traffic on the entrance side of the toll plaza as "light".

When OL approached the defendant's car, OB got out of his patrol car, and also approached the defendant's vehicle. However, OB approached the defendant's car from the passenger side.

Despite OL's request that she stop, the defendant began to pull her vehicle forward. OL again asked her to stop. Her vehicle lurched forward, and OL again asked her to stop. Defendant stated that she was not going to stop and that she wanted to go home.

Officer Blackwell (OB) testified that it appeared that defendant was trying to leave. He saw the defendant place her car into Drive. OB tried to open the passenger door. The passenger door was locked. OB couldn't get the door opened, but from the driver's side, OL was able to get the door unlocked. OB opened the passenger side door and reached across the car to turn off the car. OB removed the keys from the ignition. The car was put in park. OB could smell the odor intoxicating beverages coming from the defendant.

OL asked the defendant to step out of her car. Once OB removed the keys, the defendant "relented" (4:18) and got out of her car.

OL explained to the defendant that someone had called concerned she was an impaired driver. The defendant rolled her eyes and again said that she needed to go home. OL asked the defendant to perform voluntary field sobriety tests (FST). She agreed. OL performed standardized FST.

On the HGN the defendant demonstrated 6/6 clues. OL observed that the defendant did not comply with his instructions and moved her head. OL testified that this indicated that the subject was intoxicated (4:23).

OL then administered the One Leg Stand (OLS). OL testified that if a subject can't complete the test then you have all 4 clues. OL testified that on the re-try that defendant almost fell over. Officer Blackwell (OB) caught her because she was about to fall forward. OL testified her performance demonstrated 4/4 clues. He testified this was an indication of impairment. (4:25).

OL administered the Walk and Turn (WAT) test. The defendant demonstrated balance issues. She started the test early. She did not walk heel-to-toe, and did not complete the correct number of steps.

Defendant declined a PBT. Defendant then asked if she could go home. OL explained that she wasn't going to go home and placed her under arrest. OB testified that the defendant was upset at being placed under arrest and "put her hands to her sides and got really rigid".

After being placed under arrest, OL asked the defendant to walk outside the Toll Plaza to his vehicle. OL described this as "an exercise in asking her multiple times to walk to [his] vehicle." During this time the defendant repeatedly asked to go home. OL does recall asking the defendant any questions during this time.

Upon arrival at the car, the defendant refused to sit in the patrol car. OL and the Training Officer physically picked her up and placed her in the vehicle. They took her into the airport police statement.

The defendant repeatedly asked to go home and used "colorful language". These statements were not made in response to questions.

Upon arrival at the Airport Police Station, OL read verbatim the defendant her rights from the DUI arrest packet (Exhibit B). The defendant refused to sign those rights. The defendant refused to sign the waiver portion. OL stated that she made it clear that she did not want to speak to him any further.

Initially, the defendant asked for an attorney, then stated that she did not want to speak to an attorney. According to OB, the defendant wanted her own attorney, but that she was not going to wake her attorney at that time. (4:59).

Defendant continued to make "derogatory comments" and call OL names (4:35). OB testified that her ire was specifically directed at OL.

Defendant asked to have the fire department come check her out. OB testified that defendant was complaining about her wrists due to the handcuffs. OL had the fire department come. The defendant ultimately continued to speak to OL. The fire department arrived, then cleared, and then OL proceeded with the Implied Consent portion.

After OL advised the defendant of the Implied Consent Warnings (ICW), at approximately 20:30, the defendant responded to the DUI interview questions.

When OL began the DUI interview he asked her if she had anything in her mouth (performed a mouth check). OL made no threats or promises to get her to complete the interview.

Stipulations

1) HGN may be admitted at trial solely for purposes of consumption
2) Defense Motion on voluntariness of Field Sobriety Tests is withdrawn
3) Defense withdraws their motion on right to counsel
4) Defense withdraws their motion with respect to refusal (no refusal)
5) Defense strikes their motion with respect to ICW
6) Reasonable suspicion to expand and probable cause to arrest are stipulated only if the court finds reasonable suspicion to stop.

7) State stipulates that DUI interview (31 questions) is inadmissible, except for impeachment.

Issues Presented

1) Reasonable Suspicion to Stop
2) Defendants 3.5 statements pre/post arrest. Once invocation had occurred, the interrogation should have ceased.
3) Knapstad – Motion to Strike the Above .15 Allegation

Conclusions of Law

1) Reasonable Suspicion to Initiate Contact.

The first issue is whether Officer Leavengood's initial contact with defendant was lawful under *Terry v. Ohio*, 392 US 1 (1968) and its progeny.

It is well settled that an officer may contact or stop a person for investigative purposes if there is reasonable suspicion that the person has been involved in some form of criminal activity. *Id* at 27. A "Terry stop" and/or investigatory detention may be justified where an officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id* at 21. *see also, State v. Diluzio,* 162 Wn.App. 585, 590, 254 P.3d 218, *review denied,* 272 P.3d 850 (2011), *State v. Kennedy,* 107 Wn.2d 1, 5, 726 P.2d 445 (1986).

An articulable suspicion is "a substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy,* 107 Wn.2d at 6. When evaluating the reasonableness of an investigative stop, courts are to consider the totality of the circumstances. *State v. Acrey,* 148 Wn.2d 738, 747, 64 P .3d 594 (2003). *See also, State v. Lar*, __Wash. App. __, 2012 WL 1426573, (Not Reported, Div 2, April 24, 2012).W

In the present case, the basis of the initial contact with defendant was a report by an unnamed toll booth worker. This toll worker communicated their conclusion that a possible DUI was in progress without identifying specific behavior. When Officer Leavengood and Officer Blackwell arrived, they observed the identified

vehicle sitting inside the toll plaza area, but not moving. This is not normal behavior for vehicles approaching the toll plaza. Based on this observation, they initiated contact.

Most recently the issues surrounding traffic stops based on informant calls were discussed by both the Supreme Court of the United States and Division Two of the Washington State Court of Appeals. In each case, the court examined the distinction between identified and unidentified "informants".

In *Prado Navarette v. California;* 572 U.S. ——, ——, 134 S.Ct. 1683, —— L.Ed.2d ——, 2014 WL 1577513, 2014 U.S. LEXIS 2930 (2014), the Court held

> The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez,* 449 U.S. 411, 417–418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); see also *Terry v. Ohio,* 392 U.S. 1, 21–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). The standard takes into account "the totality of the circumstances—the whole picture." *Cortez, supra,* at 417, 101 S.Ct. 690. Although a mere " 'hunch' " does not create reasonable suspicion, *Terry, supra,* at 27, 88 S.Ct. 1868, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).
>
> These principles apply with full force to investigative stops based on information from anonymous tips. We have firmly rejected the argument "that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person." *Adams v. Williams,* 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Of course, "an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity." *White,* 496 U.S., at 329, 110 S.Ct. 2412 (emphasis added). That is because "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations," and an anonymous tipster's veracity is " 'by hypothesis largely unknown, and unknowable.' " *Ibid.* But under appropriate circumstances, an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." *Id.,* at 327, 110 S.Ct. 2412.

Id at 1687-88.

Using *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)(anonymous tipster who reported that woman driving a brown Plymouth station wagon with a broken right tail light was transporting cocaine demonstrated sufficient indicia of reliability when innocent details confirmed), and *Florida v. J. L.,* 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (tip that young black mail in plaid shirt standing at bus stop was carrying a gun was insufficient), the US Supreme Court found sufficient indicia of reliability to support a Terry Stop. Specifically, the Court found that:

> By reporting that she had been run off the road by a specific vehicle—a silver Ford F–150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability. See *Gates, supra,* at 234, 103 S.Ct. 2317 ("[An informant's] explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case"); *Spinelli v. United States,* 393 U.S. 410, 416, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) (a tip of illegal gambling is less reliable when "it is not alleged that the informant personally observed [the defendant] at work or that he had ever placed a bet with him"). *** A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously.

Id at 1698.

By contrast, in *State v. Z.U.E.,* 178 Wash.App. 769, 315 P.3d 1158, (Div. 2, 2014), the Court of Appeals considered the circumstance where a citizen informant provided the SOLE basis for police officer suspicion that a young woman getting into a gray car was a minor in possession of a firearm. The *Z.U.E.* Court explained the distinction between a known citizen informant, and anonymous or "professional" informants.

> Known citizen informants (as distinguished from anonymous or "professional" informants) generally are presumed to be reliable. State v. Gaddy, 152 Wash.2d 64, 72–73, 93 P.3d 872 (2004); State v. Wakeley, 29 Wash.App. 238, 241, 628 P.2d 835 (1981). For investigative stops, the same degree of reliability need not be shown for a "citizen" as opposed to a "professional" informant. Kennedy, 107 Wash.2d at 8, 726 P.2d 445.

Id.

Division Two found that even a named, but otherwise "unknown" citizen informant is not presumed to be reliable sufficient to justify an investigative stop. Citing to State v. Sieler, 95 Wash.2d 43, 48, 621 P.2d 1272 (1980)(father waiting to pick up his son at high school telephoned the school secretary to report that he witnessed a drug sale in another car in the parking lot held insufficient), the Division 2 of our Court of Appeals found that where two NAMED 911 callers provided the same basic information but were not contacted by officers to validate insufficient factual foundation had been laid to establish the caller's reliability to justify a traffic stop.

While, an unnamed informant's accurate description of a vehicle alone is "not [sufficient] corroboration or indicia of reliability" for an investigative stop. *State v. Lesnick,* 84 Wn.2d 940, 943, 530 P.2d 243 (1975), our Courts have upheld investigative stops where the informant was a citizen witness (rather than a paid informant), and the officer observed some corroborating factual information before he conducted the stop. Kennedy, 107 Wn.2d at 8–9.

> A report of criminal activity from a citizen-witness may provide reasonable suspicion to justify an investigatory detention. *State v. Lee,* 147 Wn.App. 912, 918–19, 199 P.3d 445 (2008); *State v. Sieler,* 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). In contrast to tips provided by paid informants, police officers may presume that citizen-witness reports are credible. *Lee,* 147 Wn.App. at 919; *State v. Wakeley,* 29 Wn.App. 238, 241, 628 P.2d 835 (1981). A citizen-witness's credibility is enhanced when he or she is an eyewitness to the events described. *State v. Vandover,* 63 Wn.App. 754, 759, 822 P.2d 784 (1992); *United States v. Colon,* 111 F.Supp.2d 439, 443 (S.D.N.Y.2000) ("crystal clear that the caller had firsthand knowledge of the alleged criminal activity"), *rev'd on other grounds,* 250 F.3d 130 (2nd Cir.2001); *Lee,* 147 Wn.App. at 918..
>
> *****
>
> Under a totality of the circumstances standard, " '[t]he reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop.' " *Lee,* 147 Wn.App. at 917 (alteration in original) (quoting *State v. Rowe,* 63 Wn.App. 750, 753, 822 P.2d 290 (1991)). In order to provide the reasonable suspicion necessary to justify an investigatory stop, the circumstances of the informant's tip must provide "indicia of reliability." *Marcum,* 149 Wn.App. at 903–04.
>
> An accurate description of a vehicle together with a conclusory statement of criminal activity does not establish the indicia of reliability. *Sieler,* 95 Wn.2d at 47. In deciding whether this indicia of reliability exists, the court considers "(1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip." *Lee,* 147 Wn.App. at 918 (citing *Sieler,* 95 Wn.2d at 47).

State v. I.T., 163 Wash.App. 1033, Not Reported in P.3d, 2011 WL 4433116, (Wash.App. Div. 1,2011)(while unreported, the rationale of this Division 1 case is persuasive).

As the US Supreme Court noted in describing the California Court of Appeals reasoning:

> [T]he officer had reasonable suspicion to conduct an investigative stop. 2012 WL 4842651 (Oct. 12, 2012). The court reasoned that the content of the tip indicated that it came from an eyewitness victim of reckless driving, and that the officer's corroboration of the truck's description, location, and direction established that the tip was reliable enough to justify a traffic stop. *Id.*, at 7. Finally, the court concluded that the caller reported driving that was sufficiently dangerous to merit an investigative stop without waiting for the officer to observe additional reckless driving himself. *Id.*, at 9. The California Supreme Court denied review. We granted certiorari, 570 U.S. ——, 134 S.Ct. 50, 186 L.Ed.2d 963 (2013), and now affirm.

Prado Naverette, at 1687

Here, the unnamed toll plaza worker reported a suspected DUI, and then physically flagged down the Officer Levengood. The worker physically pointed to the defendant's vehicle. The defendant's vehicle was stopped in the toll plaza entrance in a location that is not designed or normally used for such stops. Such observed behavior provides sufficient corroboration of the toll worker's identification to justify an initial contact. See also, *State v. Arreola*, 176 Wash2d 284, 290 P.3d 983, 988 (2012)(mixed-motive traffic stop that was primarily motivated by police officer's desire to investigate possible DUI was not pretextual so long as there is an actual, conscious, and independent cause which is reasonable and articulable caretaking function).

The defense motion is denied.

2) Defendant's Pre-Arrest Statements.

> When police officers have a well-founded suspicion, not amounting to probable cause, that a person has committed or is about to commit a crime, they may detain that person and require that he or she identify himself or herself and explain his or her activity. *State v. Gluck*, 83 Wash.2d 424, 518 P.2d 703 (1974); *State v. Clark*, 13 Wash.App. 21, 533 P.2d 387 (1975). Here the initial stop and questioning of Hobart was not improper.
>
> Miranda warnings are required only for custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966); *State v. Hilliard*, 89 Wash.2d 430, 573 P.2d 22 (1977). A "custodial" interrogation occurs when the suspect is deprived of his or her freedom of action in any significant way. *Miranda v. Arizona*, supra, 384 U.S. at 444, 86 S.Ct. 1602. An officer lacking probable cause to arrest may ask questions designed to obtain identification of a suspect and an explanation of his activities without first giving Miranda warnings. State v. *Hilliard*, supra

State v. Hobart, 24 Wash.App. 240, 242, 600 P.2d 660 (Division 1, 1979), reversed on other grounds, 94 Wash 2d 437, 617 P.2d 429 (1980). See also, State v. Bailey, 154 Wash.App. 295, 224 P.3d 852 (Division 3, 2010)(request for identification not seizure).

In the present case, the statements made by the defendant prior to being placed under arrest did not constitute a custodial interrogation.

3) Defendant's Post Arrest and Post Miranda Statements.

After being advised of her rights, the defendant stated that she wanted to speak to an attorney. However, then she said that she didn't want to wake her attorney. She made it clear that she didn't want to speak to OL, but continued to berate and communicate with him.

> In *Miranda*, 384 U.S. at 457–58, 86 S.Ct. 1602, the Supreme Court established a conclusive presumption that all confessions or admissions made during a custodial interrogation are compelled in violation of the Fifth Amendment's privilege against self-incrimination. This presumption is overcome only upon a showing that law enforcement officials informed the suspect of his or her right to remain silent and right to an attorney and that the suspect knowingly and intelligently waived those rights. *Id.* at 479, 86 S.Ct.

> 1602. A suspect may choose to invoke these rights at any time prior to or during questioning. *Id.* at 472–73, 86 S.Ct. 1602.

In Re Cross, __Wn2d__, 327 P.3d 660 (Wash 2014).

In the present case, the defendant's behavior was not consistent with an unequivocal invocation of her rights.

More importantly, it is clear that the specific statements offered by the State (excluding the 31 question, DUI interview), were not part of any interrogation. Quite the opposite, it is clear that the defendant's statements offered by the State were not a product of questioning.

> Only questions or actions reasonably likely to elicit an incriminating response from the defendant can be characterized as equivalent to interrogation. *State v. Peerson*, 62 Wash.App. 755, 773, 816 P.2d 43 (1991). Generally, a statement is not the product of custodial interrogation when it is spontaneous and unsolicited. *State v. Ortiz*, 104 Wash.2d 479, 484, 706 P.2d 1069 (1985).

State v. Kuloglija, 173 Wash.App. 1017, Not Reported in P.3d, 2013 WL 616375 (Div. 1, 2013)(Defendant's statements while in physical pain, emotionally distressed and under guard while being treated at County Hospital were not interrogation when the record was devoid of evidence that officer asked questions to prompt the response). *See also, State v. Sadler* 147 Wash.App. 97, 193 P.3d 1108, (Div. 2, 2008)(Detective advising defendant that he intended to apply for a search warrant was not a statement reasonably likely to elicit a response); *State v. Thompson*, 136 Wash.App. 1026, Not Reported in P.3d, 2006 WL 3747442 (Div. 3, 2006)(Advising defendant that officer is investigating theft, and defendant's response that "Jeff took it" was not a response to a question and not custodial interrogation).

Clearly the DUI interview was a custodial interrogation. However, the parties have stipulated to its exclusion. The remainder of defendant's statements described above were spontaneous and not the product of interrogation.

4) Knapstad Motion

The defense moves to dismiss the above .15 prong of the charge, arguing that the actual reading in this case is within the margin of error of the Datamaster. The

State responds that "although there is a theoretical possibility that the defendant's breath tests results were below .15, that **in all probability** results of .159 and .161 show a breath test sample equal to or greater to [sic] .15". (State's response brief, p. 8)(Emphasis supplied).

It is clear that the State misapprehends their burden of proof. The State must prove the above .15 element **beyond a reasonable doubt**. *State v. Keller* 36 Wn.App. 110, 672 P.2d 412 (Div 1, 1983).

In *Keller*, the Court held that "the margin of error in the Breathalyzer should be considered by the trier of fact in deciding whether the evidence sustains a finding of guilt beyond a reasonable doubt." Id at 113. Clearly, the defense may attack the accuracy of the BAC readings using any margin of error that is established by the testimony. *State v. Donahue*, 105 Wash.App. 67, 18 P.3d 608 (Div. 2, 2001).

However, it is important to note that the holding of Keller as to the role of the BAC results.

> A Breathalyzer test administered within 1 hour after the defendant stops driving is circumstantial evidence of the blood alcohol level at the time of driving. State v. Bence, 29 Wash.App. 223, 227, 627 P.2d 1343 (1981).

Keller, at 114.

The Keller Court made it clear that the determination as to the credibility and weight to be given to the BAC results belongs to the finder of fact, with the margin of error being one of the factors that the finder of fact may consider, along with other evidence that either supports or discredits a finding of that the defendant had a BAC above the statutory level(s).

Order

- Officers Leavengood and Blackwell had reasonable suspicion to initiate a traffic stop.
- Defendant's spontaneous statements are admissible.
- Defendant's Knapstad motion is denied without prejudice.

Dated: July 28, 2014

Matthew Williams, Judge

Appendix D

IN THE KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff/Respondent,	)	
vs.	)	NO. 15-1-06227-8 SEA
	)	
PAMELA BELL,	)	
	)	
Defendant/Appellant.	)	
	)	

TRANSCRIPT OF MOTIONS HEARING IN THE KING COUNTY DISTRICT COURT

Before the Honorable Matthew Williams

Date of Hearing: June 20, 2014

JUDGE -	The Honorable Matthew Williams
PROSECUTOR -	Michelle Gregoire, Deputy Prosecuting Attorney
FOX -	Jon Fox, Defense Attorney
LEAVENGOOD -	Officer Leavengood, Port of Seattle Police Department
BLACKWELL -	Officer Blackwell, Port of Seattle Police Department
DEFENDANT -	Pamela E. Bell

PROSECUTOR - And, Your Honor, the matter we can go on the record with is State of Washington vs. Pamela Bell. This is number one on the 1:30 calendar. Cause number CPS017829. The Defendant is present, out of custody, represented by Mr. Fox. We're here for a 3.5/3.6 testimonial motion hearing. Your Honor, I have spoken to Counsel and I do believe we can tighten up the number of issues before the Court. First, the State intends to only offer the horizontal gaze nystagmus test for purposes of alcohol consumption at trial.

JUDGE - OK.

PROSECUTOR - Defense is withdrawing their motion regarding the consent to the voluntary field sobriety tests.

FOX - That's correct, Your Honor.

JUDGE - Meacham kind of took the heart out of that didn't it.

FOX - So it appears, Your Honor.

JUDGE - Ya, so it appears. Thank you, Mr. Fox.

FOX - Yes, Your Honor.

JUDGE - OK, so let me just make a note. OK, what's next.

PROSECUTOR - Defense is withdrawing their motion on the right to counsel.

JUDGE - OK.

FOX - We're also withdrawing numbers six and seven, Your Honor. Refusal to perform any tests; there was no refusal that I'm aware of and I suppose that would be subject to testimony but I don't believe we'll be hearing any refusal testimony. And I would strike number seven – implied consent warnings.

JUDGE - OK. So what do I have in front of me?

PROSECUTOR - So, Your Honor, the issues before the Court are probable cause to arrest.

JUDGE - OK.

FOX - To detain and arrest, Your Honor

PROSECUTOR - Oh, sorry. Ya, so reasonable suspicion to stop, detain, and then probably cause to arrest.

JUDGE - So, reasonable suspicion to stop and reasonable suspicion to expand?

FOX - Yes, Your Honor. And mainly it's a Campbell vs. DOL type of an issue.

JUDGE - Got it. OK, what else?

PROSECUTOR - And the Defendant's statements; pre and post arrest.

JUDGE - OK. And, what else?

FOX - We also have, Your Honor, number eight which is a Knapstad motion. The allegation is that the uncertainty tables take the reading under a .15 and therefore we're alleging that that's not sufficient evidence to take that to a jury. In connection with that, I had intended to call for testimony Trooper O'Brien. It may be that we can stipulate to what her testimony might be in regards to that. And also, Your Honor, there is a case I need to bring to the Court's attention on this issue which I think it may well be controlling and if it hasn't otherwise been brought up, I feel duty bound to do so even though it does not help my case.

JUDGE - OK. And can you give me that case?

FOX - Yes, Your Honor. It's the case – I have a copy for the Court. It's the case of State vs. Keller. May I approach, Your Honor?

JUDGE - You may.

FOX - So, Your Honor, skipping ahead - I'll hand it to the court.

JUDGE - Thank you. Go ahead.

FOX - So, Your Honor, I think the issue would certainly still remain a jury question. And may I also say, Your Honor, that despite the existence of a case that seems to be pretty much on all fours, I don't wish to concede the issues because I think that case was wrongly decided and I certainly don't want to concede the correctness of that decision and Keller was decided some years ago. But in that case, Your Honor, it was a .10 breath test reading and the Court – I think it was heard as a bench trial – did not find that the impairment side of the prong had been proved. But it was in evidence that on a .10 breath

test there is a .01 margin of error. And the Defense moved essentially for a directed verdict; it was denied. And the Court essentially found that it would go to the jury to make that decision and that there was sufficient evidence in this case and the case before it to affirm the conviction. And so it seemed to me, Your Honor, if that's the position of the Court then a Knapstad issue is pretty much the same thing. It's the Court saying we cant give this evidence to the jury because there's no way a jury can make a finding. And so what I wish to do, Your Honor, is to make the record in regards to certain facts and those facts would be – perhaps we should do it this way.

JUDGE - I was going to say, why don't we – here's what I was going to suggest because right at the moment all I'm trying to do is get a listing of the issues so we can get the testimony and get the officers on their way.

FOX - Certainly, Your Honor.

JUDGE - And then you can explain it all to me once we've got them on their way.

FOX - Yes, Your Honor.

JUDGE - So I've got – so far I've got reasonable suspicion to stop, to expand, probable cause to arrest, 3.5, pre/post, Knapstad, and what else is left?

PROSECUTOR - I believe that's all, Your Honor.

FOX - That's it, Your Honor.

JUDGE - Ok. Well then let's – Ms. Gregiore if you'll... So, Ms. Gregoire, if you'll call your witness.

PROSECUTOR - Yes, Your Honor. At this time, Your Honor, the State would call Officer Leavengood to the stand.

JUDGE - Officer, if you'd raise your right hand. Do you swear or affirm the testimony you are about to give is the truth, whole truth, and nothing but the truth?

LEAVENGOOD - It is sir, yes.

JUDGE - Sir, would you have a seat. State your full name, spell your last name.

LEAVENGOOD - My full name is Ryan David Leavengood. Last name L-E-A-V-E-N-G-O-O-D.

PROSECUTOR - And Officer, where do you currently work?

LEAVENGOOD - I currently work for the Port of Seattle Police Department.

PROSECUTOR - And how long have you worked with the Port of Seattle?

LEAVENGOOD - Just cleared a year and a half so since January 15th of 2013.

PROSECUTOR - Just one moment. And Your Honor, I do apologize, I meant to do this in advance of starting testimony. I've done this before I just wanted to note for the record that my sister, Courtney Gregoire, is currently a Port of Seattle Commissioner. I have no information from my sister regarding the facts and circumstances of this case nor have I spoken to her in any way regarding it, I just wanted to put that on the record. I apologize for not doing it before.

JUDGE - That is incredibly thorough of you, Ms. Gregoire. Thank you. Any issue with that Mr. Fox?

FOX - None at all, Your Honor.

JUDGE - Thank you, Counsel. Thanks for bringing it up and getting that on the record.

PROSECUTOR - And so I apologize, Officer. If you could continue, how long have you been with the Port of Seattle?

LEAVENGOOD - Since January 15th of 2013.

PROSECUTOR - And could you describe for us the training you've received to become an officer with the Port of Seattle?

LEAVENGOOD - Yes. I attended and completed, or graduated, the basic law enforcement academy for the State of Washington. From there I went and I worked for a different agency and I'm a lateral to the Port of Seattle Police Department. Upon arrival at my first agency, I went through and completed the field training officer program after the basic law enforcement academy. And then I laterailed to the Port of Seattle Police Department in January of last year as I already mentioned. And then I went through an additional field training officer program that just has a different title – it's called police training officer program. And I conducted- I believe it was 12 weeks of training there and then I'm kind of put on my own upon completion of said program.

PROSECUTOR - Ok and so when – as you described upon your own, when did you being that?

LEAVENGOOD - I believe that was late April or early May of 2013.

PROSECUTOR - And so as you indicated, you received the basic training out in Shelton. Did you receive training in DUI investigations?

LEAVENGOOD - And correction there slightly, ma'am. Burien is where the State Academy is, Shelton is the State Patrol which would make sense because the Trooper provided testimony prior. Yes, so I completed the Academy there and then throughout my career I am required to renew my BAC certification, or user certification, so I've done that. I've also attended the NHTSA sponsored standardized field or – ya, standardized field – standardized, why am I forgetting this right now? The standardized – SFST's course. I have attended that and completed a refresher there and as well as attended the ARIDE course, which is the Advance Roadside Impairment Detection Enforcement course.

PROSECUTOR - So in total, about how long would you say your training has been to become an officer with the Port of Seattle?

LEAVENGOOD - In total, several weeks. Many many weeks because part of that when I attended the ARIDE course, that was when I was with my previous agency, the City of Redmond.

PROSECUTOR - And so you've described all the training you've received in general. I want to talk to you more in particular about DUI investigation.

LEAVENGOOD - Yes, ma'am,

PROSECUTOR - When you initially received your training did you receive DUI training?

LEAVENGOOD - I did. I did, and that would have been at the basic law enforcement academy.

PROSECUTOR - Can you describe what that was?

LEAVENGOOD - Essentially what happens is they bring in a few instructors, whether they are in house with the Academy itself or they're guest instructors, and they explain the standardized field sobriety tests – that what the acronym is, I was having trouble remembering it. And then they explain DUI detection and they run everybody through individually performing the standardized field sobriety tests. And essentially, it's a

practical test, you have to pass the test in order to pass that portion of the Academy.

PROSECUTOR - So in general, what are you trained to look for when you are investigating someone for DUI?

LEAVENGOOD - Well certainly – there's kind of two portions, at least I liken it to two different portions; there's your driving portion and then there is the contact portion with the subject that you're contacting. So certainly as far as the driving – would you like me to go through the driving portion?

PROSECUTOR - Um, sure.

LEAVENGOOD - Ya. The driving portion is certainly like vehicles that are speeding, vehicles that are having trouble staying within their lane, if they are bisecting a lane marker, if they make wide turns, if they run stop signs, if they run redlights, moving violations and the like. Certainly when it comes to the contact phase, you're looking for the well known or characteristics that are going to be – they're going to go along with somebody that's impaired or showing impairment; which is going to be the red or bloodshot, watery eyes, the droopy eyes, the inability to maintain balance, the inability to perform divided attention tasks, slurring of the words, things like that ma'am.

PROSECUTOR - And do could you describe for us in your training and experience, about how many DUI investigations would you say you've conducted?

LEAVENGOOD - I would probably say about 30.

PROSECUTOR - And did you arrest every single one of those individuals that you investigated for DUI?

LEAVENGOOD - No, ma'am. In fact, I would have to increase that number then. It's probably about 30 arrests in my career. Investigations is going to be quite a few more than that. I would probably say around maybe 50 or 60 investigations.

PROSECUTOR - Now Trooper I actually want to talk to you about this particular incident. Were you on duty on February 13, 2013?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And where were you on duty on that particular day?

LEAVENGOOD - I was working patrol for the Port of Seattle Police Department at SeaTac International Airport.

PROSECUTOR - And could you describe for us on that day, did you later come into contact with the person identified as Pamela Bell?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And is that person present in the courtroom?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - Could you describe her by an article of clothing and her location in the courtroom?

LEAVENGOOD - Yes, ma'am. She's wearing what appears to be a purple in color jacket or top.

PROSECUTOR - And if the record could reflect the witness has identified the Defendant. So Officer, I want to talk to you about how you came into contact with the Defendant on that particular day. Could you describe how you came into contact with her?

LEAVENGOOD - Sure, absolutely. As a patrol officer for the Port of Seattle Police Department that evening, I respond to calls for service. One of the calls for service...

FOX - Your Honor, at this point I would object to the question calling for a lengthy narrative.

JUDGE - Sustained.

FOX - Thank you, Your Honor.

PROSECUTOR - So Officer, I want to talk to you actually – let's first start in particular, where did you come into contact with the Defendant?

LEAVENGOOD - Directly inside the toll plaza at Sea-Tac.

PROSECUTOR - So could you describe the toll plaza for us?

LEAVENGOOD - Sure. The toll plaza is the area in which people settle their parking fees or their parking issues once they attempt to leave the large parking garage structure at Sea-Tac Airport.

PROSECUTOR - So could you describe that parking structure?

LEAVENGOOD - Ya, it's a humongous structure, it holds several thousand parking stalls. It's supposed to be the largest west of the Mississippi or something of that nature, and that's where most people park unless they are parking off-site when they are flying.

PROSECUTOR - And so as you described, you came into contact with the Defendant at the toll plaza. How did you come into contact with her there?

LEAVENGOOD - I was requested to check on a subject that potentially could be intoxicated; or an intoxicated driver attempting to leave the toll plaza.

PROSECUTOR - And could you describe how you became aware of that information?

LEAVENGOOD - Ya. My Port of Seattle Police dispatch dispatched me to that area to handle the call for service.

PROSECUTOR - So do you know who that call was coming from?

LEAVENGOOD - Um, it was coming from – I don't recall. I imagine it would have been coming from...

FOX - Objection then, Your Honor, would call for speculation.

LEAVENGOOD - I don't recall.

JUDGE - Sustained.

PROSECUTOR - And so what did dispatch advise you?

LEAVENGOOD - That there was a subject attempting to leave the toll plaza and there was suspicion of intoxication.

PROSECUTOR - And what would be your standard response?

LEAVENGOOD - Standard response would be to have two police officers head to that location to conduct a preliminary investigation.

PROSECUTOR - And so did you do that in this case?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - Could you describe what your response entailed?

LEAVENGOOD - Yes, absolutely. As I mentioned before, I started in January; this is now February so I'm still under the police training officer program. I have a senior police officer sitting next to me in the passenger seat – the front passenger seat, and we responded. There was another officer that was sent there with me to assist or be my secondary officer, if you will. We arrived and we attempted to make contact with the subject.

PROSECUTOR - How did you – prior to making contact with the subject, did someone point out which vehicle you were to...

FOX - Objection. Leading, Your Honor.

JUDGE - Sustained.

PROSECUTOR - How did you come into contact with the vehicle.

LEAVENGOOD - I arrived at the toll plaza on the outside of the garages or sheds or structures, if you will. And I was flagged down by an employee pointing to a small coupe style vehicle that was parked inside the toll plaza; so prior to paying and I began to make my way over to that location.

PROSECUTOR - So could you describe for us that area prior to exiting?

LEAVENGOOD - Ya. It's a large open area. It encompasses, I believe, 12 or 15 lanes; try to make it easy for people to exit out of the parking garage. There's a garage – or, I keep saying garage, there's a little shed at each lane that would allow people to utilize the cashier function and settle their parking fees.

PROSECUTOR - Ok, and do you recall at which toll station the Defendant's vehicle was?

LEAVENGOOD - Eight or nine. Eight or nine, in that area.

PROSECUTOR - And were there other vehicles around when you arrived to the scene?

LEAVENGOOD - Yes, ma'am.

JUDGE - Hang on for a second. Go ahead, Counsel.

PROSECUTOR - And so were there other vehicles in the area when you arrived?

LEAVENGOOD - Yes ma'am, there were.

PROSECUTOR - Could you describe what traffic was like?

LEAVENGOOD - Traffic was moderate. It certainly was not heavy. I would not describe it as light either. Maybe 15 to 20 vehicles in the area somewhere in line waiting to get out. Some were exiting the parking structure on their way to the toll plaza.

PROSECUTOR - And what were your next steps when you arrived?

LEAVENGOOD - I exited my vehicle. I parked, as I mentioned, on the outside of the toll plaza, on the other side of the swing arms, and began to walk towards the subject's vehicle with my PTO in tow. And then another officer was on his way.

PROSECUTOR - Ok. And what did the Defendant's vehicle do at this time?

LEAVENGOOD - The Defendant's vehicle began to pull into a lane. It was initially parked on the southeast side of the toll plaza itself. Upon my arrival,

it moved into lane eight, I believe – or lane nine. One of the two; in that area.

PROSECUTOR - Ok. Did you then approach the vehicle?

LEAVENGOOD - Yes ma'am, I did.

PROSECUTOR - Could you describe how you approached the vehicle?

LEAVENGOOD - I approached the vehicle on foot, as there was no way for me to make my wake via vehicle to the other side of the swing arms. And attempted to – ya, approached the vehicle on the driver's side of the vehicle.

PROSECUTOR - Do you recall was there anyone else in the vehicle?

LEAVENGOOD - There was not, no.

PROSECUTOR - And so what did you observe when you approached the vehicle?

LEAVENGOOD - I observed Ms. Bell seated in the driver's side of the vehicle attempting to drive. She was seated there in the driver's seat.

PROSECUTOR - And was the vehicle on at this point?

LEAVENGOOD - It was, yes ma'am.

PROSECUTOR - And taking a step back, when you first arrived and the employee was pointing at the vehicle, was the vehicle in lane eight at that point?

LEAVENGOOD - No ma'am, it was not.

PROSECUTOR - Where was the vehicle at that point?

LEAVENGOOD - On the south or east side – southeast side. So it would have been past lane 12 or 15. However many lanes there are -and I'm sorry I don't know exactly how many there are – from the far right side.

PROSECUTOR - The far right side. And was the Defendant's vehicle on at that point, do you recall?

LEAVENGOOD - I would assume so, I couldn't tell. I couldn't hear the engine running. I don't know.

PROSECUTOR - Ok, but you observed the Defendant's vehicle move from that position into the lane?

LEAVENGOOD - Absolutely, yes ma'am.

PROSECUTOR - Ok. And then as you approached the vehicle, could you describe what happened?

LEAVENGOOD - Yes. I approached the vehicle and I attempted to make a simple contact with the driver, identifying myself and asking her to -- just to hold a second before she left.

PROSECUTOR - Why did you ask her that?

LEAVENGOOD - Well, due to me being dispatched to a potentially intoxicated driver or drunk driver, I wanted to ensure that she was in fact not impaired before she took off through the toll plaza.

PROSECUTOR - Ok. And is that consistent with your training and experience?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And so what did you do next?

LEAVENGOOD - I asked her to stop her vehicle. And it was then that I – in her response I could see that she was slurring her words and she began to pull her vehicle forward. And it appeared that she did not want any contact with me is what I was thinking.

PROSECUTOR - And so what did you do next?

LEAVENGOOD - After that I asked her to stop her vehicle because her vehicle did lurch forward slightly, a few feet. I asked her to stop her vehicle because I wanted to speak with her and ensure that she wasn't impaired. Upon that point in time, I could smell the distinct odor of intoxicants emanating from her mouth and the passenger compartment of the vehicle upon my contact with her.

PROSECUTOR - Ok. Do you recall what she stated to you when you asked her to pull her vehicle over?

LEAVENGOOD - She told me she wanted to go home.

PROSECUTOR - And did she say anything else at that time?

LEAVENGOOD - I don't recall.

PROSECUTOR - Would looking at your report help refresh your recollection?

LEAVENGOOD - It probably would, ma'am. Yes.

PROSECUTOR - And when did you make that report?

LEAVENGOOD - I completed that report probably the early morning hours of February 14, 2013.

FOX - No objection to the Officer refreshing his recollection with the report as long as he so indicates, Your Honor.

JUDGE - Thank you.

PROSECUTOR - So Officer, I'm going to hand you what's been premarked as Plaintiff's exhibit A. Do you recognize this?

LEAVENGOOD - I do.

PROSECUTOR - And how do you recognize that?

LEAVENGOOD - This is my handwriting on this citation here on the front and I recognize my initials, my serial or personnel number. This is my report, yes ma'am,

PROSECUTOR - And is that a report for this particular case.

LEAVENGOOD - Yes ma'am, it is.

PROSECUTOR - And how do you know that?

LEAVENGOOD - Well, it's the CPS number that I have been familiar with throughout my email correspondence with the Prosecuting Attorney and it's my name along with Pamela E. Bell in the Washington State DUI arrest report.

PROSECUTOR - So Trooper, if you just kind of look at that report and refresh your recollection about what Ms. Bell stated to you when you asked her to pull over her vehicle.

LEAVENGOOD - Sure. She told me she was not going to stop and that she wanted to go home.

PROSECUTOR - And so Officer, as you described, where was the odor of intoxicants coming from?

LEAVENGOOD - Her mouth and the passenger compartment of that vehicle.

PROSECUTOR - And so what was your next step?

LEAVENGOOD - My next step is to ask her to stop her vehicle, request that she stop her vehicle and step out of the vehicle so I can in fact confirm that she's not impaired. I want to confirm that people are not impaired. That was my goal.

PROSECUTOR - And so did the Defendant comply with your request that time?

LEAVENGOOD - She did. In fact, she said. Eventually she did. She said no and then my partner or my secondary officer, Officer Blackwell, took it up himself to open the passenger side door because he was on that side, reached through the passenger compartment of the vehicle and turned the vehicle off and took the keys in his possession.

PROSECUTOR - Ok and prior to that did you – about how long after you made contact with the Defendant did Officer Blackwell arrive?

LEAVENGOOD - This is within a minute.

PROSECUTOR - Ok.

LEAVENGOOD - This is – ya, it's all happening dynamically in about a minutes time.

PROSECUTOR - Why did you feel it was necessary for the keys to be pulled out of the ignition?

LEAVENGOOD - She was not complying with my request. I didn't want her to drive through. We've had people speed through these swing arms and break them. I didn't want her to leave, get on a freeway and potentially injure somebody else.

PROSECUTOR - And so what did you advise the Defendant next?

LEAVENGOOD - I told her to turn the vehicle off and step out of the vehicle.

PROSECUTOR - And then what happened?

LEAVENGOOD - Upon Officer Blackwell obtaining possession of the keys, she relented and actually did come out of the vehicle.

PROSECUTOR - And once you had her outside of the vehicle, what happened?

LEAVENGOOD - I asked her – I explained to her that I needed to determine whether or not she was impaired. I asked her to submit to some voluntary field sobriety tests. We moved to the rear bumper of her car in order to conduct those test.

PROSECUTOR - So prior to asking her if she would perform the voluntary field sobriety tests, did you talk to her about the reason you were contacting her?

LEAVENGOOD - I did, yes ma'am.

PROSECUTOR - And how did you advise her of that?

LEAVENGOOD - I told her that somebody has...

FOX - Object as to relevance, Your Honor.

JUDGE - Counsel?

PROSECUTOR - Her response would be relevant, Your Honor for probable cause for arrest taking in the totality of the circumstances.

JUDGE - I'll allow for that purpose.

LEAVENGOOD - I explained to her that someone had called concerned that she was in fact intoxicated and I wanted to confirm that she was not in fact impaired; or determine the level of impairment.

PROSECUTOR - And how did she respond?

LEAVENGOOD - She rolled her eyes and said she wanted to go home.

PROSECUTOR - And when you were able then to ask the Defendant out of the vehicle, what other physical observations did you make of the Defendant?

LEAVENGOOD - Yes During my initial contact I could see that her eyes were watery and bloodshot. She was slurring her words and having balance issues upon exiting her vehicle and standing there.

PROSECUTOR - Why was that a concern to you?

LEAVENGOOD - It was concerning because those are indicators of someone that is in fact intoxicated and it concerns me when those people are behind the wheel.

PROSECUTOR - And so, as you indicated, you asked the Defendant if she would perform the voluntary field sobriety tests.

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And you did not go into this in detail previously, but you described you were trained in the field sobriety tests.

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And did you conduct the field sobriety tests in this case as you were trained to do?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And why did you ask the Defendant if she would perform the voluntary field sobriety tests?

LEAVENGOOD - The field sobriety tests are created to flush out, if you will, indicators that show or tell law enforcement personnel whether or not the subject who is taking the tests are in fact impaired.

PROSECUTOR - And so when you administered the horizontal gaze nystagmus tests, you did the instructional phase.

LEAVENGOOD - Yes ma'am, I did.

PROSECUTOR - And did the Defendant state that she understood those instructions?

LEAVENGOOD - She did.

PROSECUTOR - And so can you describe how many clues are you looking for on the horizontal gaze nystagmus test?

LEAVENGOOD - There are three clues for each eye, so a total of six.

PROSECUTOR - And to you recall how many clues, if any, the Defendant (indiscernible).

LEAVENGOOD - All six.

PROSECUTOR - Do you recall any other observations made of the Defendant while administering this test?

LEAVENGOOD - I do not recall.

PROSECUTOR - Did you have to readvise the Defendant to stop moving her...

FOX - Objection, leading, Your Honor

JUDGE - Sustained.

PROSECUTOR - Was there anything that you readvised the Defendant of during the test.

FOX - Objection, leading, Your Honor.

JUDGE - Sustained.

PROSECUTOR - And Your Honor, I would just ask that this is testimonial motions hearing that evidence rules are a little bit more lax.

JUDGE - This isn't really an evidence issue. This is more an issue in terms of the ability of the Officer to testify in terms of what he remembers.

PROSECUTOR - So Officer, do you recall noting anything in your report about how the Defendant performed on the horizontal gaze nystagmus test?

LEAVENGOOD - Yes. I recall that there was a lack of smooth pursuit and lack of equal tracking and there was distinct or – onset of nystagmus – distinct onset of horizontal gaze nystagmus prior to 45 degrees.

PROSECUTOR - And did you make any observations of the Defendant's head during the test?

LEAVENGOOD - I did. I had to ask her...

FOX - Objection, leading, Your Honor.

JUDGE - Overruled. Ask the question again.

PROSECUTOR - Did you make any observations of the Defendant's head during the test?

JUDGE - That's a yes or no question,

LEAVENGOOD - Yes, sir. Yes.

PROSECUTOR - What were those observations?

LEAVENGOOD - During the horizontal gaze nystagmus test, it is imperative that the subject keeps their head still; you're tracking the eyes and the eyes only.

PROSECUTOR - Did the Defendant keep her head still?

LEAVENGOOD - No, ma'am.

PROSECUTOR - And is that something you're looking for on the test?

LEAVENGOOD - Yes, ma'am. It's a part of the failure to follow instructions during the test itself.

PROSECUTOR - And as you indicated, the Defendant had tested positive for six of six clues. What did that indicate to you in your training and experience?

LEAVENGOOD - That indicates that the subject is intoxicated.

PROSECUTOR - And so Trooper, what tests did you administer at that time?

LEAVENGOOD - The test I did after that would have been the one leg stand test.

PROSECUTOR - And did you administer that test in accordance with your training and experience?

LEAVENGOOD - Yes, ma'am

PROSECUTOR - How many clues are you looking for on the one leg stand?

LEAVENGOOD - I believe it's four.

PROSECUTOR - Ok and in this case do you recall what clues, if any, the Defendant exhibited on the test?

LEAVENGOOD - Ya, so this test is unique in that if the subject is...

FOX - Objection, non-responsive, Your Honor.

JUDGE - Sustained.

PROSECUTOR - And so Trooper, do you recall what clues, if any, the Defendant tested positive for (indiscernible)

LEAVENGOOD - Yes. What I'm trying to explain is that if the subject is unable to pass the test, you then receive all four clues. I don't know how else to explain that.

PROSECUTOR - Did the Defendant pass this test?

LEAVENGOOD - No, ma'am.

PROSECUTOR - Why not?

LEAVENGOOD - There was an inability to complete it. About four seconds into the test itself, the leg was put down, there was a retry, and the subject almost fell over. That is a failure for us, ma'am.

PROSECUTOR - And so what did you do next?
LEAVENGOOD - I moved on to the third portion of the standardized field sobriety tests.
PROSECUTOR - So prior to that, that did the Defendant almost falling over indicate to you, in your training and experience?
LEAVENGOOD - That is an additional indication of impairment of intoxication.
PROSECUTOR - So what test did you administer third?
LEAVENGOOD - That would have been the walk and turn test, ma'am.
PROSECUTOR - Did you administer that test in accordance with your training and experience?
LEAVENGOOD - Yes, ma'am.
PROSECUTOR - And how many clues are you looking for in that test?
LEAVENGOOD - Four.
PROSECUTOR - And what clues, if any, did the Defendant exhibit on that test?
LEAVENGOOD - Initially, starting before I asked her to do so and then there was a failure to walk heel-to-toe, and then lastly there is ten steps when it's stated clearly in the instructional phase nine steps.
PROSECUTOR - And you as you described, you advised the Defendant of the instructional phase of the test?
LEAVENGOOD - Yes, ma'am.
PROSECUTOR - How did she respond?
LEAVENGOOD - She confirmed her understanding of the instructional phase.
PROSECUTOR - And so what did the Defendant's performance on the walk and turn test indicate to you?
LEAVENGOOD - Again, it's just like the other. Its additional indicators that in fact the Defendant is intoxicated or there is a measurable level of impairment.
PROSECUTOR - After you completed the field sobriety tests, what did the Defendant say to you?
LEAVENGOOD - Um. She told me that she – asked if she could go home.
PROSECUTOR - What did you say in response?
LEAVENGOOD - I explained to her that she wasn't going to go home and I asked her to turn around and put her hands behind her back as she was getting placed under arrest for DUI.
PROSECUTOR - And did you ask the Defendant in this case if she would submit to a portable breath test?

LEAVENGOOD - Yes, I did.

PROSECUTOR - And how did she respond?

LEAVENGOOD - She declined.

PROSECUTOR - And so then you then place the Defendant under arrest for DUI?

LEAVENGOOD - I did.

PROSECUTOR - Why did you place the Defendant under arrest for DUI?

LEAVENGOOD - Based upon the evidence presented before me, I felt that it was sufficient to place her under arrest for DUI.

PROSECUTOR - Could you describe what happened after you placed the Defendant under arrest?

LEAVENGOOD - Yes. Upon placing...

FOX - Your Honor, if I may, if you're referring to your report if you'd so indicate. I saw you looking down, I don't know.

LEAVENGOOD - Yes sir, absolutely. I do have to refer to my report.

PROSECUTOR - Actually Officer, if you could, just use your report to refresh your recollection and when you're done refreshing your recollection you can flip it back over.

LEAVENGOOD - Absolutely.

PROSECUTOR - So Officer, if you could describe after you placed the Defendant under arrest, what happened?

LEAVENGOOD - Ya, I asked Ms. Bell to walk over to my vehicle as it was it was little bit of a walk because were inside the toll plaza, my vehicle's on the outside – 50 feet or so about. I asked her to walk over there with me and it was an exercise in having to ask her multiple times to walk to my vehicle. That's what occurred. I'd asked her multiple times to walk to my vehicle.

PROSECUTOR - And do you recall, did she say anything to you during this time?

LEAVENGOOD - She kept telling me she wanted to go home.

PROSECUTOR - And was that in response to any question?

LEAVENGOOD - I don't recall. Maybe I don't understand.

PROSECUTOR - Did the Defendant say that voluntarily?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - Were you asking her any questions when she made that statement to you?

LEAVENGOOD - I was telling her that she needs to walk to my vehicle; we need to go to my vehicle because she needs to be taken to the police station for processing.

PROSECUTOR - Did you recall making any other statements to the Defendant or asking the Defendant any questions (indiscernible)?

LEAVENGOOD - I don't recall.

PROSECUTOR - After you placed the Defendant under arrest, then what happened? Excuse me, after you went back to your vehicle.

LEAVENGOOD - Ms. Bell refused to sit in my patrol car. So in order to alleviate utilizing any force on Ms. Bell, myself and my PTO physically had to pick her up and place her in our vehicle.

PROSECUTOR - And then did you transport her to the Port of Seattle?

LEAVENGOOD - Ya. The police station is inside the airport so, yes ma'am, we took our vehicle back to the police station and brought her up to our booking facility for processing.

PROSECUTOR - And then did you advise the Defendant of her constitutional rights?

LEAVENGOOD - Yes ma'am, I did.

PROSECUTOR - Prior to advising the Defendant of her constitutional rights, do you recall any other statements that were made in your interaction with the Defendant?

LEAVENGOOD - Yes, there were multiple. Multiple statements that she wants to go home now, some other colorful language – calling me an asshole and the like.

PROSECUTOR - And were all of those statements made to you voluntarily?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - Were they answers in response to questions?

LEAVENGOOD - No they were not.

PROSECUTOR - And prior to arrest, any of the statements that the Defendant made to you in your investigation, did you make any promises or threats to get the Defendant to make those statements?

LEAVENGOOD - No, ma'am.

PROSECUTOR - Did you coerce the Defendant in any way to get her to make those statements?

LEAVENGOOD - No, ma'am.

PROSECUTOR - And so Officer, what did you use to advise the Defendant of her constitutional rights once inside the Port of Seattle precinct?

LEAVENGOOD - I utilized the Washington State DUI arrest report packet.

PROSECUTOR - State's exhibit B. And so Officer, I am handing you what has been premarked as Plaintiff's exhibit B. Do you recognize this form?

LEAVENGOOD - I do.

PROSECUTOR - And how do you recognize that?

LEAVENGOOD - This is part of my DUI arrest packet that I employed that evening. It's got my name on it.

PROSECUTOR - Is that the constitutional rights form used in this particular case?

LEAVENGOOD - Yes ma'am, it is.

PROSECUTOR - Is that a fair and accurate copy of the form what was used?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And at this time, Your Honor, I would move to admit Plaintiff's exhibit B into evidence for purposes of this hearing.

FOX - No objection for purposes of this hearing, Your Honor.

JUDGE - Exhibit B is admitted, for purposes of this hearing.

PROSECUTOR - So Officer, did you read those rights to the Defendant as they are written there on that constitutional rights form?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And did you read them verbatim off that rights form?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - After you read those rights in their entirety, how did the Defendant respond?

LEAVENGOOD - She refused to sign the subject's signature, where it is actually just saying that you have had the rights read to you.

PROSECUTOR - Did you read the next portion of the...

LEAVENGOOD - Yes ma'am, I did.

PROSECUTOR - And could you read that for us into the record?

LEAVENGOOD - I understand my constitutional rights. I decided not to exercise these rights at this time. Any statements made by me are made freely, voluntarily, and without threats or promises or any kind. Is that the part you mean, ma'am?

PROSECUTOR - Yes.

LEAVENGOOD - Ok.

PROSECUTOR - And how did the Defendant respond to that?

LEAVENGOOD - While asking if she was willing to sign, she said that she refused, she did not wish to sign that subject signature portion.

PROSECUTOR - And then after you had read those rights, did the Defendant invoke her rights?

LEAVENGOOD - She did, in fact.

PROSECUTOR - And how did she invoke them?

LEAVENGOOD - There was – she made it clear she didn't want to speak to me any longer.

PROSECUTOR - And did she ask to speak to an attorney?

LEAVENGOOD - She did not.

PROSECUTOR - Do you recall any other statements the defendant made to you at that point?

LEAVENGOOD - I do not recall.

PROSECUTOR - Would looking at your report help refresh your recollection?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - If you want to look at your report just to refresh your recollection about any other statements the Defendant may have made to you.

LEAVENGOOD - She did in fact ask for an attorney and then declined. There was also an episode where she requested the fire department to come and check her.

PROSECUTOR - Could you describe – when you say the Defendant declined what do you mean?

LEAVENGOOD - She asked for an attorney and then upon my willingness to try to go down that route with here and assist her in that that, she said she did not want an attorney.

PROSECUTOR - And then as you indicated, the Defendant indicated she did not want to speak to you further. Is that correct?

LEAVENGOOD - I believe so, yes ma'am.

PROSECUTOR - Did she then make any other statements to you after that?

LEAVENGOOD - Yes. There were the derogatory comments, calling me names – this that and the other – throughout my contact with her.

PROSECUTOR - And was that in response to any question that you may have asked?

LEAVENGOOD - Not that I recall. I think it was most likely through asking her about her desire to have the fire department come and assist or check her out and see if she needed any additional attention.

PROSECUTOR - And when she asked for the fire department to come, did you abide?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - So was your communication with the Defendant at that point voluntary?

FOX - Objection, Your Honor. It calls for a conclusion.

JUDGE - Sustained.

PROSECUTOR - So Officer, did the Defendant then agree that she wanted to speak to you at any time?

LEAVENGOOD - Um, I believe so. I think that would have been upon the continuation of the DUI arrest report.

PROSECUTOR - And could you describe what happened?

LEAVENGOOD - Yes. Essentially, I go in order in the DUI arrest report. So the next page or – the preceeding pages would have been the implied consent warning portion and I continued with that and moved along.

PROSECUTOR - And after you advised the Defendant of the implied consent warnings, did you do the DUI 31 question interview in this case?

LEAVENGOOD - I would have to look at my report to refresh my memory.

PROSECUTOR - Do you want to look at the report just to refresh your recollection?

LEAVENGOOD - Yes ma'am, I did.

PROSECUTOR - And do you recall about what time you would have conducted that interview?

LEAVENGOOD - I believe that would have been about 20:30 hours, maybe 21:00 hours, around then.

PROSECUTOR - Do you recall, was that after you advised her of the implied consent warnings?

LEAVENGOOD - Yes that's – yes, ma'am.

PROSECUTOR - And so Officer, prior to doing the interview, how do you advise the Defendant of the interview?

LEAVENGOOD - Usually the way I handle it is I like to do implied consent, do a mouth check, and then conduct the interview because you have that 15 minute period where you need to get on the books prior to conducting

any breath samples, and that's when I do my arrest report or arrest interview.

PROSECUTOR - So prior to doing the actual interview itself, do you advise the Defendant of anything at that point?

LEAVENGOOD - I just follow along the DUI arrest report.

PROSECUTOR - Ok. And when you began the DUI interview what, if anything, did you ask the Defendant?

LEAVENGOOD - Prior to the interview? Is that what you're asking me?

PROSECUTOR - Um hm.

LEAVENGOOD - I ask them if they have anything in their mouth. I conduct that mouth check.

PROSECUTOR - Plaintiff's exhibit C. So Officer, I'm handing what's been premarked as Plaintiff's exhibit C. Do you recognize that form?

LEAVENGOOD - I do.

PROSECUTOR - And how do you recognize that?

LEAVENGOOD - That is the DUI arrest report, DUI interview portion that I conducted that evening,

PROSECUTOR - And how do you know it's the interview that was conducted in this case?

LEAVENGOOD - Because it has the corresponding case number and criminal citation number in the upper right hand corner.

PROSECUTOR - Is that a fair and accurate copy of the interview that was conducted?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - So at this time, Your Honor, the State would move to admit Plaintiff's exhibit C into evidence for purposes of this hearing only.

FOX - No objection for that purpose, Your Honor.

JUDGE - Admitted for purposes of this hearing only.

PROSECUTOR - And so Officer, does that reflect the interview that you conducted with the Defendant in this case?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - And during that interview, did the Defendant's participation in that interview (indiscernible) voluntary?

LEAVENGOOD - Yes, ma'am.

FOX - Objection, Your Honor. If I understood the question, it calls for a conclusion, perhaps a legal conclusion.

JUDGE - I'm going to overrule it and let the objection go to credibility rather than to admissibility.

FOX - Yes, Your Honor.

PROSECUTOR - During the interview did the Defendant's participation in the interview appear to be voluntary?

LEAVENGOOD - Yes, ma'am.

PROSECUTOR - Did you make any threats or promises to get the Defendant to make those statements to you?

LEAVENGOOD - No.

PROSECUTOR - Did you coerce the Defendant in any way to get her to give (indiscernible).

LEAVENGOOD - No, ma'am.

PROSECUTOR - Do you recall any other statements the Defendant may have made to you throughout your processing for DUI?

LEAVENGOOD - I don't recall.

PROSECUTOR - Do you recall, Officer, about how long after you advise the Defendant of her constitutional rights until you conducted the DUI interview?

LEAVENGOOD - I would say it would be about anywhere from 10 to 15 minutes, possibly 20 minutes.

PROSECUTOR - And as you had indicated in that 10 to 15 minutes is when the fire department came?

LEAVENGOOD - I believe the fire department came prior to the interview but I don't – again, I'd have to refer to my report. I don't recall exactly at what point in time the fire department came.

PROSECUTOR - Do you want to just refer to your report to refresh your recollection?

LEAVENGOOD - Sure. The fire department arrived and then cleared and then the implied consent portion occurred.

PROSECUTOR - No further questions at this time.

JUDGE - Mr. Fox?

FOX - Thank you, Your Honor, and good afternoon Officer.

LEAVENGOOD - Hello, sir.

FOX - Just a few questions. You wrote the report in this case back in February?

LEAVENGOOD - Yes, sir.

FOX - And would you agree that your memory of the incident at that time was fresh?

LEAVENGOOD - Yes, sir.

FOX - And that the report would be written in a sequential fashion. In other words, things happen one after another and you write them that way in the report?

LEAVENGOOD - Yes, sir.

FOX - And so in your report, as I read it, and you can look at it to follow along and let me know if this is correct. As I read your report it states, there was a toll employee who pointed to the vehicle. As I parked my patrol vehicle, the vehicle – referring to Ms. Bell's vehicle – then drove away from the area and proceeded to get in lane eight in order to leave.

LEAVENGOOD - Yes, sir.

FOX - And the next sentence is, I approached the driver's side window and asked the female to stop her vehicle.

LEAVENGOOD - Yes, sir.

FOX - And the next sentence is, the female identified as Pamela E. Bell began to slur her words telling me she was not going to stop as she wanted to go home.

LEAVENGOOD - Yes, sir.

FOX - Now, if I understand correctly, later on Ms. Bell did invoke her Miranda rights – that was your testimony. I'm referring to your testimony today.

LEAVENGOOD - Understood, sir.

FOX - Is that correct?

LEAVENGOOD - I believe so.

FOX - And on that day you were in uniform I take it?

LEAVENGOOD - Yes, sir.

FOX - When you rolled up on the scene, were your vehicle emergency lights going?

LEAVENGOOD - No, sir.

FOX - That's all I have. Thank you very much.

LEAVENGOOD - Yes, sir.

JUDGE - Ms. Gregoire?

PROSECUTOR - Just one moment, Your Honor. Officer, could you describe what you mean by invoking her rights after she was advised of her constitutional rights?

LEAVENGOOD - Yes. Upon her refusal to sign that she has had the Miranda warnings read to her or she has read them, and then again with her refusal to sign the portion that says I understand my constitutional rights, I decided not to exercise them at this time, I took that as an implied implication of her Miranda warnings.

PROSECUTOR - And between that point... No further questions, Your Honor.

FOX - Nothing further from the Defense, Your Honor.

JUDGE - Ok. May this witness, the Officer, may step down?

FOX - Yes, Your Honor.

JUDGE - And may he be excused?

FOX - The Defense would say so, Your Honor.

JUDGE - Ms. Gregoire?

PROSECUTOR - Yes, Your Honor.

JUDGE - Thank you.

LEAVENGOOD - Thank you, Your Honor.

FOX - Thank you, Officer.

JUDGE - Ms. Gregoire, do you have any further witnesses?

PROSECUTOR - Yes, Your Honor. The State would call Officer Blackwell to the stand.

JUDGE - Raise your right hand. Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

BLACKWELL - I do, sir.

JUDGE - Sir, would have a seat. Would you tell us your full name, spell your last name.

BLACKWELL - Raymond F. Blackwell. B-L-A-C-K-W-E-L-L.

PROSECUTOR - Thank you, Officer. And where do you currently work?

BLACKWELL - I work for the Port of Seattle Police Department, ma'am.

PROSECUTOR - How long have you worked for the Port of Seattle Police Department?

BLACKWELL - I have worked with the Port since 1999.

PROSECUTOR - So Officer, could you briefly describe the training (indiscernible) to become an officer with the Port of Seattle?

BLACKWELL - I went to the State Academy or (indiscernible) out in Burien. And then I received refresher training throughout the years to include traffic enforcement, (indiscernible), canine, things like that nature.

PROSECUTOR - Officer, could you describe for us, have you received training in DUI detection?

BLACKWELL - Yes, ma'am. I went through that training in '97 when I was a reserve for Bainbridge Island Police Department. I was assigned to the Kitsap County DUI enforcements squad.

PROSECUTOR - And could you describe about how long would you say your training in DUI investigations is?

BLACKWELL - I couldn't tell you how long. I know we have refreshers all the time. I just went through the ARIDE – the Advanced Roadside Investigation. And with that class, a refresher for PBT and also the BAC.

PROSECUTOR - And so Officer, could you describe what sort of training you've received in detecting someone who may be under the influence of alcohol.

BLACKWELL - That training was through NHTSA. The training it's from the state. And the training I received was indications, how to determine if somebody may be possibly a distracted driver, whether they are under the influence of something or whether they were just not paying attention.

PROSECUTOR - And so Officer, what sorts of physical observations are you trained to look for in detecting if somebody is under the influence of alcohol?

BLACKWELL - In driving or in...?

PROSECUTOR - In driving.

BLACKWELL - Not following instructions, ie: the signs. Not being in the lanes. A big one I've noticed is when you stop somebody on a traffic stop they don't pay attention to what you tell them to do or ask them to do, they get confused.

PROSECUTOR - And so what types of physical indicators may someone exhibit if they're under the influence of alcohol.

BLACKWELL - The biggest one would be the odor of intoxicating beverage. Eyes could be red, their face could be flush, and their speech could be slurred or deliberate.

PROSECUTOR - And Officer, in your training and experience, how many DUI investigations have you conducted?

BLACKWELL - I think, to date, a little over 200.

PROSECUTOR - And did you arrest every one that you investigated?

BLACKWELL - No, ma'am.

PROSECUTOR - So Officer Blackwell, I want to talk to you about your involvement with an incident involving Ms. Pamela Bell. Could you describe for us – were you on duty on February 13, 2013?

BLACKWELL - Yes, ma'am.

PROSECUTOR - And what time were you on duty that day?

BLACKWELL - I started at 17:00. The incident was a 19:15, I believe.

PROSECUTOR - Ok. And did you later come into contact with the person identified as Pamela Bell?

BLACKWELL - Yes, ma'am.

PROSECUTOR - Is she present in the courtroom today?

BLACKWELL - Yes, she is.

PROSECUTOR - And could you identify her by an article of clothing and her location?

BLACKWELL - She's wearing a purple jacket, I believe.

PROSECUTOR - And if the record could reflect that the witness has identified the Defendant. So Officer Blackwell, do you recall reporting to this incident at the SeaTac Airport?

BLACKWELL - Yes, ma'am.

PROSECUTOR - And were you the primary officer in this case?

BLACKWELL - No, ma'am.

PROSECUTOR - So what was your involvement?

BLACKWELL - It was backing Officer Leavengood.

PROSECUTOR - So could you describe what does that mean?

BLACKWELL - What it means is additional officers need to show up. Officer Leavengood, if I remember correctly, his vehicle was in front of the

toll plaza on the exiting side and I was on the entrance side. So I was able to make sure that nobody hit them, traffic wise.

PROSECUTOR - So could you describe where your vehicle was when you arrived in comparison to the Defendant's?

BLACKWELL - I do believe it was maybe 15 feet away from her vehicle because Officer Rosa and Officer Leavengood were right there with her at that time. And we were right at the entrance of the toll plaza, trying to exit out.

PROSECUTOR - And so do you recall what was Officer Rosa's involvement in the case?

BLACKWELL - He used to be Officer Leavengood's PTO, which he was monitoring the situation.

PROSECUTOR - So that area of the toll plaza, about how many lanes are there in the area?

BLACKWELL - I haven't counted. There's a lot, maybe 12 to 14?

PROSECUTOR - And do you recall in what lane the Defendant's vehicle was?

BLACKWELL - I think it was lane 8 or 9, I can't remember.

PROSECUTOR - Ok. And do you recall what traffic was like at the time of this incident.

BLACKWELL - Yes, ma'am. It was medium to low. It was a light day for us.

PROSECUTOR - But were other vehicles around?

BLACKWELL - Oh yes, ma'am.

PROSECUTOR - And so as you described, you approached, you were about 15 feet away from the Defendant's vehicle.

BLACKWELL - Right.

PROSECUTOR - What were you advised of prior to arriving to the scene?

BLACKWELL - That they believed – the toll plaza individual – believed that the female driver of an Alaska-plated vehicle was intoxicated.

PROSECUTOR - So...

JUDGE - Please stop for a second. Go ahead.

PROSECUTOR - So do you recall who provided that information to you over dispatch?

BLACKWELL - Dispatch. It was dispatch, ma'am.

PROSECUTOR - And did dispatch advise you of who made that initial call?

BLACKWELL - I didn't know.

PROSECUTOR - Could you describe what happened when you arrived?

BLACKWELL - When I arrived, Officer Leavengood was talking to Ms. Bell and I approached from the passenger side of the vehicle. And I could hear a little bit of the conversation; it was a little noisy because it's the airport.

PROSECUTOR - Do you recall specifically what was said?

BLACKWELL - Well I guess Officer Leavengood – I remember him telling her that he could smell the odor of intoxicating beverage. And I remember when the window finally got rolled down by Ms. Bell, she told all of us that she just wanted to go home.

PROSECUTOR - And so did you make any observations of the Defendant when you approached on the passenger side?

BLACKWELL - Yes, well it appears as if she was trying to leave the toll plaza and because of the intoxicating beverage, the odor, we were doing the investigation and we wanted to make sure – or, Officer Leavengood was – wanted to make sure she was safe to drive. Safety the biggest thing for everybody. We went ahead and he tried to get her to just come out and talk to him. She put her car in drive and I attempted to get into the car to get her stop because she had the key in the ignition and she's ready to go. I sort of got tied up there because the door was locked and eventually Officer Leavengood was able to get the door unlocked and I went in her side of the vehicle or – I'm sorry, the passenger side of the vehicle and I was able to turn the vehicle off.

PROSECUTOR - When you say caught, could you describe what you mean?

BLACKWELL - I'm sorry?

PROSECUTOR - You stated you got caught. Could you describe what you mean?

BLACKWELL - Oh, I got caught – her door was locked so I couldn't get the door open. We just wanted to get her to stop because it appeared and it was apparent that there was an issue.

PROSECUTOR - So when you were able to take the keys as you described, what happened next?

BLACKWELL - The car was put in to park and I took the keys and at that time I could smell the odor of intoxicating beverage inside the vehicle and also her person, because I was right next to her. She wasn't too happy

with all of us and I can understand that. Officer Leavengood was then able to get her to get out of the vehicle and talk to him about the investigation we were doing.

PROSECUTOR - Did you make any other observations outside of the odor that you recall?

BLACKWELL - Not that I can recall, no.

PROSECUTOR - Could you describe – you stated the Defendant stated she wanted to go home. Do you recall about how many times she had made that statement?

BLACKWELL - At least a couple, ma'am.

PROSECUTOR - Then once the Defendant was out of the vehicle, what happened?

BLACKWELL - Officer Leavengood and Ms. Bell did the FST's.

PROSECUTOR - Ok and how close were you when Officer Leavengood administered those tests?

BLACKWELL - I couldn't tell you that. I was close enough that on one section of the FST's that I remember was the balance and there was a point where I had to catch her because she lost her balance and we were afraid she was going to fall down.

PROSECUTOR - And do you recall during which test that was?

BLACKWELL - That would have been the balance test.

PROSECUTOR - And...

BLACKWELL - Or, one legged stand, I'm sorry.

PROSECUTOR - And so Officer, do you recall hearing any statements the Defendant made during the time that she was outside the vehicle.

BLACKWELL - No, I don't.

PROSECUTOR - And were you present during the entire time that the FST's were administered?

BLACKWELL - Yes ma'am, I was.

PROSECUTOR - And were you present when the Defendant was placed under arrest?

BLACKWELL - Yes, I was.

PROSECUTOR - Were there any other statements that you recall the Defendant making throughout that time?

BLACKWELL - Not statements that I can recall, I just remember that when she was placed under arrest, she made it very clear she didn't want to be

arrested, she wanted to go home. And she made it difficult for the officers to – myself and Officer Leavengood and Officer Rosa to place her in custody. She got really rigid, put her hands down to her side if I remember correctly.

PROSECUTOR - So did you in fact go with Officer Leavengood for the DUI processing at the Seattle Police Precint?

BLACKWELL - Yes, ma'am.

PROSECUTOR - And were you present when the Defendant was advised of her constitutional rights?

BLACKWELL - Yes.

PROSECUTOR - Do you recall the Defendant's response to her advisement of her rights?

BLACKWELL - Yes, ma'am. She wanted her own attorney but she wasn't going to wake her attorney at that time.

PROSECUTOR - Ok and so...

JUDGE - Can you stop for just a second. Go ahead.

PROSECUTOR - So Officer, do you recall the Defendant's response after she was advised of her rights.

BLACKWELL - She informed that she will get her own attorney and she didn't want to wake him up, or her.

PROSECUTOR - Ok. And so was she put in touch with another attorney?

BLACKWELL - I do believe Officer Leavengood did do that.

PROSECUTOR - Do you recall any other statements the Defendant may have made after being advised of her constitutional rights?

BLACKWELL - I know she informed us that she was going to sue. She was extremely upset with Officer Leavengood. She had no issue with me and I don't know what the issue with those two but that's all I can really remember.

PROSECUTOR - Ok. And were you present when the fire department arrived?

BLACKWELL - I believe so.

PROSECUTOR - Do you recall about how long of a time span there was between when the Defendant was advised of her rights and after the fire department left?

BLACKWELL - No, I don't. I do remember her wrist – she was complaining about her wrists because of the handcuffs and I do not know how long it took.

PROSECUTOR - Ok. And so I just want to take one step back. I know you stated that you were present during the administration of the field sobriety tests. Do you recall making any observations during those tests of the Defendant's performance, outside of the one leg stand?

BLACKWELL - I know on the horizontal gaze I couldn't see too much. I do remember on the walk and turn she had some issues. I can't remember what exactly one she had, other than I remember it was a balance and I think she didn't take the correct number of steps.

PROSECUTOR - And would looking at your report help refresh your recollection about that?

BLACKWELL - Yes.

PROSECUTOR - And so Officer, when did you make the report in this case?

BLACKWELL - I'm sorry?

PROSECUTOR - When did you make your report in this case?

BLACKWELL - The day of, ma'am.

PROSECUTOR - And were your memories of the events that took place fresh in your mind at the time you made the report?

BLACKWELL - Yes, ma'am.

PROSECUTOR - So Officer, I'm going to hand you what's been premarked as Plaintiff's exhibit D. Do you recognize that?

BLACKWELL - Yes.

PROSECUTOR - How do you recognize that?

BLACKWELL - This would be one of our Port of Seattle Police Department officer statement forms.

PROSECUTOR - And is that the form that you used in this case?

BLACKWELL - Yes ma'am, it is.

PROSECUTOR - And so if you want to just look at that form to refresh your recollection about the performance on the field sobriety tests.

BLACKWELL - Yes, ma'am. On the horizontal gaze she was having issues following Officer Leavengood's instructions.

PROSECUTOR - And I apologize Officer, if you don't mind, if you want to just refresh your recollection then you'll need to flip it back over.

BLACKWELL - Ok, I can do that.

PROSECUTOR - So is your memory fresh now?

BLACKWELL - Yes.

PROSECUTOR - So do you recall what you observed when the Defendant was performing the horizontal gaze nystagmus test?

BLACKWELL - She was having issues following his instructions.

PROSECUTOR - And do you recall any observations you made about her balance?

BLACKWELL - Well that would be the one legged stand and balance issue where she fell forward and I had to brace her.

PROSECUTOR - Ok. And what did that indicate to you in your training and experience?

BLACKWELL - With the situation and the totality of the circumstances, she was impaired at that time.

PROSECUTOR - Ok. Did you make any other observations during the walk and turn?

BLACKWELL - No heel to toe; she had issues with that. I can't remember exactly.

PROSECUTOR - And would looking at your report just help refresh your recollection. If you want to look at your report to refresh your recollection.

BLACKWELL - Yes, I'm sorry. Officer Leavengood gave her the instructions and she started the test before and didn't allow him to finish it and then also there was the issue of her balance as well.

PROSECUTOR - As you indicated, I know you weren't the primary but you made contact with the Defendant. Were you able to form any opinions in this case?

BLACKWELL - Yes, I did.

PROSECUTOR - And Officer, based on your training and experience, what were you able to form?

BLACKWELL - I believe that Ms. Bell was impaired at that time.

PROSECUTOR - And why did you believe that?

BLACKWELL - Well, one is the odor of intoxicating beverage; her ability to follow out instructions, failing to follow our instructions, her balance was not where it needed to be. Somebody that I definitely would –even if on a roadside stop I had done myself, I would have done the exact same thing. I would have arrested her.

PROSECUTOR - No further questions at this time.

FOX - No questions, Your Honor.

JUDGE - May this witness step down?

PROSECUTOR - Yes, Your Honor.

FOX - Yes, Your Honor.

JUDGE - May he be excuses?

PROSECUTOR - Yes, Your Honor.

FOX - Yes, Your Honor.

JUDGE - Officer, thank you.

BLACKWELL - Thank you, sir.

JUDGE – Have a good afternoon. Ok, counsel. Ms. Gregoire?

PROSECUTOR - Yes, Your Honor.

JUDGE - Do you have any additional witnesses?

PROSECUTOR - Oh, no, Your Honor.

JUDGE - Thank you. I know, it's been a long day. Mr. Fox?

FOX - We'll be presenting no evidence, Your Honor. I have discussed with Ms. Bell the Court rule regarding presentation of her testimony today and how it might be used at trial if she were to testify. And with that in mind, were not presenting any evidence.

JUDGE - Ok. Well then counsel, would you like to proceed to testimony?

FOX - To argument, Your Honor?

JUDGE - I'm sorry. It has been a long day. Yes, would you like to proceed to argument?

FOX - Yes, Your Honor. I think that the central issue in this case is defined by the case of Campbell v. Department of Licensing. And so what we have in this case is a classic Campbell situation in that we have an unnamed, unidentified informant – someone identified as a toll booth employee – whose name is not known and experience in the job is not known, whose qualifications is not known and whose trustworthiness or lack of it is not know. There are no details that were communicated to the officer in this case other than there's a suspected impaired driver. There's nothing communicated in regards to what the toll both employee might or might not have observed that would have corroborated or it might not, that might have dispelled it. There's absolutely none of that information. And the stop is made

before there's any observations made. As the Officer stated, the sequence was: he parked his patrol car and as he parked his car, the vehicle drove away from the area, as he approached the side window he approached the side window and asked the female to stop the vehicle – there's the detention, that's when it happens. The female, later identified as Ms. Bell began to slur her words and so on and so forth and so it goes. I will not argue that if the Court finds the detention to be proper then there is probable cause to arrest following that, I'm not arguing that. I argue that the detention itself is improper and it's on a basis of an uncorroborated tip. Now the fact that the employee...

JUDGE - Hang on just a sec. So I just want to make sure I'm clear because I'm going to list that as a stipulation so we can kind of focus this...

FOX - Yes, certainly, Your Honor.

JUDGE - So, the key is reasonable suspicion to stop. Probable cause, reasonable suspicion to expand, those are now off the table, right?

FOX - Correct, Your Honor.

JUDGE - Ok. Hang on for just a sec. I apologize, it's just easier if I get it recorded and then I don't have to go back and listen to everything that you say again.

FOX - Understood, Your Honor.

JUDGE - So I apologize for the delay. So here's what Im noting as the stipulation and that is that reasonable suspicion to expand, probable cause to stop, or probable cause to arrest are stipulated only if the Court finds reasonable suspicion to stop.

FOX - Yes, Your Honor.

JUDGE - Got it. Ok, thanks, go ahead.

FOX - And so, Your Honor, I would (indiscernible) to the Court as a classic Campbell situation and the cases following Campbell that have been published recently such as the case of State v. Z.U.E. In summary, the case is (indiscernible) indicated that an individual who is an unidentified, anonymous informant who points out a car – that's not enough, and that's what happened here. A vehicle was pointed out. There's just none of the information that the Courts have required to

justify this type of a detention. If there was more information than that burden would be met, because it's not a very high burden from the cases that I've read, but there's just not enough here. And so that's where I'll leave it, Your Honor. If the Court wishes further briefing, I'd be happy to do that but it seems like a pretty clear issue. Now the detention had already occurred by the time Officer Blackwell came on the scene so I don't think his testimony adds anything to the equation on way or another. Beyond that, Your Honor, and just briefly if we do get that far, and I'd suggest that we...

JUDGE - Let me ask you about that because my notes of what the officer, Officer Blackwell, testified may be a little bit different than yours. What I heard Officer Blackwell testify to was that he responded to the scene in a separate vehicle. He testified he'd been advised by dispatch that an Alaska-plated vehicle was blocking the toll plaza. He was not advised as to who made that, but he got there in about the same time frame as Officer Leavengood and they approached kind of simultaneously. That was what I got. Did I misunderstand of mishear?

FOX - Your Honor, my understanding was that by the time he got there, Officer Leavengood had already made the detention. It had happened at that point, in the sense that he had told Ms. Bell to stop. He had given her that command.

JUDGE - Then maybe we're talking about two different things. I'm thinking about the time frame in which the two vehicles arrived, in terms of their observations, in terms of where her vehicle was and what her vehicle was doing. And this goes to the reasonable suspicion issue because I thought I heard Officer Blackwell testify that he actually put his car about 15 behind hers to -- and I think he used the word protect or to block other traffic. And again, no question that Officer Leavengood was the one that made the detention when he got to the window but my understanding was that Officer Blackwell was there when that happened. Did I misunderstand?

FOX - Well, Your Honor, that's not my impression of it. I will certainly defer to the Court on that. My impression was that Officer Leavengood had

done what he – had already effected the detention by telling Ms. Bell to stop. And then, perhaps even a moment later Officer Blackwell comes on to the scene. That's my understanding.

JUDGE - And it's that comes on to the scene, it's probably linguisticly is probably where were getting – my impression was that they were both in the vicinity. No question, as you were saying, Officer Leavengood is clearly the individual that initiated the stop. And my impression was that as he was doing that, Officer Blackwell was approaching from the opposite direct.

FOX - Oh, then I think we're on the same page, Your Honor.

JUDGE - Ok, I just wanted to make sure factually we're kind of – that we're not looking at this differently.

FOX - I think we're looking at it in the same way there, Your Honor. So, Your Honor, rather than belabor the point, it just seems like a pretty clear argument to me on that point. Just to move on to some of the other arguments, which I'm only making for the record in the event that the Court should find there's reasonable suspicion to detain. I think on the Miranda issue, once invoked, the questions – especially after the invocation of the right to counsel, the 34 questions should not have been asked. And so I would move to suppress those. And the final issue that I have raised is the issue of the Knapstad motion on the breath test. And as to that, Your Honor, I just wish to make an offer of proof because I do believe the Keller case is against me on pretty much all fours – against this argument on all fours. And that's why I brought it to the Court's attention because I think lawyers have a duty to do that, even if they don't like the law. That's the way that goes sometimes.

JUDGE - That's why the rules of ethics specifically allow you to do that.

FOX - Yes, Your Honor. And so, with that in mind, my offer of proof on that issue is that the confidence intervals – the meaning of confidence intervals is that each of the readings within the confidence intervals is as likely as the other to occur. In other words, one is not more likely than the other, they are all equally likely with a 99% percentile probability to occur. And in this case, the uncertainty readings would

take the breath test reading under a .15. So I believe a good argument can be made that that would, in essence, take that out of the hands of the jury but the Keller case stands against that argument.

JUDGE - And I think factually, I'm not sure I have on this record (indiscernible)

FOX - Agreed, Your Honor.

JUDGE - But you've made a very clear record on that point, Mr. Fox. Thank you.

FOX - Thank you, Your Honor. I could argue much more at length but the case is – if the Court wishes me to present more cases, I could do so but I'll leave my argument brief, especially given the hour and I appreciate the Court's attention.

JUDGE - Ok. Counsel.

PROSECUTOR - And, Your Honor, I think it's important case law and as I noted, I would just like to supplement to the State's briefing a new case law on 911 callers. I'm specifically referring to Prado Navarette v. California. This was a US Supreme Court decision from this year regarding an anonymous 911 caller. And in that case and under the totality of the circumstances, the 911 call was found by the Supreme Court to be sufficiently reliable because the caller reported the location, make, model and license plate of the vehicle and was based on a first hand observation. I think taking in to consideration what was flesh out in testimony to hear, I believe that would be similar to the facts of the case Prado Navarette; which was, in fact, both officers in this case independently were advised through dispatch of a potential driver who was under the influence of alcohol. They were not sure who it was reporting through dispatch, they did indicate that. But the first officer that did arrive, which was Officer Leavengood, approached. He did see the toll booth operator pointing to the vehicle, at which point he then approached that vehicle. I think that when he approached that vehicle, he did approach on the driver's side, made an initial inquiry and at that point would have sufficient basis to stop the vehicle. They had a brief detention to further investigate and upon that brief detention, he had a reasonable basis

to expand his investigation; based upon the fact that the Defendant was not complying with his requests, that the Defendant had a strong odor of alcohol coming from her breath. And in fact there was concern for public safety as both officers did testify to the other vehicles on the roadway, meaning in that toll booth area, that exit area...

JUDGE - And I think the key here is I think we've – Mr. Fox has very accurately zeroed in on what was probably the toughest factual issue here. And that's the issue of – it's the unnamed informant issue and the case law surrounding that specifically. And of course, State v. Z.U.E, State v. (indiscernible) which is State versus Division II, State v. (indiscernible) that's Division III. And factually, how do I get to the place where the initial stop, given the fact that we have at this point an unnamed informant. I have dispatch saying something but those cases specifically deal with the concept of dispatch. How do I get there?

PROSECUTOR - And, Your Honor, the State can provide – while it got fleshed out in testimony that neither of these officers were aware of the individual that made that informant tip, there in an officer that was involved in the investigation that did conduct a witness statement with the toll booth employee that, in fact, was the individual that conducted the call. Now I understand that those facts are not in evidence. I think that the State can get there with the testimony that's been present here today under the Prado Navarette case. And I don't think Defense Counsel has cited that case. I think that that case deals specifically with an anonymous 911 caller and reporting what they believe to be someone who was under the influence of alcohol. Obviously, the State is concerned for the fact that simply the officer in this case that conducted the interview with the employee was not present today to testify to those facts. However, I guess for purposes of - if the Court is so inclined to be concerned with the fact that at this point an anonymous caller – I do believe that there has been sufficient facts in the testimony under the new case law with the anonymous 911 caller. However, if the Court is concerned with the

fact that that was not established with the facts today, we do have quite a bit of speedy trial left in this case and it would be the State's concern that we could provide evidence of that 911 caller to support the basis of the stop.

JUDGE - Ok. So, let's take a look. And just so you know, Z.U.E. actually does cite Prado Navarette and is actually a 2014 – just came down from Division II. The question for you – ok, actually I think I understand. Mr. Fox, did you want to respond?

FOX - I'd only respond that, Your Honor, we have had this case before the Court on a couple occasions and there's been ample opportunity, the evidence is closed and we have the record we have.

JUDGE - Ok. Well, thank you, Counsel. I've got some research to do and so I will be doing that. I'll issue a written opinion. I'm showing that we have readiness on August 6th. I'll issue a written decision on or before then. And I appreciate the thoroughness of both of your presentations. Ms. Gregoire, I know that you got thrown into this today. I know that you were actually covering for another lawyer this afternoon, so I appreciate the fact that you were able to step in and handle this today on behalf of that other attorney. So thank you.

PROSECUTOR - And, Your Honor, if I could address one thing with the Court with regards to evidence on the 31 question DUI interview. The State would be stipulating to the inadmissibility of it. I do believe there was sufficient evidence to indicate the Defendant invoked her rights, and that that interview would not be admissible for trial. But we do reserve the right for impeachment evidence.

JUDGE - I will note that. And so State stipulates that DUI interview... except for impeachment. Counsel again, thank you.

FOX - And thank you so much, Your Honor.

END OF TRANSCRIPT.

I HEREBY CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING TRANSCRIPTION IS TRUE AND CORRECT TO THE BEST OF MY ABILITY.

DATED: 03/11/15.

ALLYSON COX

LUNDIN LAW PLLC

February 04, 2019 - 4:06 PM

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Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76511-6
Appellate Court Case Title:	State of Washington, Respondent v. Pamela E. Bell, Petitioner
Superior Court Case Number:	15-1-06227-8

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