COA No. 35704-0-III

No. 96851-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ERIC L. OLSEN, Petitioner.

PETITION FOR REVIEW

RESPONDENT'S ANSWER

Respectfully submitted:

Teresa Chen

by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the suppression ruling, conviction, and sentence of the Appellant.

III. ISSUES

1. Does any RAP 13.4(b) consideration exist which would permit discretionary review?

2. Did the superior court properly deny the suppression motion, where it found

- the detaining officer had a single pretext-free motive to stop the Defendant in order to cite an infraction, and
- the detention was limited to the scope of the traffic violations?

3. Should this Court reverse *State v. Arreola*, 176 Wn.2d 284, 288, 290 P.3d 983 (2012)?

IV. SUMMARY OF THE ARGUMENT

The Defendant Eric Olsen seeks review of the denial of his motion to suppress which alleged the traffic stop was pretextual. The trial court found no pretext. The court of appeals held the conclusions were

supported by the findings, which were supported by the evidence. Unpublished Opinion at 3.

> Unlike *Arreola*, the trial court here did not determine that [Officer] Green had a second motive for stopping Olsen. On that basis, alone, the motion to suppress necessarily failed. But, even if the fact that Mr. Olsen can postulate an additional motive were sufficient to make this a mixed [motive] case, *Arreola* disposes of that contention.

Unpublished Opinion at 5.

The Defendant believes this case offers the Court a vehicle to overturn *State v. Arreola*, 176 Wn. 2d 284, 290 P. 3d 983 (2012).

V. STATEMENT OF THE CASE

On October 29, 2016, Walla Walla police officer Paul Green read Ofc. Gunner Fulmer's computer communications inquiring if fellow officers were familiar with a particular Subaru Outback. RP 3, 24. Shortly thereafter Ofc. Green observed the Defendant Eric Olsen driving the Subaru and determined that the plate displayed tabs for two years, 2016 and 2017, and lacked any month tab. RP 3. Ofc. Green testified that when he comes across a vehicle with tabs displayed in this way and if he has time, "I effect a traffic stop." RP 3-4, 8. The unusual display of two years and no month suggests a tampering with the tabs as turned out to be the case here. RP 5 (the

tabs had been issued for a different vehicle). A relatively new officer, Ofc. Green had already pulled over approximately 50 vehicles for a tab violation. RP 7, 17, 19.

Ofc. Green stopped the car and cited the Defendant for invalid registration.[1] RP 4-5. [Ofc. Green would later learn that one of the tabs had been issued for a different vehicle, belonging to the Defendant's parents. RP 5. This would cause Ofc. Green to cancel the first ticket and issue another for the more appropriate infraction of display change or disfigured plate. RP 7, 11-13.]

Because the Defendant did not have his license on him, which can be scanned into the system, it took the officer a little longer than normal to fill out the paperwork. RP 4-6 (approximately 15 minutes). While Ofc. Green was attending to the violation, Ofc. Fulmer arrived and spoke with the Defendant, who said that he had just been smoking marijuana with his long-time friend Donnie Demaray. RP 7, 25-27, 39. Ofc. Fulmer had observed the same tabs violation earlier, while the car was parked in the driveway of known heroin dealer Demaray. CP 57; RP 22-23, 26. Like Ofc. Green, Ofc. Fulmer also

[1] There is no significant distinction between a tabs violation and a registration violation. Expired tabs indicate that the owner has not renewed his or her registration. WAC 308-96A-295.

regularly cites these violations, however, the vehicle had been unoccupied when he observed it. RP 22-23. While Ofc. Green was occupied with writing the ticket, Ofc. Fulmer decided to apply his canine to the exterior of the Subaru. RP 28. Before doing so, Ofc. Fulmer explained that if the canine alerted, he would apply for a warrant which could result in an impoundment of the vehicle. RP 54-55.

So advised, the Defendant volunteered that he had a syringe with a small amount of heroin. RP 27, 28, 47-48. Post-Ferrier warnings, the Defendant gave consent for the officer to retrieve the syringe and heroin from between the center console and seat. RP 29, 30, 32, 55. No further search was conducted, and the canine was not deployed. RP 31.

The Defendant was charged with possessing heroin and using drug paraphernalia. CP 3-4; RP 31. He filed a suppression motion alleging a pretextual stop. CP 7-27.

At the hearing, Ofc. Green explained that he was alert to how every contact may develop. "Any time I make a traffic stop, I'm investigating for drugs." RP 17. "I always keep my eye out of indicators of drug use." RP 18. But he did not stop the Defendant for

that purpose. "It was a stop for the tabs." RP 17. "Many times I'm just pulling them over for the violation." RP 18.

The superior court denied the defense motion.

> 2. The Court finds that Off. Green would have conducted a traffic stop of Mr. Olsen's vehicle based on the registration violation regardless of having information of where the vehicle had been seen earlier by Off. Fulmer.
> ...
> 4. The Court finds Mr. Olsen was not detained at the scene beyond the scope of the traffic stop for the violations found by Off. Green.

CP 31.

The Defendant proceeded by way of a stipulated facts trial and was sentenced to 30 days converted to community service hours. CP 29-46; RP 66, 70, 75.

In the appeal, the Defendant

> both attempts to distinguish this case from *State v. Arreola*, 176 Wn. 2d 284, 290 P. 3d 983 (2012), and, alternatively, argues that we should not follow that decision. ... Finding *Arreola* indistinguishable, we affirm the conviction [ ].

Unpublished Opinion at 3. In this petition, the Defendant asks this Court to overturn *Arreola*.

V. ARGUMENT

A. THERE IS NO RAP 13.4(B) CONSIDERATION PRESENT, NECESSARY FOR THE COURT TO ACCEPT REVIEW.

The Defendant urged the court of appeals to depart from *State v. Arreola*, 176 Wn. 2d 284, 290 P. 3d 983 (2012).

> This Court clearly has the freedom to display its disagreement with the supreme court's decisions. See, e.g., State v. Bacani, 79 Wn. App. 701, 902 P.2d 184 (1995) (Grosse, J., concurring) ("The reasoning supporting the 1903 decision in State v. Morgan, 21 Wash. 226, 71 P. 723 (1903), is as dead as the judges who authored it"), rev. denied, 129 Wn.2d 1001 (1996).

Brief of Appellant at 20. *Arreola* is a relatively recent decision, informed by amici the ACLU, the Office of the Attorney General, WAPA and the Washington State Patrol.

Now he asks this Court to accept review in order to reverse its 2012 decision. He cites RAP 13.4(b)(1), which regards cases where the court of appeals conflicts with a decision of the Supreme Court. The Defendant claims that *State v. Arreola* conflicts with *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).[2] Petition at 8. The *Arreola* opinion was not only aware of *Ladson*, but also addressed it in the very first paragraph of the opinion and throughout the opinion.

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[2] By the associative property, the Defendant's claim can be interpreted to be that the Unpublished Opinion conflicts with *State v. Ladson*.

Arreola does not "conflict" with *Ladson*. It draws on and develops the law addressed in *Ladson*.

The Defendant claims that his petition involves a significant question of constitutional law and an issue of substantial public interest. Petition at 8-9 (citing RAP 13.4(b)(3) and (4)). By this, he only means that *Arreola* and *Ladson* addressed a significant constitutional question under article I, section 7 (*See State v. Arreola*, 176 Wn.2d at 294), and that he disagrees with the evolution of the law under *Arreola*.

The Defendant's disagreement with a relatively recent *en banc* opinion of this Court is not a basis for discretionary review.

B. THE SUPERIOR COURT DID NOT ERR IN RULING THE STOP WAS NOT PRETEXTUAL.

1. The investigative detention was justified by probable cause of a traffic infraction and was reasonable in scope.

A warrantless traffic stop for an investigative purpose is constitutional under WASH. CONST. art. I, § 7 if it is based upon reasonable articulable suspicion of criminal activity or a traffic infraction and if the stop is reasonable in scope. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012). An investigative detention

must last no longer that necessary to effectuate the purpose of the stop. *State v. Williams*, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984). However, the scope of an investigatory stop may be enlarged or prolonged if the stop confirms or arouses further suspicions. *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990).

In this case, Officer Green had probable cause for a tabs violation. He stopped the car, requested the driver's documentation, and began to write out the ticket. According to his report, his involvement was limited to the infraction and transport. CP 58.

While the Defendant was waiting for Officer Green to complete the ticket, Officer Fulmer engaged the Defendant in conversation. This conversation by itself did not extend the length of the detention and did not involve any intrusion on the Defendant's liberty.

Very shortly afterward, the Defendant volunteered that he was holding heroin and attempted to show it to the police. At that point, the scope of the investigation increased to that justified by probable cause of a felony. This permitted the request for consent to retrieve the drugs, the search, and the arrest.

The actual search took several minutes, because the objects were rather small and hard to find in a messy car. RP 30-31, 43. But

this detention for the duration of that search was justifiable, not because Officer Green was busy writing a ticket for expired tabs, although he was, but because there was probable cause for possessing heroin.

Broken down most simply, only the following police acts occurred prior to the discovery of probable cause of a felony:

- Officer Green's stop of the vehicle;
- Officer Green's request for driver information;
- Officer Green's creation of the infraction ticket;
- Officer Fulmer's query where the Defendant was coming from; and
- Officer Fulmer's advisement of his intent to conduct a canine sniff of the exterior of the car.

All are justified as being within the scope of the expired tabs. It is common and inoffensive for an officer conducting a traffic stop to ask a driver where they are coming from or where they are going to. A seizure does not occur simply because an officer approaches and asks a few questions as long as the person would feel free to disregard police. *Florida v. Bostick,* 501 U.S. 429, 434, 115 L. Ed.2d 389, 111 S. Ct. 2382, 2386 (1991) (the encounter is consensual and

no reasonable suspicion is required). In this case, the Defendant felt free to disregard Ofc. Fulmer's questions. RP 26, ll. 22-25 ("ended the conversation that we were having"). *State v. Mennegar,* 114 Wn.2d 304, 310, 787 P.2d 1347 (1990) (an officer does not seize a person simply by engaging in a conversation).

Before Officer Fulmer could retrieve his canine partner, the Defendant volunteered that he was holding heroin and attempted to show it to the police. At that point, the scope was expanded based on probable cause of a felony, not merely reasonable articulable suspicion of a traffic infraction.

2. There was no pretextual stop, where the true reason that Officer Green performed a traffic stop was to cite the infraction.

A pretextual traffic stop is where an officer relies on legal authorization only as a mere pretext to dispense with a warrant when the true reason for the seizure is not exempt from the warrant requirement. *State v. Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012) (quoting *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999)). A pretextual traffic stop is illegal. *Arreola*, 176 Wn.2d at 294.

The superior court found that Officer Green did not stop the Defendant in order to investigate a drug offense, but only to cite him

for the registration infraction. It was not a pretextual stop.

On a claim of pretext, the matter necessarily turns on the credibility of the officer or officers. The superior court believed the officers and specifically found that Ofc. Green would have conducted a traffic stop "regardless of having information of where the vehicle had been seen earlier by Ofc. Fulmer." CP 31, FF 2. Credibility determinations cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003).

The judge explained that ultimately his decision rested on Ofc. Green, who was the officer who made the stop:

> Had the two officers been reversed in the sense that had Fulmer pulled the vehicle over, I'm thinking at that point the defense has a pretty good argument. But it was Officer Green who pulled the vehicle over. ... And the reason for the stop while driving [was that] the tab was not registered[.] [A]nd the infraction with reference to the tab, that was the reason for the stop by Officer Green. And so the contact is a routine stop, expired license tabs, and that's the legitimate basis for the stop. ... It's what this officer does and does do when he comes across that type of information.

RP 64-65.

The offense in the pretextual stop is that it is *not* initiated because the stop is "reasonably necessary" to enforce the traffic laws or because the traffic violation "actually merits police attention."

Arreola, 176 Wn.2d at 296-97. Here Officer Green testified that he always stops vehicles for exactly the tab concern that was presented to him when there is nothing more pressing that demands his attention. He testified that the traffic violation was the reason for this stop. The court found him credible.

3. *State v. Arreola* reasonably addressed the common experience of mixed motives.

The Defendant attacks *State v. Arreola* as incorrect and harmful and "created a new type of traffic stop." Petition at 7, 15.

It should be noted that the "mixed-motive" rule which came out of *Arreola* is not necessary for the outcome here. Officer Green, the detaining officer, had a singular motive: to investigate and cite the registration/tabs violation. Unpub. Op. at 5. Therefore, the superior court's ruling is justified by the law that pre-dated *State v. Arreola.*

Arreola does not depart from *Ladson*, but only reasonably observes that human beings have complicated motives and suspicions. A mixed-motive traffic stop is one based on both legitimate and illegitimate grounds. *Arreola*, 176 Wn.2d at 297. Because of their training and experience, it is common for officers to have intuitions and suspicions that cannot always be articulated.

Where a civilian sees a car driving too fast or too slow, an officer suspects intoxication or worse. This educated suspicion should not prevent an officer from ticketing a violation of law occurring in one's presence.

Nor should an improper motive be imputed to senior officers simply because they have more experience. The legislature expects all general authority officers to enforce traffic laws and has taken step to remove artificial barriers to such enforcement. RCW 10.93.070. Detectives, canine handlers, sergeants, etc. can ticket traffic violations. The job is not limited to patrol officers. The common sense rule is for officers to enforce traffic laws as they occur. *Delaware v. Prouse*, 440 U.S. 648, 659, 99 S. Ct. 1391, 1399, 59 L. Ed. 2d 660 (1979) ("The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations.")

When the officer exercises discretion appropriately by making an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, such stop is not pretextual and will not violate article I, § 7. *State v. Arreola*, 176

Wn.2d at 297-98.

> That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop, and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion, because the officer would have stopped the vehicle regardless. The trial court should consider the presence of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless). But a police officer cannot and should not be expected to simply ignore the fact that an appropriate and reasonably necessary traffic stop might also advance a related and more important police investigation. *Cf. Nichols,* 161 Wash.2d at 11, 162 P.3d 1122 (" '[E]ven patrol officers whose suspicions have been aroused may still enforce the traffic code ....' " (quoting *State v. Minh Hoang,* 101 Wash.App. 732, 742, 6 P.3d 602 (2000))). In such a case, an officer's motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop, so long as discretion is appropriately exercised and the scope of the stop remains reasonably limited based on its lawful justification.

State v. Arreola, 176 Wn.2d at 299.

This holding clarifies that challenges will necessarily be decided by the trial court which makes findings of credibility, thus

limiting criminal defendants' ability to seek review. This is reasonable. The further the courts get from the testimony, the less the ruling will be about the true facts of the case.

The Defendant argues that the facts of his own stop are significantly distinguishable from those in *Arreola*. Petition at 16. The State disagrees. The Defendant attempts to distinguish one infraction from another, arguing that the altered muffler violation which attracted police attention in *Arreola* is a true general welfare concern due to the nuisance of a muffler's excessive noise. Petition at 16. Apparently the Defendant is not familiar with the Mattawa area that Officer Valdivia patrols. Moreover, if an officer cannot stop a vehicle for a tab violation, then the vehicle registration law cannot be enforced at all. The only possible time to ticket such a violation is when an officer observes the violation and the driver is present.

In attempting to distinguish the cases, the Defendant misrepresents the record. He claims that Ofc. Green "did not see Olsen's car while out on a routine patrol." Petition at 16. In fact, the officer testified that he was on patrol. RP 2, ll. 20-21. He was not actively looking for Olsen's car. RP 14. No one directed Ofc. Green to stop Olsen's car. RP 14, 19, 32-33. But Olsen drove by in a

vehicle with two year tabs and no month tab. RP 3. The officer routinely stopped vehicles for such violations and did so in this instance. RP 4.

Ofc. Green credibly testified, consistent with *Arreola*, that he "would have stopped the vehicle regardless." *State v. Arreola*, 176 Wn.2d at 299. That and the scope of the detention are the essential factors that makes the stop inoffensive to the privacy interest in article I, § 7.

C. THE PETITION SUFFERS FROM MISREPRESENTATIONS OF THE RECORD AND LAW.

Before the court of appeals, the defense made misrepresentations of the facts, which the State corrected. Inexplicably, those misrepresentations persist in this petition.

The Defendant claims that Ofc. Green "did not cite Olsen for expired tabs." Petition at 11-12 (citing RP 5, 11-13). The implication is that, unless the citation reflects the initial suspicion rather than the actual facts learned upon investigation, then the infraction could not have been the true purpose of the stop. This was addressed in briefing below. Respondent's Brief at 3. The inaccurate implication aside, the facts demonstrate a citation for the infraction. The officer

initially cited the Defendant for invalid registration (tabs indicate whether a vehicle registration is up to date) and then for having a display change or disfigured plate (where it was determined that, not only had the registration lapsed, but the driver had also transferred tabs from another vehicle to his own license plate). RP 4-5, 7, 11-13.

The Defendant claims that "the purpose of stopping Olsen's car was to look for drugs." Petition at (citing RP 12, 17-18). The State pointed out this was false. Respondent's Brief at 5. The officer explained that "It was a stop for the tabs," but "I always keep my eye out for indicators of drug use." RP 17-18. The superior court agreed. CP 31 (findings of fact that officer's purpose was for the infraction).

While the Defendant may cite to an unpublished case filed after 2013 (GR 14.1), it is improper to suggest, as he does, that this single case provides adjudicative facts. Petition at 19, n. 10 (asking the court to take "judicial notice" of facts that had no bearing on the decision in an unpublished opinion); *State v. Tait*, 191 Wn. App. 1035, 2015 WL 7777223 at *3 (2015) (where defendant did not challenge any findings of fact from the suppression hearing, "The only question presented for our review, then, is whether the findings of fact support the trial court's conclusion that the glass smoking pipe containing

methamphetamine was admissible for the reason it was found during a lawful traffic stop.").

A court may take judicial notice of adjudicative facts. ER 201. These are facts of the sort normally determined by a jury. 5 Wash. Prac., Evidence Law and Practice § 201.1 (6th ed.).

If an attorney references a "fact" that he or she knows is not the proper subject of judicial notice, then that attorney deprives an opponent of a meaningful opportunity to be heard on the question of whether or not that "fact" is true. This is unfair to the opposing party and violates a rule of the appellate tribunal. RPC 3.4(c).

It appears the Defendant cites the unpublished opinion in order to suggest a statistic. No statistic can be established by a single case.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition.

DATED: March 15, 2019.

Respectfully submitted:

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Jared Steed steedj@nwattorney.net sloanej@nwattorney.net	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 15, 2019, Pasco, WA _____ **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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