

62734-1

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NO. 62734-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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CITY OF BOTHELL,

Respondent,

v.

ROBERT WALLACE,

Appellant.

2009 AUG 14 11:10:46  
CLERK OF COURT  
COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Bruce E. Heller

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REPLY BRIEF OF APPELLANT

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In addition to the issues and arguments presented on behalf of Mr. Wallace in Appellant's Opening Brief, Mr. Wallace respectfully offers the following for the consideration of the Court.

A. ARGUMENT

1. THERE WERE NO FACTS SUPPORTING REASONABLE ARTICULABLE SUSPICION THAT MR. WALLACE OR HIS PASSENGER WERE DRIVING UNDER THE INFLUENCE OR WERE IN POSSESSION OF CONTROLLED SUBSTANCES, THUS THERE WAS NO REASONABLE BASIS FOR DETAINING MR. WALLACE

Mr. Wallace argues that (1) the officer lacked authority to stop and investigate for possession of drug paraphernalia since he could not arrest for that crime, (2) that the stop was not justifiable under Terry because the officer lacked authority to investigate the crime of possession of drug paraphernalia, (3) that there was no nexus between the crime of possession of drug paraphernalia and the place searched, and (4) that the stop was pretextual as the officer's true purpose was to conduct a general investigation for drugs.

The City attempts to sidestep these arguments by claiming that the officer had reasonable articulable suspicion of two arrestable crimes: driving under the influence (a gross misdemeanor) and possession of narcotics (a felony). Brief of Respondent at 20-25. According to the City, this reasonable suspicion justified a Terry stop, created a nexus between the

dropped pipe and the car, and obviates concerns about pretext. The central weakness in the City's arguments is that the undisputed evidence contains no facts supporting DUI or possession of controlled substances.

a. There was no evidence of any impaired driving. No evidence exists supporting any impaired driving, including speeding, improper lane changes or weaving, failure to signal, or reckless driving. RP 23. While the officer chose not to observe Mr. Wallace's driving for very long, his choice to initiate an encounter quickly does not provide a factual basis upon which to support a reasonable and articulable suspicion of DUI. The officer's stated concern about impaired driving is based on pure speculation, not on factual observation of any impaired driving.

b. There was no evidence of current substance use. The tip from the Kinko's clerk did not contain any evidence of current substance use, nor did the clerk indicate any facts from which current substance use could be inferred. RP 4-5. No evidence was provided of behavioral indicators of substance impairment; no unsteady gait, no red or runny eyes, no slurred or incoherent speech, no odor. Id. In the absence of such factual observations, the second-hand tipster's conclusion that the couple looked like "drug addicts" does not provide objective facts giving rise to reasonable and articulable suspicion that either Mr. Wallace or his

companion currently were under the influence of controlled substances. Similarly, once he detained the couple, the officer did not make any factual observations of drug or alcohol impairment of either suspect. Any notion that Mr. Wallace or his companion were currently using controlled substances was pure speculation.

c. There was no evidence of current controlled substance possession. Nothing in the tip indicated that either suspect currently possessed any controlled substances. No substance was seen; no handing back and forth of any objects was observed; no handing around of money was reported. There was no mention of any controlled substances. Once Mr. Wallace and his companion were detained, the officer found no controlled substances on either suspect's person and no other evidence of the presence of any controlled substance. No such substance was in plain view in Mr. Wallace's car. As a result, the idea that Mr. Wallace or his companion currently possessed controlled substances was pure speculation.

Nevertheless, the City's response hinges on these speculations. In response to Mr. Wallace's argument that he should not have been investigated for a crime for which he could not have been arrested, the City responds that DUI and possession of illegal drugs are arrestable offenses, so the officer could investigate them. Brief of Respondent at 22. But since there were

no objective facts supporting a reasonable and articulable suspicion of DUI or possession of illegal drugs, the City's argument misses the point.

Likewise, in response to Mr. Wallace's argument that there is no nexus between the crime of possession of drug paraphernalia and the place searched (Mr. Wallace's car), the City claims that there is a nexus between the crimes of DUI and possession of illegal drugs and the place searched. This argument fails because the only crime there is any evidence of is possession of paraphernalia. It does not matter whether there might be a nexus between DUI or possession of illegal drugs and Mr. Wallace's car, because there is no reasonable suspicion of DUI or possession of illegal drugs.

d. The stop was pretextual. The City attempts to defend the objective reasonableness of the officer's claimed justification for the stop by arguing that there was reasonable suspicion to investigate for DUI and possession of illegal drugs. Brief of Respondent at 21-22. Since there was no factual support for reasonable suspicion, however, the officer's claimed justifications for the stop were not objectively reasonable.

The officer honestly admitted that he used the non-arrestable drug paraphernalia tip to pursue a general investigation for drugs. RP 23. ("I was just investigating what – what exactly

was going on.” Id.; “I was going to contact them and – and make sure that, you know, like I said, investigate what I had at this point in time, what was – what was happening.” RP 24). This is similar to Ladson, where officers decided to pull over the defendant for general questioning, and used expired tabs as their pretext to initiate a broader investigation. 138 Wn.2d 343, 346, 979 P.2d 833 (1999). Here, the officer decided to detain Mr. Wallace and his companion just to find out “what exactly was going on.” Such a general investigation is unconstitutional.

The officer’s claim that he was conducting a genuine DUI investigation is belied by the complete lack of any indication of impaired driving and by the officer’s failure to conduct any field sobriety tests or to ask standard DUI investigation questions.

If the stop had been a genuine DUI or narcotics possession investigation, it should have ended quickly. Once it was ascertained that Mr. Wallace showed no sign of being under the influence, and once the officer determined that neither he nor his passenger possessed any drugs on their person or in plain view in the car, those justifications for the encounter evaporated. Continuing the investigation and prolonging the detention to use a drug dog indicate that the intrusion was not tied to its claimed justification. The stop was pretextual.

2. THIS COURT SHOULD FOLLOW STATE v. DUNCAN AND REJECT THE CITY'S INVITATION TO TREAT THIS CASE AS A FELONY OR DUI

This is a case about a misdemeanor committed outside the presence of law enforcement; one so minor that it is not included in RCW 10.31.100's list of offenses for which arrest is permitted. Yet the City persistently invites this Court to analyze it as a felony or DUI case. Such an approach directly contradicts the Supreme Court's holding in Duncan: "[w]e place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime." 146 Wn.2d 166, 177, 43 P.3d 513 (2001). Ignoring Duncan completely, the City encourages this court to analogize to the circumstances of State v. Wheeler, 108 Wn.2d 340, 737 P.2d 1005 (1987), a case concerning hot pursuit of a burglary in progress. Brief of Respondent at 9-10. Similarly, the City encourages the Court to rely upon State v. Anderson, a case in which a lane-weaving defendant made deliberate and strange gestures apparently referencing her lane weaving to an officer. 51 Wn. App. 775, 755 P.2d 191 (1988); Brief of Respondent at 19-20. The City also suggests this Court analogize to a case in which a police officer has been notified that a man nearby has a gun. State v. Franklin, 41 Wn. App. 409, 704 P.2d 666 (1985). Brief of Respondent at 19. Such analogies

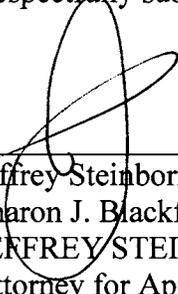
simply do not apply to the minor misdemeanor at issue here. In this case, this Court should follow Duncan and, considering the minor nature of the possible criminal activity, hold the City to a higher burden to justify its intrusion into Mr. Wallace's privacy.

B. CONCLUSION

Because there were no facts supporting reasonable articulable suspicion that Mr. Wallace or his passenger were driving under the influence or were in possession of controlled substances, there was no reasonable basis for detaining Mr. Wallace.

DATED this 11<sup>th</sup> day of August, 2009.

Respectfully submitted



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

CITY OF BOTHELL,  
  
Plaintiff,  
  
v.  
  
1982 MERCEDES BENZ 240, LICENSE  
NO. 532TOP, VIN  
WDBAB23AXCB334543,  
  
Defendant In Rem,  
  
ROBERT WALLACE,  
  
Claimant.

No. 62734-1--I

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Reply Brief of Appellant and this Certificate of Service were served on June 08, 2009, via first class U.S. mail, postage prepaid, upon:

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DATED this 11<sup>th</sup> day of August, 2009.

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STATE OF WASHINGTON  
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