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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 DEC 28 PM 4:54

NO. 63529-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHEICK DIABATE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHEN P. HOBBS
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TABLE OF CONTENTS

I. ISSUE PRESENTED 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 2

IV. CONCLUSION 4

TABLE OF AUTHORITIES

Table of Cases

Washington State:

State v. Cole, 73 Wn. App. 844,
871 P.2d 656 (1994) 2

State v. Winterstein, ___ Wn.2d ___,
2009 WL 4350257 (December 3, 2009) 1, 3, 4

Rules and Regulations

Washington State:

CrR 3.6 ..... 3, 4

I. ISSUE PRESENTED

Whether the State must concede that Cheick Diabate's conviction must be reversed when the trial court denied the motion to suppress incriminating evidence obtained after an unlawful search by relying on the inevitable discovery doctrine, a doctrine that was subsequently rejected by the Washington Supreme Court in State v. Winterstein.

II. STATEMENT OF THE CASE

Cheick Diabate was found guilty by a jury of one count of possession of intent to deliver a controlled substance, a violation of the Uniform Controlled Substances Act. CP 1-4, 69. Diabate received a standard range sentence and has filed a timely appeal. CP 71-89.

Prior to trial, Diabate moved to suppress evidence obtained during a search of his person. The trial court found, and the State did not dispute, that the initial seizure of Diabate was unlawful, but denied the motion to suppress on the grounds that the evidence would have been inevitably discovered. CP 10-29, 90-99.

III. ARGUMENT

Diabate was a passenger in a car stopped for expired tabs. CP 90-91 (Finding 1, a-k). Diabate was not wearing a seatbelt. CP 91 (Finding 1, l). When Diabate could not provide identification, he was ordered from the vehicle. CP 91 (Finding 1, s-t). Diabate then produced an identification card and the officer discovered he had an outstanding warrant. CP 91 (Finding 1, u-x). A search of Diabate incident to arrest uncovered marijuana; more marijuana was discovered on Diabate during a search at the police station. CP 91 (Finding 1, y-aa).

The trial court found that the officer illegally seized Diabate when he ordered him from the car and that the officer should not have asked Diabate to get out of the car during an inquiry about a seatbelt violation. CP 92 (Conclusion m-n). The court also found that there was no evidence of furtive movements or any other reason for the officer to ask Diabate to get out of the car. CP 92 (Conclusion o). The Court found that the seizure was illegal pursuant to State v. Cole, 73 Wn. App. 844, 871 P.2d 656 (1994). CP 92 (Conclusion p).

Nevertheless, the trial court concluded that the doctrine of inevitable discovery applied. CP 92 (Conclusion q). The trial court

found that there was nothing to suggest that Diabate was not going to give his true name and that the officer would then have discovered the outstanding warrant. CP 93 (Conclusion t-x). With the existence of the warrant revealed, Diabate would have been arrested and the evidence he sought to suppress discovered during the subsequent searches. CP 93 (Conclusion y). The Court found that the officer had not acted unreasonably and was not placed in a better position after the unlawful seizure. CP 93 (Conclusion r-s, z). Accordingly, the trial court denied the suppression motion. CP 93 (Conclusion aa).

The trial court's ruling on the CrR 3.6 motion to suppress occurred before the Washington Supreme Court's decision in State v. Winterstein, ___ Wn.2d ___, 2009 WL 4350257 (December 3, 2009). In Winterstein the Washington Supreme Court concluded that the inevitable discovery doctrine no longer has force in Washington. Winterstein, ¶ 23-36.

Under the facts of this case, and without conceding any future arguments as to the validity of Winterstein, the State concedes that Diabate's conviction must be reversed. The only evidence that supported Diabate's conviction was obtained after an unlawful seizure. The motion to suppress this evidence was denied

based on the inevitable discovery doctrine. The trial court's CrR 3.6 ruling was erroneous in light of Winterstein. There appears to be no other basis that would support the introduction of the evidence. Absent the introduction of this evidence there is not sufficient evidence to support Diabate's conviction.

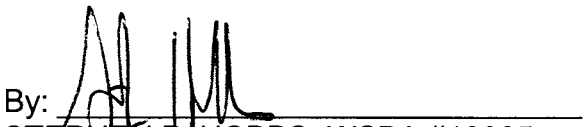
IV. CONCLUSION

For the reasons stated above, the State of Washington concedes that Diabate's conviction must be reversed.

DATED this 28th day of December, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 08-1-11789-4 SEA
vs.	)	
CHEICK DIABATE, Defendant,	)	WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO SUPPRESS PHYSICAL, ORAL OR IDENTIFICATION EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on March 9 and March 10, 2008 before the Honorable Judge Regina Cahan. After considering the written briefing, testimony and evidence submitted by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. FINDING OF FACTS:
   a. On June 4, 2008 at about 8:00 p.m. Bellevue Police Officer Amir Mousavi was on routine patrol in the 5600 block of 119th Avenue S.E.
   b. Running license plates is one of Officer Mousavi's routine traffic patrol functions.
   c. Officer Mousavi observed that a vehicle had expired tabs.
   d. Officer Mousavi ran a records check of the vehicle on his patrol car computer and confirmed that its registration had expired.
   e. He followed the vehicle for several blocks waiting for the computer to confirm the expired tabs.
   f. The vehicle appeared to have two front seat passengers.
   g. Officer Mousavi followed the vehicle northbound on 119th Avenue S.E. and initiated a traffic stop.
   h. The vehicle turned left onto S.E. 52nd Street and stopped.
   i. He approached the vehicle and noticed it had three occupants.

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j. He approached the vehicle on the passenger side.
k. The Defendant was seated in the backseat.
l. Officer Mousavi noticed that both passengers, including the Defendant, were not wearing their seatbelts.
m. He asked the Defendant why he was not wearing a seatbelt.
n. The Defendant responded that he wasn't wearing it because it didn't work.
o. Officer Mousavi asked the driver to see his license, registration, and proof of insurance.
p. The driver provided his driver's license and was identified as Marcus Francis.
q. Officer Mousavi also asked both passengers for identification.
r. The front passenger was identified from his Washington State identification card as Isaiah Francis.
s. The Defendant told Officer Mousavi that he did not have his identification card.
t. Officer Mousavi ordered the Defendant to exit the vehicle.
u. The Defendant then found his identification card and gave it to the officer.
v. Officer Mousavi identified him as Cheick Diabate.
w. He then found that the Defendant had an unconfirmed warrant.
x. Officer Mousavi confirmed the warrant and placed the Defendant under arrest.
y. Officer Mousavi searched the Defendant incident to arrest and found a marijuana pipe and a purple Crown Royal bag containing a green leafy substance he recognized as marijuana in the right outside pocket of his brown sleeveless jacket.
z. As he continued to search the Defendant, Officer Mousavi found a colored plastic baggie containing a green leafy substance that also appeared to be marijuana in the right inside pocket of the brown vest.
aa. At the station, additional suspected marijuana was found in various locations in the Defendant's clothing.

2. CONCLUSIONS OF LAW:

a. The stop was not pretextual.

b. The objective evidence shows that the tabs were expired.

c. It is routine for officers to run vehicle plates.

d. The fact that the officer followed the vehicle for a couple of blocks is not evidence of pretextual intention but rather is consistent with waiting for a response from the patrol car computer on the vehicle plate and status of the expired tabs.

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e. Approaching the vehicle from the passenger side is not evidence of pretext nor causes suspicion but is rather a routine procedure for officer safety when a vehicle is still in the lane of traffic.

f. The inquiry by the officer into whether and why the passengers did not have their seatbelts fastened was not unreasonable and is not evidence of pretext.

g. There was sufficient probable cause to stop the vehicle for a traffic infraction.

h. The officer approached the vehicle for the expired tabs not for the seatbelt violations.

i. The officer had the necessary probable cause when he was approaching the vehicle.

j. The officer observed the seatbelt violation in plain view.

k. At that point, the officer had probable cause to inquire about the seatbelt violations.

l. There are no grounds for suppression of evidence based on probable cause to stop the vehicle.

m. The officer illegally seized the Defendant when he asked the Defendant to step out of the vehicle.

n. The officer should not have asked the Defendant to step out of the vehicle during an inquiry about a seatbelt violation.

o. There was no evidence of furtive movements or any other reason to have the Defendant exit the vehicle.

p. Under State v. Cole, 73 Wn.App. 844 (1994), this was an unlawful seizure.

q. The doctrine of inevitable discovery does apply in this case.

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r. The question is whether the officer was placed in a better or worse position after the unlawful seizure.

s. In this case, the officer was not placed in a better position after asking the Defendant to step out of the vehicle.

t. As much as the Defendant did not have to give his true name, he did not have to voluntarily produce his identification card.

u. The Defendant did give the officer his identification card instead of waiting for the officer to inquire further about his identity.

v. The officer was not placed in a better position by the Defendant's seizure as the court assumes that a person will give their true identity to the police.

w. There are no facts here to suggest that the Defendant was not going to give his true identity.

x. Therefore, the officer would have found the Defendant's identity and would have discovered the warrant for his arrest.

y. The inevitable discovery doctrine does apply as once the arrest warrant was discovered, the arrest and search incident to arrest would have occurred.

z. Although the seizure was unlawful, the officer did not act unreasonably in this case and there was no offensive or improper conduct on the part of the officer.

aa. The suppression motion is denied.

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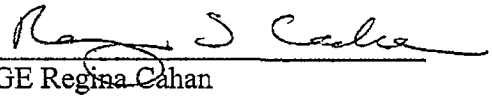
In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 25 day of May, 2009.

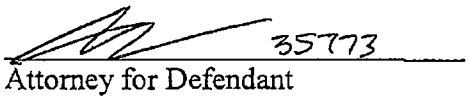


JUDGE Regina Cahan

Presented by:

#36634

Deputy Prosecuting Attorney



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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to JARED STEED, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE v. CHEICK DIABATE, Cause No. 63529-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

UBrame
Name

12/28/09
Date

Done in Seattle, Washington