70055-3

70055-3

NO. 70055-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY E. BURR,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

2010 OCT 29 PM 1:29

TABLE OF CONTENTS

I. ISSUES 1
II. STATEMENT OF THE CASE 1
A. FACTS OF THE CRIMES. 1
1. February 2010 Incident – No. 70056-1. 1
2. March 2010 Incident – No. 70055-3. 3
B. PROCEDURAL HISTORY. 4
1. February 2010 Incident – No. 70056-1. 4
2. March 2010 Incident – No. 70055-3. 5
III. ARGUMENT 7
A. DEPUTY BRITTINGHAM'S STOP OF DEFENDANT WAS NOT PRETEXTUAL. 7
B. DEPUTY DILL'S PAT-DOWN OF DEFENDANT FOR OFFICER SAFETY WAS LAWFUL. 9
IV. CONCLUSION 11

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Arreola, 176 Wn.2d 284, 290 P.3d 983 (2012).....7, 8, 9
State v. Bailey, 109 Wn. App. 1, 34 P.3d 239 (2000).....10
State v. Belieu, 112 Wn.2d 587, 773 P.2d 46 (1989).....10
State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993).....10
State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002).....9
State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005).....7
State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994).....10

FEDERAL CASES

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ..7, 10

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 7 8

I. ISSUES

1. Even if one of Deputy Brittingham's motives was to investigate whether defendant was driving under the influence; was the stop of defendant for an observed traffic infraction a pretext?

2. Was Deputy Dill's pat-down of defendant, based on specific and articulable facts supporting a reasonable suspicion that defendant was armed, lawful?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

1. February 2010 Incident – No. 70056-1.

On February 9, 2010, at approximately 10:18 p.m., Deputy Dill observed two males standing near a parked car in an apartment complex parking lot in the 800 block of 112th Street SW, Everett, WA. This is a high crime area. The driver's car door was open and a wheel was leaning against the car. Deputy Dill illuminated the males with his light and immediately recognized Anthony Earl Burr (defendant) and Jason Cobbs, from prior contacts with each of them. Deputy Dill knew that neither defendant nor Cobbs lived in the apartment complex. Defendant looked at Deputy Dill, entered the car for a brief period, then exited the car and closed the driver's door. Deputy Dill asked both defendant and Cobbs to remove their

hands from their pockets. Deputy Dill was aware that both defendant and Cobbs were convicted felons with histories of possessing weapons. Earlier that day Deputy Dill had received information regarding an anonymous tip that Cobbs had been attempting to selling firearms to juveniles. Deputy Dill was working alone. For officer safety defendant and Cobbs were patted down for weapons. 1CP 80-81; 2RP 4-12, 24-28, 36-38.[1]

Deputy Dill felt a hard object in defendant's pocket and defendant told Deputy Dill that it was a marijuana pipe. Deputy Dill noted the odor of burnt marijuana coming from the area where defendant had been standing near the car. Deputy Dill asked if there was marijuana in the car and defendant replied that he did not know. Deputy Dill's request of defendant for permission to search the car was declined. A K-9 responded to the location and indicated a positive response on the car for drugs. The car was impounded while Deputy Dill sought a search warrant. On February 16, 2010, a search warrant was obtained and the car was searched. A stolen firearm was located in the glove box. 1CP 81; 2RP 12-19, 28-32.

[1] Appellant's notation format is used for uniformity.

2. March 2010 Incident – No. 70055-3.

On March 17, 2010, Deputy Brittingham was on duty in Snohomish County. At approximately 10:30 p.m., Deputy Brittingham observed the vehicle in front of him was traveling about 15 mph below the speed limit and Deputy Brittingham wondered if the driver was DUI. The vehicle changed from lane 2 to lane 1 without signaling. Deputy Brittingham conducted a traffic stop of the vehicle to address the traffic infraction of failing to signal. Prior to stopping the vehicle Deputy Brittingham did not know who the driver was. The vehicle was not registered to defendant. When he made contact with the driver, Deputy Brittingham immediately recognized the driver as Anthony Earl Burr, defendant. 2CP 18, 121-122; 1RP[2] 38-41, 47-49; 3RP 4-9, 12-13, 16.

Deputy Brittingham was aware the defendant was a convicted felon who had recently been found in possession of a loaded firearm. Deputy Dill responded to the location of the stop. Defendant was told to keep his hands on the steering wheel, but he kept moving his hand to his left pants pocket. For officer safety

[2] A transcript of the proceedings from the 3.5 hearing on July 12, 2012, was used by defense for impeachment purpose at the 3.6 hearing on November 29, 2012. 3RP 13-16. The transcript was admitted during argument to assist the court in assessing Deputy Brittingham's credibility. 3RP 38-40, 51-55. The court found Deputy Brittingham's testimony credible. 2CP 18; 3RP 58.

defendant was removed from the vehicle and patted down for weapons. Defendant stated that he had "meth" in his pocket. Methamphetamine was found in defendant's pocket. Defendant stated that he only sells drugs to a few friends and rarely buys a quarter ounce at a time. A search warrant was obtained for the vehicle and a loaded handgun that had been reported stolen was found in the backseat. 2CP 15, 122; 1RP 28, 30-31, 35, 38-42, 44-46, 48-51; 3RP 16.

B. PROCEDURAL HISTORY.

1. February 2010 Incident – No. 70056-1.

Defendant was charged with Unlawful Possession of Firearm in the Second Degree. 1CP 110-111. On July 12, 2012, a hearing pursuant to the CrR 3.5 was held before Judge Lucas to determine the admissibility of defendant's statements. The court found that defendant's statements to Deputy Dill were admissible at trial. 1CP 83-84; 1RP 2-61.

On August 2, 2012, Judge Weiss heard defendant's motion to suppress evidence pursuant to CrR 3.6. The court heard testimony from Deputy Dill. 2RP 2-41. The court specifically addressed the issue of the pat down. 2RP 42-47. Finding that under the totality of the circumstances Deputy Dill had a reasonable

concern for his safety the court concluded that there was a sufficient basis for Deputy Dill to pat down defendant. 2RP 46-47. The court denied defendant's motion to dismiss. 1CP 80-82; 2RP 46-66.

The case proceeded to stipulated bench trial and defendant was found guilty of Unlawful Possession of Firearm in the Second Degree. 1CP 13-15; 6RP 4-5. On February 26, 2013, defendant was sentenced to 22 months. 1CP 2-12; 8RP 11-13.

2. March 2010 Incident – No. 70055-3.

Defendant was charged with count 1: Possession of a Controlled Substance with Intent to Manufacture or Deliver with a Firearm; and count 2: Unlawful Possession of Firearm in the Second Degree. 2CP 145-146. On July 12, 2012, a hearing pursuant to CrR 3.5 was held before Judge Lucas to determine the admissibility of defendant's statements. The court found that defendant's statements to Deputies Brittingham and Dill were admissible at trial. 2CP 130-131; 1RP 2-61.

On November 29, 2012, Judge Weiss heard defendant's motion to suppress evidence pursuant to CrR 3.6. The court heard testimony from Deputy Brittingham, defendant, and defense investigator Michael Powers. 3RP 2-31. Defendant said that he

did not change lanes, he stayed in lane 2. 3RP 24-26. Defense argued that there was no basis for the stop. 3RP 33-41. The court found that defendant changed from lane 2 to lane 1 without using a signal. 2CP 121; 3RP 58-59. The court specifically addressed the issue of whether the stop was pretextual. 3RP 41-59. Defense argued the reason for the stop was that the officer knew defendant was driving the vehicle and that infraction was a pretext. 3RP 42-43. The court found that prior to stopping the vehicle Deputy Brittingham did not know who was driving the vehicle. 2CP 18; 3RP 45. Defense then argued that the officer stopped the vehicle because he thought the driver was DUI for going to slow and the officer made up the lane change violation. 3RP 45-47. The court inquired, "if he committed these infractions, really, still your argument it's pretextual because he was thinking DUI?" Defense counsel replied, "But, I will concede, the case law is against me on that. If there is a traffic infraction, then there is grounds." 3RP 58. The court denied defendant's motion to dismiss. 2CP 18-19, 121-123; 3RP 58-59.

The case proceeded to stipulated bench trial and defendant was found guilty of both counts, Possession of a Controlled Substance with Intent to Manufacture or Deliver with a Firearm and

Unlawful Possession of Firearm in the Second Degree. 2CP 14-17; 6RP 4-5. On February 26, 2013, defendant was sentenced to 120 months. 2CP 2-13; 8RP 11-13.

III. ARGUMENT

The relevant facts, which were found by the trial court following a suppression hearing, are unchallenged before this court and thus are verities on appeal. State v. Arreola, 176 Wn.2d 284, 288, 290 P.3d 983 (2012); State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. Arreola, 176 Wn.2d at 291; Gaines, 154 Wn.2d at 716.

A. DEPUTY BRITTINGHAM'S STOP OF DEFENDANT WAS NOT PRETEXTUAL.

Here, the trial court found that Deputy Brittingham observed defendant change lanes without using a turn signal and that defendant was traveling approximately 15 miles per hour under the speed limit. The trial court concluded that Deputy Brittingham had a reasonable suspicion to believe that defendant had committed a traffic infraction and conducted a proper *Terry*[3] stop of defendant's vehicle. Whether the traffic stop was also motivated by Deputy

[3] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Brittingham's suspicion that the driver might be DUI does not make it a pretext stop. Where an officer's has reasonable articulable suspicion of a traffic infraction and actually, consciously, and independently determines that a traffic stop is reasonably necessary in order to address a suspected traffic infraction, the stop is not pretextual despite other motivations for the stop. Arreola, 176 Wn.2d at 300.

In Arreola the Court addressed the issue of whether a mixed-motive traffic stop is unconstitutionally pretextual. Arreola, 176 Wn.2d at 288 (stop was motivated primarily by an uncorroborated tip, but also independently motivated by a reasonable articulable suspicion of a traffic infraction). The Court held:

> So long as a police officer actually, consciously, and independently determines that a traffic stop is reasonably necessary in order to address a suspected traffic infraction, the stop is not pretextual in violation of article I, section 7 [of the Washington State Constitution], despite other motivations for the stop.

Arreola, 176 Wn.2d at 288.

Here, defendant's argument in the trial court was that the lane change never happened, that the officer fabricated the infraction to justify a pretext stop. 3RP 42-43, 45-47. Defendant

conceded that if there was a traffic infraction there were grounds to stop him. 3RP 58. Deputy Brittingham testified that one of his duties is to initiate traffic stops to enforce the traffic laws. 3RP 4. He stated that what drew his attention was the vehicle's slow speed and the thought crossed his mind of a possible DUI, based on his training and experience that drivers under the influence typically do not make quick actions, they slowly swerve in lanes. 3RP 5, 9, 16. Deputy Brittingham stated he stopped the defendant on March 17, 2010, for failure to use a turn signal. 3RP 5, 12. The trial court's uncontested findings support the conclusion that the stop was based on the traffic infraction. 2CP 121-122.

In the present case, Deputy Brittingham's mixed-motive traffic stop was not pretextual. Arreola, 176 Wn.2d at 288.

B. DEPUTY DILL'S PAT-DOWN OF DEFENDANT FOR OFFICER SAFETY WAS LAWFUL.

An officer may briefly search for weapons if the officer reasonably believes an officer safety search is necessary. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). "A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and

presently dangerous.'" State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993), citing Terry, 392 U.S. at 21–24, 88 S.Ct. at 1879–1881. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." Collins, 121 Wn.2d at 173, quoting Terry, 392 U.S. at 27, 88 S.Ct. at 1882; State v. Bailey, 109 Wn. App. 1, 5, 34 P.3d 239 (2000). "[C]ourts are reluctant to substitute their judgment for that of police officers in the field. 'A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.'" Collins, 121 Wn.2d at 173 (emphasis omitted), quoting State v. Belieu, 112 Wn.2d 587, 601–602, 773 P.2d 46 (1989). A valid weapons frisk pursuant to a *Terry* stop is justified if its scope is limited to a pat-down search of the outer clothing to discover weapons that might be used to assault the officer. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

Here, the officer's pat-down was prudent. Deputy Dill had a founded, reasonable suspicion that defendant was armed and dangerous. Deputy Dill's suspicion was based upon the fact that he was alone with two subjects, both subjects had their hands in

their pockets, defendant entered and exited the car upon seeing him, his knowledge that both subjects were felons with histories of possessing weapons, the time of night, and the high crime area in which the incident was occurring. Under the circumstances it was reasonable for Deputy Dill to be concerned for his safety. The pat-down of defendant was a valid protective search.

IV. CONCLUSION

For the reasons stated above, defendant's appeal should be denied and his convictions affirmed.

Respectfully submitted on October 28, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:
JOHN J. JUHL, WSBA #18951
Deputy Prosecuting Attorney
Attorney for Respondent