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NO. 36008-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ALAN DUNLAP, APPELLANT

Green

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming
The Honorable Linda CJ Lee
The Honorable Lisa Worswick

No. 06-1-01690-6

**CORRECTED BRIEF OF RESPONDENT
(Corrected as to Clerk's Papers Citations only)**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly deny defendant's motion to suppress evidence of the contents of defendant's vehicle when Officer Downey had probable cause to stop defendant for driving without his headlights when (1) headlights were required, (2) defendant admitted that there were warrants for his arrest, (3) Officer Downey arrested defendant pursuant to valid warrants for his arrest, and (4) defendant's vehicle was searched incident to this valid arrest?

B. STATEMENT OF THE CASE.

1. Procedure

On April 17, 2006, the Pierce County Prosecutor's Office charged MICHAEL ALAN DUNLAP, hereinafter "defendant," with one count of second degree identity theft and two counts of second degree possession of stolen property. CP 1-2.

On December 21, 2006, defendant brought a CrR 3.6 motion to suppress the evidence seized from the vehicle defendant was driving at the time he was arrested. RP(1) 1-13; CP 12-33. Defendant argued that the arresting officer did not have probable cause to stop defendant's vehicle because defendant was not required to use his headlights at the time he was stopped and because the stop was a mere pretext. RP(1) 1-6; CP 12-

33. Defendant also argued that the officer was not authorized to search his vehicle. RP(1) 1-6; CP 12-33. The court ruled that the evidence was admissible, concluding that Officer Downey had a reasonable articulated suspicion that a traffic infraction had occurred, the stop was not a mere pretext, Officer Downey had probable cause to arrest defendant, and Officer Downey searched the vehicle incident to this valid arrest. RP 11-12; CP 41-43. The court entered findings of fact and conclusions of law in support of this ruling. CP 41-43.

The matter proceeded to a stipulated facts bench trial on January 18, 2007. RP(2) 1-19. Defendant and the State stipulated that the facts contained in a police report prepared by Officer Downey of the Milton Police Department were true. RP(2) 4-5; EX. 1. The court found defendant guilty of all three counts and entered findings of fact and conclusions of law in support of this verdict. CP 47-51, 55-68. On February 16, 2007, the court sentenced defendant to serve 25 months' confinement for Count I, 12.75 months' confinement for Count II, and 12.75 months' confinement for Count III. RP(3) 17-18; CP 55-68. The court also ordered defendant to pay monetary penalties. RP(3) 17-18; CP 55-68. From entry of this judgment and sentence, defendant has filed a timely notice of appeal. CP 69.

2. Facts¹

On April 16, 2006, Officer Downey was patrolling Pacific Highway East near the 7700 block in a police cruiser. At 6:30 a.m., he observed defendant driving a passenger car southbound. The car's headlights were not lighted at the time, and the sun had not yet risen. In Officer Downey's opinion, headlights were required to drive at that time. Officer Downey activated his emergency lights and stopped the vehicle defendant was driving. Defendant was within 1000 feet of a school zone at the time.

When Officer Downey contacted defendant, defendant was unable to provide a driver's license or proof of insurance. Defendant did verbally identify himself as Michael Dunlap and said to Officer Downey, "I have warrants you're going to want to run me in on." Officer Downey returned to his police vehicle to check defendant's warrant and driver's status. During this check, defendant made two phone calls on his mobile phone. Officer Downey learned from the warrant check that defendant had three outstanding warrants. Officer Downey then approached defendant and ordered him to get out of the car with his hands up.

¹ Because the trial was a stipulated facts trial, the substantive facts of this case are all contained in the police report prepared by Officer Downey of the Milton Police Department. CP 78-98. Defendant stipulated to the truth of these facts during the stipulate facts trial on January 18, 2007. RP(2) 4-5. To improve readability, the State will not cite that report in this section, but all of the substantive facts come from that report.

As defendant was exiting the vehicle, defendant locked the car door and began to close it. Officer Downey told defendant not to close the door, but defendant closed it anyway. Defendant claimed that he closed the door in order to secure the car, which was not his. Officer Downey took defendant into custody, handcuffed him, and read him his Miranda² rights.

After defendant was taken into custody, four people in two vehicles arrived. The people told Officer Downey that defendant had called them; defendant claimed that they had called him. Stephanie Anderson approached defendant and claimed that the car that defendant had been driving belonged to her. Ms. Anderson could not produce identification, however, so Officer Downey had the car towed and impounded.

Before the tow truck arrived, Officer Downey inspected the vehicle. He noted that the locks in the passenger-side door and trunk had been punched out. In the backseat of the car, he found a license and social security card for a person named Berg, a credit card for a person named Barnett, a Best Buy card for a person named Lensegrav, a credit card for a person named Bergquist, a checkbook for a person named Gjertson, and a Medical Examiner's card for a person named Stammen. Officer Downey found a duffle bag containing mail addressed to persons named Barnett,

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

Lensegrav, and Carlson. He found a glass pipe with cocaine residue under the duffle bag.

Officer Downey contacted Mr. Berg, Mr. Barnett, and Ms. Lensegrav on April 16, 2006. Mr. Berg reported that a week earlier, someone broke into his car and stole his wallet. Mr. Barnett reported that a week earlier, he noticed that someone he gone through his mail. Mr. Barnett also reported that on April 14, 2006, his credit card was used to make a \$28 purchase at a gas station. Ms. Lensegrav reported that on April 11, 2006, someone broke into her vehicle and stole her purse.

C. ARGUMENT.

1. THE COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE CONTENTS OF DEFENDANT'S VEHICLE BECAUSE OFFICER DOWNEY HAD PROBABLE CAUSE TO STOP DEFENDANT FOR DRIVING WITHOUT HIS HEADLIGHTS WHEN HEADLIGHTS WERE REQUIRED, DEFENDANT ADMITTED THAT THERE WERE WARRANTS FOR HIS ARREST, DEFENDANT WAS ARRESTED PURSUANT TO VALID WARRANTS FOR HIS ARREST, AND THE VEHICLE WAS SEARCHED INCIDENT TO THIS VALID ARREST.

It is clear under Washington State law that the appellate courts review findings of fact regarding a motion to suppress under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a

fair minded, rational person of the truth of the finding. Id. at 644. The appellate courts review conclusions of law regarding an order pertaining to suppression of evidence de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996); State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999). Attorneys' remarks, statements, and arguments are not evidence. State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Id. at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal, the court should treat the unchallenged findings of fact as verities. Defendant has assigned error to Finding as to Disputed Fact No. 2 and Conclusion of Law No. 1 from the courts written findings re: the CrR 3.6 motion. Br. of Appellant at 1; CP 41-43. There is no argument in his brief, however, as

to how the other findings are unsupported by the evidence. In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence, made no cites to the record to support its assignments, and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Id. at 244; see also, State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998). Because defendant has failed to assign error to the Undisputed Facts, The Findings as to Disputed Facts Nos. 1 and 3, and Conclusions of Law Nos. 2 and 3, these findings and conclusions are verities on appeal. CP 41-43. Defendant has further failed to assign error to any of the findings of fact of conclusions of law supporting the trial court's finding that defendant was guilty in this case. CP 47-51. Thus, the findings of fact and conclusions of law underlying the finding of guilt are verities on appeal.

- a. Officer Downey had probable cause to stop defendant, who failed to use his headlights when they were required.

A law enforcement officer may lawfully perform a traffic stop if he has probable cause to believe that a traffic violation has occurred. State v. Chelly, 94 Wn. App. 254, 259, 970 P.2d 376 (1999). Probable cause requires facts and circumstances within the arresting officer's knowledge which are sufficient to justify a reasonable belief that an offense has been committed. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). It is a traffic infraction for a person to drive a vehicle without lighted headlights

at any time from a half hour after sunset to a half hour before sunrise and at any other time **when**, due to insufficient light or unfavorable atmospheric conditions, **persons and vehicles on the highway are not clearly discernible at a distance of one thousand feet**

RCW 46.37.010(1)(b), (1)(c), and (2); RCW 46.37.020 (emphasis added).

Once an officer has stopped a person, the officer may reasonably detain that person if "further articulable facts giv[e] rise to a reasonable suspicion of criminal activity." State v. Armenta, 134 Wn.2d 1, 15-16, 948 P.2d 1280 (1997); see also, Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

There were facts within Officer Downey's knowledge that suggested that defendant's headlights were unlit and that there was insufficient light for defendant to clearly discern persons and vehicles on

the highway at a distance of one thousand feet. No party disputes the fact that defendant was driving with unlit headlights. CP 78-98, 41-43, 47-51. The sun had not risen at the time that Officer Downey saw defendant's vehicle. CP 78-98, 41-43, 47-51. Officer Downey reported, defendant stipulated, and the court found that headlights were required at that time. CP 78-98, 41-43, 47-51. It was dark enough that defendant knew headlights were required at the time. CP 78-98, 41-43, 47-51. Defendant only failed to use his headlights because he forgot to turn them on, not because the lighting conditions made them unnecessary. CP 78-98, 41-43, 47-51.

In support of defendant's argument that he was not required to use his headlights at the time Officer Downey stopped him, defendant claims, "it is undisputed that sunrise on the date in question occurred at 6:19 a.m., about 11 minutes before the traffic stop." Br. of Appellant at 3. To support this claim, defendant cites a portion of the State's rebuttal argument to defendant's 3.6 motion:

[STATE:] The RCW that counsel referred to is RCW 46.37.020. It says (reading:) Any other time, due to insufficient light or unfavorable atmospheric conditions persons or vehicles on the highway are not clearly discernable at a distance of 1,000, shall display bright headlights. The officer – even though **sunrise was at 6:19, I believe, according to Ms. Jean [defense counsel]**, the officer stopped him at 6:30.

There are a lot of local conditions that occurred when it may be dark even though the sun is up. In fact, this occurred on Pacific Highway. The officer's opinion was that it was dark. Other cars on the road had their headlights

on. In fact when he stopped the defendant, the defendant's immediate comment was, I knew I should have my lights on. I forgot.

RP(1) 6 (emphasis added). In other words, defendant is relying on a portion of the record in which the State relayed information that defense counsel gave earlier. There is no indication in the record that the State intended to be bound by Ms. Jean's statement. After making this statement, the State proceeded to argue assuming *arguendo* that Ms. Jean's statement was true and the sun had already risen. RP(2) 6. This citation is the only portion of the record to which defendant points in support of his claim that the sun had risen when Officer Downey stopped him. Br. of Appellant at 3. No evidence or stipulation below supports this claim. In fact, in one page of his brief, defendant simultaneously claims that the sun had risen and that the police report stated the sun had *not* risen. Br. of Appellant at 6. Although Ms. Jean may have mentioned the time the sun rose, attorneys' claims and arguments are not evidence, so they cannot establish facts below. Smith, 155 Wn.2d at 505.

The portions of the record that do establish the facts of this case indicate that Officer Downey stopped defendant at 6:30 a.m., that the sun had not yet risen at that time, and that headlights were required at that time. The first and second Undisputed findings of fact based on the CrR 3.6 motion stated that defendant was stopped after 6:30 a.m. and that the "sun had not yet come up and headlights were still required." CP 41-43.

Defendant has not assigned error to these findings, so they are verities on appeal. Hill, 123 Wn.2d at 644. Defendant agreed to a stipulated facts trial, during which he stipulated to the truth of the facts contained in the 24 pages of Exhibit 1. RP(2) 4-5. Page four of Exhibit 1 read, “Due to the time of morning, the sun had not yet come up and thus headlights were still required.” EX. 1. Based on these stipulate facts, the court found defendant guilty and entered findings of fact and conclusions of law. CP 47-51. As part of its verdict, the court found that Officer Downey stopped defendant at 6:30 a.m., that “the sun had not yet come up and[, that] headlights were required.” CP 47-51. Defendant has not assigned error to these findings, so they are verities on appeal. Hill, 123 Wn.2d at 644.

- b. Officer Downey was justified in further detaining and then arresting defendant because defendant admitted that there were warrants for his arrest and Officer Downey confirmed that these warrants existed.

If an officer lawfully stops a vehicle, then that officer may reasonably detain a person if “further articulable facts giv[e] rise to a reasonable suspicion of criminal activity.” State v. Armenta, 134 Wn.2d 1, 15-16, 948 P.2d 1280 (1997); Terry, 392 U.S. 1; State v. Kennedy, 107 Wn.2d 1, 9, 726 P.2d 445 (1986). An officer may arrest a person if the officer has a valid warrant for that person’s arrest. State v. Gunwall, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986); U.S. Const. Amend. IV; Wash. Const. Art. I, § 7.

Officer Downey had specific and articulable facts that justified detaining defendant to check for warrants for defendant's arrest. When Officer Downey approached defendant, defendant immediately told Officer Downey that there were warrants that he would "want to run [defendant] in on." CP 41-43, 47-51, 75-98. Once Officer Downey discovered that defendant had warrants out for his arrest, he was authorized to arrest defendant. Thus, defendant was legitimately detained and arrested.

c. Officer Downey properly search defendant's car incident to defendant's valid arrest.

The Fourth Amendment protects the privacy interests of persons. Katz v. United States, 389 U.S. 347, 350-351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The key question is whether a person has a constitutionally protected reasonable expectation of privacy; this expectation of privacy must be both subjectively held and objectively justifiable under the circumstances. State v. Simpson, 95 Wn.2d 170, 187, 622 P.2d 1199 (1980).

Washington Constitution, article I, section 7, provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 127 (2002). A violation of this right turns on whether the State has unreasonably intruded into a person's private affairs. State v. Bobic, 140

Wn.2d 250, 258, 996 P.2d 610, 615 (2000) (quoting State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). Thus, Washington's "private affairs inquiry" is broader than the Fourth Amendment's "reasonable expectation of privacy inquiry." Id. at 258 (quoting State v. Goucher, 124 Wn.2d 778, 782, 881 P.2d 210 (1994)). In determining whether a privacy interest exists under article I, section 7, a court examines what a person's subjective expectation of privacy is and whether that expectation is one that a citizen of this state is entitled to hold. In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 339, 945 P.2d 196 (1997). A private affairs interest is an object or a matter personal to an individual such that any intrusion on it would offend a reasonable person. Goucher, 124 Wn.2d at 784. A defendant has no standing to challenge a search of an item if he does not own the item, unless the defendant is entitled to assert automatic standing. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002).

"While warrantless searches are per se unreasonable, an exception to the warrant requirement allows for a warrantless search incident to arrest." State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001). Evidence taken pursuant to a search incident to arrest need not be evidence solely of the crime for which the person was arrested. State v. Henneke, 78 Wn.2d 147, 150, 470 P.2d 176 (1970); State v. White, 44 Wn. App. 276, 278, 722 P.2d 118 (1986) (defendant arrested for DUI and drugs found on his person). Washington has adopted "a bright-line rule allowing

a search of the passenger compartment [of a car] incident to arrest.”

Vrieling, 144 Wn.2d at 492 n. 1.

Officer Downey only searched the vehicle defendant was driving after validly arresting defendant. EX. 1. Thus, the search was a valid search incident to the valid arrest.

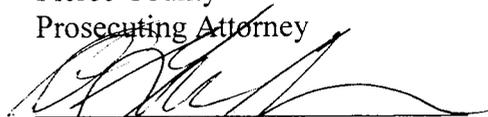
The trial court properly denied defendant’s motion to suppress the evidence because Officer Downey had facts from which he could presume defendant was driving without his headlight when he could not clearly discern objects at 1000 feet, defendant admitted that there were warrants out for his arrest, Officer Downey arrested defendant based on those warrants, and Officer Downey searched defendant’s car incident to this valid arrest.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: OCTOBER 5, 2007

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John M. Cummings
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/5/07
Date Signature