

No. 36833-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Thomas Owen,**

Appellant.

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

Grays Harbor Superior Court

Cause No. 07-1-00215-7

The Honorable Judges McCauley and Foscue

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Owen's motion to suppress.
2. The trial court erred by adopting Conclusion of Law No. 1, which reads as follows:

Deputy Kevin Schrader had a reasonable suspicion to stop the vehicle in order to investigate a traffic infraction for having a cracked windshield.

Findings and Conclusions, Supp. CP.

3. The trial court erred by adopting Conclusion of Law No. 3, which reads as follows:

Deputy Kevin Schrader search [sic] of the vehicle subsequent to Owen's arrest was proper.

Findings and Conclusions, Supp. CP.

4. The trial court erred by entering Part 4 of the Order, which reads as follows:

All evidence obtained as a result of the search is admissible.

Findings and Conclusions, Supp. CP.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Thomas Owen was stopped while driving a car with a cracked windshield. At a suppression hearing, he produced evidence that the deputy stopped the car for pretextual reasons. The state did not establish that the crack endangered anyone or obstructed the driver's view, and did not disprove the pretextual basis for the stop.

1. Did the deputy lack a reasonable, articulable suspicion that Mr. Owen had committed a traffic violation? Assignments of Error Nos. 1-4.
  
2. Did the state fail to disprove that the alleged traffic violation was a pretext for the stop? Assignments of Error Nos. 1-4.
  
3. Did the traffic stop, arrest, and search incident to arrest violate the Fourth Amendment and Wash. Const. Article I, Section 7? Assignments of Error Nos. 1-4.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Linda Pratt had been the victim of domestic violence. After her husband's death, she was embroiled in a civil dispute with her son. RP (7/30/07) 21, 27, 28; RP (8/14/07) 43, 50. During both of these challenges, Deputy Schrader of the Grays Harbor Sheriff's Department had been very kind and helpful to her. RP (7/30/07) 27, 28; RP (8/14/07) 43, 50.

On April 5, 2007, Ms. Pratt took part in a discussion relating to a stolen car. She told someone that they should ask Dep. Schrader about it. RP (7/30/07) 28. When Schrader heard this, he thought Ms. Pratt was making an accusation. He contacted Ms. Pratt, upset about the implications of her statement. RP (7/30/07) 28-29.

The next day, after an unpleasant contact with her son, Ms. Pratt asked her friend Thomas Owen to drive her in her car. RP (8/14/07) 42. The car had been her husband's, and she and her daughter had been using it for 4 months. RP (8/14/07) 41-42. The windshield had a diagonal crack in it, starting above the steering wheel and stretching across the center. RP (7/30/07) 7, 17-19.

Dep. Schrader saw the vehicle, turned around to follow, and pulled the car over. RP (7/30/07) 7. A records check revealed that Mr. Owen

had a suspended license. RP (7/30/07) 8. Deputy Schrader arrested Mr. Owen and searched the car. He found a glass pipe with residue under the passenger seat, and arrested Ms. Pratt. RP (7/30/07) 9-10. After Mr. Owen said that anything the officer found in the car was his, Deputy Schrader released Ms. Pratt.<sup>1</sup> RP (7/30/07) 11-14. Mr. Owen was charged with Possession of Methamphetamine in Grays Harbor County Superior Court. CP 1-2.

Mr. Owen moved for suppression of the evidence, arguing that the officer lacked a reasonable suspicion of a traffic infraction, and that the stop was pretextual. Supp. CP. Deputy Schrader testified that the only reason that he stopped the car was for the cracked windshield. RP (7/30/07) 7, 33. He said that the crack created a safety hazard. RP (7/30/07) 18. He acknowledged that he had seen the car since April 6, and not pulled it over, and had not noticed if the crack had been fixed. RP (7/30/07) 19.

Ms. Pratt testified that the crack was very thin, had been on the car four years, did not obstruct the view, and could only be seen from less

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<sup>1</sup> This issue was contested at the suppression hearing. Ms. Pratt testified that neither of them was aware of any methamphetamine or paraphernalia in the car, and that they made that clear to the officer. RP (7/30/07) 30. Deputy Schrader testified that Mr. Owen gave a detailed description of the location of the paraphernalia (with methamphetamine residue). RP (7/30/07) 11, 14, 16-17.

than 5 feet away. RP (7/30/07) 25-26. The defense argued that the officer did not have a reasonable suspicion of a traffic infraction, and also that the cracked windshield was a pretext to stop the car to retaliate for Ms. Pratt's April 5<sup>th</sup> statements. RP (7/30/07) 28-32, 36-37; Supp. CP.

The court found the stop, arrest, and subsequent search lawful, and denied Mr. Owen's suppression motion. RP (7/30/07) 38-41. In his oral ruling, the judge stated that the crack in the windshield did not block the driver's view. He speculated that the officer could have been pulling over the car to be helpful to the driver. RP (7/30/07) 39. He also indicated that perhaps the officer had seen the crack on a previous occasion, even if he had not been able to see it while Mr. Owen was driving. RP (7/30/07) 38. Written Findings of Fact and Conclusions of Law were entered; these included the following:

Deputy Kevin Schrader had a reasonable suspicion to stop the vehicle in order to investigate a traffic infraction for having a cracked windshield.  
Finding of Fact No. 1, Supp. CP.

Deputy Kevin Schrader search [sic] of the vehicle subsequent to Owen's arrest was proper.  
Conclusion of Law No. 3, Supp. CP.

All evidence obtained as a result of the search is admissible.  
Order, Part 4, Supp. CP.

Mr. Owen was tried and convicted, and he timely appealed. CP 3-9, 10-11.

## ARGUMENT

### **THE EVIDENCE ADMITTED AT TRIAL WAS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.**

Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Under the Fourth Amendment and Washington Constitution Article I, Section 7, searches conducted without authority of a search warrant are presumed to be unconstitutional. U.S. Const. Amend. IV; Wash. Const. Article I, Section 7; *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000). Courts have outlined a small number of narrowly drawn and jealously guarded exceptions to the warrant requirement. *Wheless, supra*. The burden is always on the State to prove one of these narrow exceptions. *State v. Kypreos*, 110 Wn.App. 612 at 624, 39 P.3d 371 (2002). Where the state asserts an exception, it must produce the facts

necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280 at 284, 28 P.3d 775 (2001). The validity of a warrantless search is reviewed *de novo*. *Kypreos*, at 616 (2002).

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer's safety, but also for the preservation of potentially destructible evidence within the arrestee's control. *Wheless, supra*; *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). In order for such a search to be valid, however, the arrest must be a lawful custodial arrest. *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996). Where the arrest is derived (directly or indirectly) from a violation of the Fourth Amendment or Wash. Const. Article I, Section 7, the seized items must be suppressed as "fruits of the poisonous tree." *Nardone v. United States*, 308 U.S. 338 at 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wn.2d 670, 685, 49 P.3d 128 (2002).

The Fourth Amendment and Wash. Const. Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), *State v. Crane*, 105 Wn.App. 301, 311, 19 P.3d 1100 (2001). In order to justify a brief investigative detention, the police must have a well-

founded suspicion of criminal activity based on specific and articulable facts; there must be a substantial possibility that criminal conduct has occurred or is about to occur. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. O'Cain*, 108 Wn.App. 542, 548, 31 P.3d 733 (2001); *see also State v. Brown*, 154 Wn.2d 787 at 798, 117 P.3d 336 (2005) (police illegally seized passenger by merely asking him to identify himself for a warrants check.)

Under an exception to the rule requiring a substantial possibility of criminal conduct, an officer is permitted to stop a moving vehicle for a traffic violation when he or she has a “reasonable articulable suspicion that a traffic infraction has occurred.” *State v. Ladson*, 138 Wn.2d 343 at 349, 979 p.2d 833 (1999); *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002).

A trial court is required to enter written findings of fact and conclusions of law following a CrR 3.6 hearing. Factual findings are reviewed for substantial evidence. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Rogers Potato*, at 391; *State v. Carlson*, 130 Wn.App. 589 at 592, 123 P.3d 891 (2005). It is more than “a mere scintilla” of evidence, and must convince an unprejudiced thinking mind of the truth of

the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. *State v. Armenta*, 134 Wn.2d 1 at 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259 at 265, 39 P.3d 1010 (2002).

- A. The traffic stop was unlawful because the officer lacked a reasonable, articulable suspicion that a traffic infraction had occurred.

Driving with a cracked windshield is not a traffic infraction unless the crack puts the vehicle “in such unsafe condition as to endanger any person.” RCW 46.37.010(1)(a)(b). In this case, the trial court found that the car was stopped “for having a cracked front windshield.” Finding of Fact No. 1, Supp. CP. The judge concluded that the deputy “had a reasonable suspicion to stop the vehicle in order to investigate a traffic infraction for having a cracked windshield.” Conclusion of Law No. 1, Supp. CP. The court did not find that the cracked windshield put the vehicle “in such unsafe condition as to endanger any person.”<sup>2</sup> RCW

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<sup>2</sup> An alternate statute referenced by the parties was RCW 46.37.410(2); however, this section does not apply to cracked windshields. *State v. Wayman-Burks*, 114 Wn. App. 109 at 112, n. 1, 56 P.3d 598 (2002).

46.37.010(1)(a)(b). Nor did the court find that the deputy had a reasonable, articulable suspicion of such endangerment. Supp. CP. In fact, the trial judge specifically stated (in his oral ruling) that the windshield “doesn’t block the view.” RP (7/30/07) 39.

In the absence of a finding on any of these points, this court must presume that the state failed to meet its burden. *Armenta, supra; Byrd, supra*. The traffic stop occurred without authority of law in violation of Wash. Const. Article I, Section 7 and the Fourth Amendment. Because of this, the arrest was invalid and the search unlawful. *Johnson, supra*. Accordingly, the conviction must be reversed and the evidence suppressed. *Nardone v. U.S., supra; Glossbrener, supra*.

B. The traffic stop was unlawful because the officer subjectively intended to stop the car for reasons that did not provide lawful authority.

The Supreme Court has required courts evaluating a traffic stop to analyze both the objective circumstances and the officer’s subjective intent in performing the stop. *State v. Ladson, supra*. In *Ladson*, the Court held that pretext stops—that is, stops performed for underlying reasons different than their stated purpose—are unlawful. In *Ladson*, officers selectively used traffic infractions to pull over suspected gang members whom they wished to question. Officers targeted the driver of a vehicle in which Mr. Ladson was a passenger. They followed the vehicle,

looking for a legal justification for a stop, eventually determining that the vehicle's license tabs had recently expired. The driver was arrested, and a search revealed a firearm and drugs in Mr. Ladson's possession. The Supreme Court reversed the conviction. In reaching this result, the Court explained that

[T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason... Article I, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary.  
*Ladson*, at 351, 353.

In this case, Mr. Owen presented evidence and argued that the deputy stopped the car based on his belief that Ms. Pratt (the car's owner) had wrongfully accused him of car theft. RP (7/30/07) 28. Specifically, the deputy seemed upset about the accusation, the cracked windshield was not visible from the deputy's vantage point (and did not obscure the view or create a danger), the deputy did not issue an infraction for the cracked windshield, Ms. Pratt had not previously been stopped for the cracked

windshield in four years (although she had been seen driving the car by the same deputy during that time), and Ms. Pratt had not subsequently been stopped for the cracked windshield although she continued to drive the car in that condition. RP (7/30/07) 24-32; *see also* Exhibits 1-6, Supp. CP. Furthermore, the deputy did not deny this motivation when he testified in rebuttal. RP (7/30/07) 33. The trial judge made no findings on the subject of the officer's subjective intent. Findings of Fact and Conclusions of Law, Supp. CP.

In the absence of a finding that the deputy was not subjectively motivated by the reasons to which Ms. Pratt testified, this court should presume that the state failed to meet its burden of disproving the pretext. *Armenta, supra; Byrd, supra*. Since the stop was pretextual, it occurred without authority of law in violation of Wash. Const. Article I, Section 7 and the Fourth Amendment. *Ladson, supra*. Because of this, the arrest was invalid and the search unlawful. *Johnson, supra*. Accordingly, the conviction must be reversed and the evidence suppressed. *Nardone v. U.S., supra; Glossbrener, supra*.

**CONCLUSION**

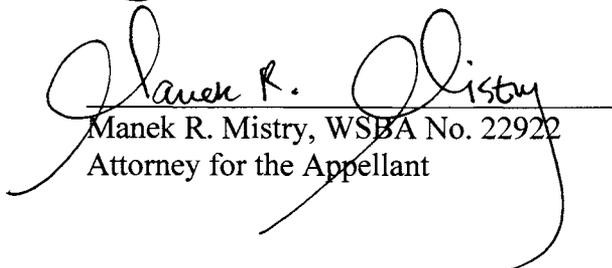
Because Mr. Owen was unlawfully stopped in violation of the Fourth Amendment and Wash. Const. Article I, Section 7, his conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on March 29, 2008.

**BACKLUND AND MISTRY**



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

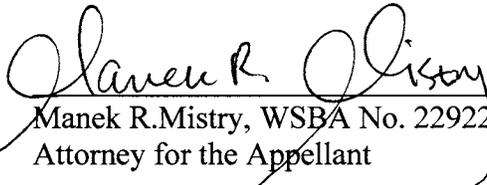
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and that I sent the original and one copy to the Court of Appeals, Division  
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE  
AND CORRECT.

Signed at Olympia, Washington on March 29, 2008.

  
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