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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 36833-I-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Thomas Owen.

Appellant.

Grays Harbor Superior Court

Cause No. 07-1-00215-7

The Honorable Judges McCauley and Foscue

RESPONDENT'S BRIEF

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A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not err in denying Mr. Owen's motion to suppress.

2. The trial court did not err 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 did not err by adopting Conclusion of law No. 3, which reads as follows:

Deputy Schrader [sic]search of the vehicle subsequent to Owen's arrest was proper.
Findings and Conclusions, Supp. CP.

4. The trial court did not err in 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.

B.

STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Thomas Owen was stopped while driving a car with a cracked windshield.

At the suppression hearing Deputy Kevin Schrader of the Grays Harbor

Sheriff's Office testified that the only reason that he stopped the vehicle was because of the cracked windshield. Owen asserted that the stop was pretextual. However, Owen's subjective beliefs are not relevant to the issue at hand. The State is not required to disprove that the reason for the stop was a pretext. Deputy Schrader had a reasonable, articulable, suspicion which justified stopping the vehicle for the infraction of having a cracked windshield.

C.

STATEMENT OF THE CASE

On April 6, 2007, at approximately 4:49 p.m., Grays Harbor Sheriff Deputy Kevin Schrader stopped vehicle license 846PKD on SR 105 for having a cracked front windshield in the State of Washington, Grays Harbor County. RP (07/30/07) 7. The crack in the windshield was a two and a half foot crack across the driver's side with a one-inch-round chip mark above the steering column on the driver's side of the windshield. RP (7/30/07) 18. Deputy Schrader testified that the crack obstructed the driver's view and was unsafe. RP (7/30/07) 18.

Deputy Kevin Schrader, contacted the driver and asked him for his license, registration, and proof of insurance. The driver identified himself with an Alaska driver's license as Thomas Owen. RP (07/30/07) 8. At the

time of stop, a woman later identified as Linda Pratt was sitting in the front passenger seat. RP (07/30/07) 8.

Deputy Schrader was advised by dispatch that the Washington driver's license of Thomas Owen was suspended in the third degree for unpaid tickets. Deputy Schrader advised Owen of his license status. Deputy Schrader then removed Owen from the vehicle and placed Owen under arrest. RP (07/30/07) 8.

A search of Owen revealed a switchblade knife in his front pocket. While placing Owen in the rear of his patrol vehicle, Deputy Schrader noticed that the passenger had exited the vehicle and had begun to get into the driver's seat. Deputy Schrader instructed the passenger, Linda Pratt, to stay out of the vehicle. RP (07/30/07) 8-9.

A search of the vehicle incident to arrest revealed a glass pipe under the passenger's seat. The pipe contained a white powdery residue that Deputy Schrader recognized as methamphetamine based on his training and experience. Deputy Schrader has been a Deputy for over seven years. RP (07/30/07) 9-10.

Deputy Schrader contacted Pratt and advised her that she was her under arrest for possession of drug paraphernalia. Pratt stated that she did not know that the pipe was under the seat and that it was not hers. Pratt

was searched and placed into the rear seat of Deputy Schrader's patrol vehicle. RP (07/30/07) 9-10.

Upon opening the door to place Pratt in the rear of his patrol vehicle, Pratt advised Owen that Deputy Schrader had located the pipe under the passenger seat. Owen immediately told Deputy Schrader that the pipe was his and so were the drugs that were in the black pouch in the vehicle. Deputy Schrader secured Pratt in his patrol vehicle and continued searching the vehicle incident to arrest. RP (07/30/07) 10-11.

In the back seat of the vehicle Deputy Schrader located a black "fanny pack." Inside the pack Deputy Schrader located a wood pipe that contained a plastic baggie containing a crystal substance that Deputy Schrader recognized as methamphetamine. Deputy Schrader also located green vegetable matter in a film container that he recognized as marijuana based on his training and experience. The Deputy also located inside the pack electronic scales and several hypodermic needles. RP (07/30/07) 11-12.

Deputy Schrader returned to his patrol vehicle and read Owen his *Miranda* warnings from the card issued to him by the Grays Harbor Sheriff department. Owen advised Deputy Schrader that he understood his rights and agreed to speak with the Deputy. Owen stated that he was the owner of the black fanny pack. Owen was able to delineate the exact

locations and packaging of the drugs and paraphernalia found in the black fanny pack. RP (07/30/07) 13-14.

Pratt was subsequently released and Owen was transported to Grays Harbor County Jail. Once at the jail Deputy Schrader read Owen his *Miranda* warnings a second time and obtained a written statement from Owen. Owen's written statement described the exact locations and packaging of the drugs and paraphernalia located in the vehicle and indicated that the contraband belonged to Owen. RP (07/30/07) 14.

Contrary to Owen's Statement of the Case, at no time did Judge McCauley in his oral ruling find "that the crack in the windshield did not block the driver's view." Appellant's Brief at 3.

Ultimately, Judge McCauley found the stop, arrest, and subsequent search lawful, and denied Owen's suppression motion. RP (7/30/07) 38-41. Written Findings of Fact and Conclusions of Law were entered. A jury convicted Owen of possession of a controlled substance (methamphetamine). CP 3-9,10-11.

D.

ARGUMENT

THE EVIDENCE ADMITTED AT TRIAL WAS NOT SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

A. Introduction

Owen asserts that the trial judge erroneously failed to suppress evidence. The trial judge's ruling to deny Owen's motion to suppress was made after a preliminary hearing under CrR 3.5 and CrR 3.6.

Findings of fact on a motion to suppress are reviewed under a substantial evidence standard. *State v. Hill*, 123 Wash.2d 641, 644 870 P.2d 313 Wash. (1994). Conclusions of law pertaining to suppression of evidence are reviewed de novo. *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).

A warrantless search is presumed unreasonable except in a few established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). The State bears the burden of proving that a warrantless search falls under an established exception. *State v. Johnson*, 128 Wash.2d 431, 451, 909 P.2d 293 (1996). One exception to the search warrant requirement is where the search is performed incident to a lawful arrest. *State v. Wheless*, 103 Wash.App. 749, 14 P.3d 184 (2000).

B. The traffic stop was lawful because the deputy had a reasonable, articulable suspicion that a traffic infraction had occurred.

Officers only need reasonable suspicion, not probable cause, to stop a vehicle in order to investigate whether the driver committed a traffic

infraction or a traffic offense. *State v. Duncan*, 146 Wash.2d 166, 173-75, 43 P.3d 513 (2002). Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time in order to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction. RCW 46.61.021(2).

A traffic detention is a seizure and must have been justified in its inception to be lawful. *State v. Tijerina*, 61 Wash.App. 626, 628-29, 811 P.2d 241 (1991). The detention thus must be based on “a well founded suspicion based on objective facts” that the person is violating the law. *State v. Sieler*, 95 Wash.2d 43, 46, 621 P.2d 1272 (1980); *see State v. Duncan*, 146 Wash.2d 166, 43 P.3d 513 (2002) (*Terry* stop for traffic infraction is lawful).

RCW 46.37.010(1) provides in pertinent part: “It is a traffic infraction for any person to drive or move, or for a vehicle owner to cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles that: (a) is in such unsafe condition as to endanger any person; . . .” This statute and RCW 46.61.021 authorize an officer to stop the driver of a vehicle whose windshield is in such an

unsafe condition as to endanger any person. *See State v. Reynolds*, 144 Wash.2d 282, 284-86, 27 P.3d 200 (2001) (assuming sub silentio that a traffic stop for a cracked windshield was lawful); *State v. Feller*, 60 Wash.App. 678, 682, 806 P.2d 776 (noting that an officer lawfully stopped a vehicle with a cracked windshield and no gas cap and whose driver failed to signal a lane change), *review denied*, 117 Wash.2d 1005, 815 P.2d 265 (1991).

The undisputed facts in this case indicate that the windshield of the vehicle was in fact cracked. The crack measured two and a half feet across the driver's side of the vehicle with a one-inch-round chip mark above the steering column on the driver's side of the windshield. RP (7/30/07) 18. Deputy Schrader testified that the crack obstructed the driver's view and was unsafe. RP (7/30/07). These facts in and of themselves prove the validity of the initial stop because they give rise to a reasonable suspicion that an infraction has occurred. Furthermore, these facts prove that the infraction did in fact occur.

Owen argues that because the State did not prove an uncharged infraction, the State is presumed to have failed to meet its burden. Under Owen's theory, every stop that did not result in the finding of a committed infraction would be unlawful. Owen cites to no authority that requires the

State to prove that the infraction actually was committed. Washington case law has consistently held that a court is not obliged to search out authority to support a party's position. *State v. Chapman*, 140 Wash. 2d 436, 453, 998 P.2d 282 (2000). A court is entitled to conclude that the failure of counsel to cite to authority means that no authority exists supporting counsel's position. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

Owen also relies on *State v. Armenta*, 134 Wash. 2d 1, 948 P.2d 1280 (1997) and *State v. Byrd*, 110 Wash.App. 259, 39 P.3d 1010 (2002) for the proposition that due to the trial court's failure to make a finding that the windshield obstructed the driver's view or endanger any person, the appellate court must reverse the conviction and suppress all evidence. The lubricity of this argument is addressed, *infra*, at 13-15.

B. The traffic stop was lawful because the deputy's conduct was objectively reasonable and because the deputy did not subjectively intend to stop the vehicle for an improper reason.

Deputy Schrader's conduct was objectively reasonable, and Owen has not presented any credible evidence that the officer had another, subjective reason to initiate the stop. The record therefore contains no indication that the stop was "pretextual." *See State v. Ladson*, 138 Wash.2d 343, 358-59, 979 P.2d 833 (1999).

A pretextual traffic stop violates article 1, section 7 of our State Constitution because it is a warrantless seizure. *State v. Ladson*, 138 Wash.2d at 358. The essence of a pretextual traffic stop is that the police stop a citizen not to enforce the traffic code, but to investigate suspicions unrelated to driving. *Ladson*, 138 Wash.2d at 349. “When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.” *Ladson*, 138 Wash.2d at 358-59. *See also State v. DeSantiago*, 97 Wash.App. 446, 983 P.2d 1173 (1999).

In *Ladson*, the officers admitted that they stopped the vehicle to investigate suspicions that the occupants were involved in narcotics trafficking. They followed the vehicle for several blocks, looking for a legal justification to stop it. The officers eventually pulled the vehicle over for having expired license tabs. *Ladson*, 138 Wash.2d at 346. Relying upon *State v. Chapin*, 75 Wash.App. 460, 464, 879 P.2d 300 (1994), the State argued that the officers' subjective motivation was irrelevant to the constitutionality of the stop, so long as the officers had probable cause to believe that a traffic infraction had occurred. The *Ladson* court, however, disapproved the purely objective inquiry of

Chapin, and stated that “our (state) constitution requires we look beyond the formal justification for the stop to the actual one.” *Ladson*, 138 Wash.2d at 353. Because the officers admitted the actual reason for the stop was not to enforce the traffic code but rather to conduct a criminal investigation, the court concluded the stop was made under an unconstitutional pretext and the seized evidence had to be suppressed.

Here, unlike *Ladson*, there is no evidence that the “real” reason Deputy Schrader stopped the vehicle was for anything other than a routine traffic stop. In reviewing the totality of the circumstances, Deputy Schrader's decision to stop the vehicle for a cracked front windshield was appropriate given the circumstances and nature of the infraction. Additionally, the deputy was on routine patrol, not conducting any kind of investigation involving the individuals who were found in the car.

Under *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation. The totality of the circumstances in this case should not lead one to conclude that

objectively or subjectively the stop was for anything but a traffic infraction; therefore, the stop was not pretextual.

In this case, Owen argued that he subjectively believed that the deputy stopped the car for another reason other than to enforce the traffic code. This accusation was specifically denied by the Deputy. RP (7/30/07) 33. Unfortunately for Owen, his subjective belief and that of Pratt are not dispositive; what matters is the “real” reason why Deputy Schrader stopped the vehicle.

Owen essentially argues that he should have won the suppression hearing because his testimony and the testimony of Pratt was more credible than that of Deputy Schrader. This argument fails because the trial judge found in favor of the State at the suppression hearing RP (7/30/07) 48.

Finally, Owen argues that the State failed to meet its burden of disproving that the stop was pretextual because the trial court made no finding about the Deputy’s subjective intent. Owen contends that the Court of Appeals should ignore the trial court’s ruling and overturn Owen’s conviction pursuant to *State v. Armenta* 134 Wash.2d , 948 P.2d 1280 (1997) and *State v. Byrd*, 110 Wash.App. 259, 39 P.3d 1010 (2002)

Owen’s reliance on *Armenta* and *Byrd* is misplaced. This case is easily distinguishable from the cases upon which Mr. Owen’s relies. To

begin with, the issue in *Armenta* was whether a police officer had a reasonable and articulable suspicion that the defendant was engaged in criminal activity. During the hearing on the defendant's motion to suppress, the arresting officer testified that the defendant told him that he had a Washington identification card, but the trial court did not enter a finding to that effect. Because there was no finding, the Court concluded that the defendant was entitled to the benefit of the doubt.

An obvious distinction between *Armenta* and this case is that the issue in *Armenta* involved a finding of probable cause to arrest. The current case involves a finding of reasonable suspicion to stop for an infraction. Additionally, it is worth noting that the Court in *Armenta*, reinstated the trial court's decision to suppress evidence.

The issue in *Byrd* was whether an invalid stop of a vehicle to check the validity of a trip permit could be made lawful because the driver's side window as obscured. The State conceded on appeal that because driving with a trip permit is legal in Washington, a stop merely to check the validity of a trip permit was invalid. The officer in that case testified that the only reason for the stop was to verify that the trip permit was valid. Furthermore, the officer testified that she saw the plastic covering only when she approached the driver's side, after she stopped the vehicle. *Byrd* is similarly distinguishable from the present case because the officer in

Byrd did not articulate a valid reason to initially stop the vehicle in question.

Setting these differences aside, the gravamen of Owen's argument is that the failure to enter an explicit finding regarding whether the stop was pretextual is a fatal flaw. Appellant's Brief at 10. But, as noted in the dissenting opinion in *Armenta*:

While, in general, the absence of an express finding of a material factual issue is presumed to be a negative finding, based on a failure of proof on that issue, *Smith v King*, 106 Wash.2d 443, 451, 722 P.2d 796 (1986), applying such a presumption here would ignore a "well-recognized exception" to the rule: This common law rule must be selectively applied. It should not be determinative on a material issue where the record shows . . . there is ample evidence to support the missing finding, and the findings entered by the court, viewed as a whole, demonstrate that the absence of the finding was not intentional. *Douglas Northwest, Inc. v. Bill O'Brier & Sons Constr., Inc.*, 64 Wash. App. 661, 682, 828 P.2d 565 (1992); *State v. Souza*, 60 Wash.App. 534, 541-43 805 P.2d 237, review denied, 116 Wash.2d 1026, 812 P.2d 103 (1991). Thus, an appellate court may supply a missing finding of fact where there is ample evidence to support the finding of fact where the remaining findings, viewed as a whole demonstrate that the trial court's failure to enter the finding was not intentional. Where there is support in the record for such omitted finding and the omission appears unintentional, the failure to make a finding may be harmless error. *Douglas*, 64 Wash.App. at 682, 828 P.2d 565; see also *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 371, 798 P.2d 799 (1990).

134 Wash.2d at 23 (Justice Talmadge, dissenting).

In both *Byrd* and *Armenta* the appellate court reviewed the record of the suppression hearing and the written findings of fact when making

the determination that State had failed to carry its burden. In these cases the appellate court found that there was not “ample evidence” to infer a missing finding. The situation is different here. The trial judge could not have made his ruling to deny the suppression motion without finding that Deputy Schrader had a reasonable suspicion to stop the vehicle Owen was driving.

Moreover, at the suppression hearing the State only needed to prove that there was a reasonable basis for the stop—not that a traffic infraction actually had occurred. Here the stop was justified because Deputy Schrader had a reasonable basis to stop Owen’s vehicle to investigate whether a traffic infraction had occurred, viz., whether the crack in the windshield put the vehicle “in such unsafe condition as to endanger any person.” RCW 46.37.010(1). Likewise, the absence of a specific finding stating that the stop was not pretextual is not dispositive, because “ample evidence” exists to justify the stop from the outset. Specifically, the tenor of the trial court’s oral decision after the suppression hearing provides “ample evidence” that Judge McCauley rejected Owen’s contention regarding a pretextual stop.

Additionally, by failing to object to the findings of fact as entered, Owen in principle conceded that the findings were accurate. Owen is bound by his silence. A party is not entitled to relief on appeal based on

the trial court's failure to make a finding where the party seeking relief failed to raise the issue before the trial court. *In re Dependency of O.J.*, 88 Wash. App 690, 696 947 P.2d 252 (1997).

Finally, if the Court of Appeals is so inclined, this case can be remanded for addition findings. *State v. Greco*, 57 Wash. App. 196, 787 P.2d 940 (1990). Remand, rather than reversal, generally is appropriate where the evidence in the record is sufficient to support the missing finding. *State v. Alvarez*, 74 Wash. App. 250, 872 P.2d 1123 (1994).

E.

CONCLUSION

For the reasons listed above, the Appellant's assignments of errors should be rejected and relief sought by the Appellant should be denied. Owen's conviction should be upheld. In the alternative, this case should be remanded back to the trial court for the entry of additional findings of fact.

RESPECTFULLY SUBMITTED:

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

STATE OF WASHINGTON,)	
)	NO. 36833-I-II
Respondent.)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
THOMAS OWEN,)	
)	
Respondent.)	

STATE OF WASHINGTON)
)ss.
COUNTY OF PACIFIC)

BONNIE WALKER, being first duly sworn on oath, deposes and says:

I am the Paralegal II for the Pacific County Prosecutor.

That on June 2, 2008, I mailed two copies of the State's Brief of Respondent to
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SUBSCRIBED AND SWORN to before me this 2 day of June, 2008.

[Signature]
NOTARY PUBLIC in and for the State of Washington,
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