COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 37131-6-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent

v.

MICHAEL ELLIOT,

Defendant/Appellant.

APPELLANT'S AMENDED BRIEF

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I. Introduction

Mr. Michael Elliot was unlawfully arrested for the crime of vehicular assault and forced to provide a mandatory blood sample based solely on the officer's speculation that the other driver could possibly have sustained a broken wrist. He hereby asks this Honorable Court to reverse the trial court and vacate his conviction.

II. Assignments Of Error

1. The trial court erred in denying Mr. Elliot's motion to suppress the blood test results based on the State's failure to establish probable cause for an arrest for vehicular assault (Conclusion of Law 3.1).
2. The trial court erred in finding that medical personnel told officers that they thought Mr. Elliot might be affected by drinking (Finding of Fact 1.2).
3. The trial court erred in finding that medical technicians reported that it appeared the driver of the southbound vehicle had a broken bone (Finding of Fact 1.4).
4. The trial court erred in finding that later at St. Peter Hospital Officer Westphal was told by other officers

that treating physicians also felt that the passenger had a broken bone (Finding of Fact 1.4).

III. Issue Presented For Review

Was Mr. Elliot unlawfully arrested for the crime of vehicular assault, thereby compelling him to provide a sample of his blood and denying his right to implied consent warnings under RCW 46.20.308, where the officer knew only that the other driver complained of pain and speculated she may have sustained a broken wrist?

IV. Statement Of The Case

Mr. Elliot, a gainfully employed locomotive engineer with no prior criminal history, was involved in a two-car accident while driving home on a rainy night in November 2006. No law enforcement officers witnessed the accident. Transcript at 48, 75.[1] When officers arrived, Mr. Elliot advised he was not injured and did not require medical attention. Transcript at 15. Mr. Elliot informed the officers that he had swerved to avoid a car coming directly at him and had lost control of his vehicle after it went onto the gravel shoulder. Id. Officers investigating the collision immediately discounted Mr. Elliot's statement and speculated that he had caused the collision because the point of impact was in the opposite lane of travel. Transcript at 38.

[1] "Transcript refers to the Verbatim Report of Proceedings for the pretrial motions hearing held on July 9, 2007.

The driver of the other vehicle was treated by aid at the scene and complained of general pain in her neck, back and wrist. Transcript at 83. Neither the medics nor other law enforcement officers observed any visible physical defect to any part of the driver's body. Transcript at 83.

Medics informed the officers that they smelled alcohol on Mr. Elliot's breath though neither reported any visible signs of intoxication.[2] Officer Westphal of the Lacey Police Department was asked to respond to conduct a DUI investigation. Upon arrival Officer Westhpal contacted Mr. Elliot and observed the he had the odor of alcohol on his breath and body, had droopy bloodshot eyes, and slightly slurred speech. Transcript at 15. He did not observe any balance or dexterity difficulties or lack of coordination. Transcript at 47. Mr. Elliot responded appropriately to the conversation and, although he appeared distraught, was not dazed or unintelligible. Transcript at 40.

Officer Westphal made a determination to arrest Mr. Elliot for the crime of DUI. Transcript at 18, 91, 92. He was then advised that there was a possibility that the other driver might have a broken bone.

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[2] Contrary to Finding of Fact 1.2, the substantial evidence in the record reveals that no information other than the odor of alcohol on breath was provided from the medics regarding Mr. Elliot. *See* Transcript at 35-36, 78.

Transcript at 52. Officer Westphal did not know what bone was possibility broken or who made such an assessment. Transcript at 53. He did not see or speak to either the driver or the medics personally. Officer Westphal then determined that based on the possibility of a vehicular assault enhancement he could obtain a mandatory blood sample. Transcript at 54-55.

Mr. Elliot was transported to the hospital for the sole purpose of the blood draw, and was read the special evidence warnings only. He was not read the implied consent rights under RCW 46.20.308, nor was he ever given the option of submitting to a breath test. A blood draw was conducted and Mr. Elliot was subsequently charged with Vehicular Assault.

On July 9, 2007, pretrial motions were held before the Honorable Chris Wickham of the Thurston County Superior Court. At that time Officers Westphal and Johansen testified, and motions to suppress the blood evidence were heard, *inter alia*. Judge Wickham denied Mr. Elliot's motion to dismiss/suppress for lack of probable cause, holding that the need to obtain blood alcohol content evidence expeditiously rendered the officer's actions reasonable. Transcript at 135.

Subsequently, both the State and the defense prepared proposed Findings of Fact and Conclusions of Law, and a status conference was

scheduled for August 16, 2007. At that time, Mr. Bowman appeared on Mr. Elliot's behalf and was informed that the court had signed the State's findings *ex parte* prior to his arrival. Mr. Bowman filed a copy of the defense's proposed findings for the record but was never heard on the matter in open court. A subsequent jury trial resulted in a conviction for vehicular assault and Mr. Elliot timely filed his appeal therefrom.

V. Argument

Officer Westphal unlawfully arrested Mr. Elliot for vehicular assault based on the mere possibility of a broken wrist to the other driver. Such speculation fails the 4th Amendment prerequisite of probable cause as to each and every element of the offense. As so aptly noted by the United States Supreme Court, "probable cause" requires a quantum of evidence that goes beyond mere suspicion. Brinegar v. U.S., 338 U.S. 160, 175, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949).

The State always bears the burden of establishing both the lawfulness of the stop (seizure), detention, and arrest of the defendant. Lego v. Twomey, 404 U.S. 447, 92 S.Ct. 619, 30 L.Ed. 618 (1972). A reviewing court can consider only the information that was available to the officer at the time of arrest. Wong Sun v. U.S., 371 U.S. 471, 481-82,

9 L.Ed.2d 441, 83 S.Ct. 407 (1963). Further, the decision must be based on facts, not mere conclusions. Aguilar v. Texas, 378 U.S. 108, 112-13, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964).

Most importantly, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." (internal citations omitted) Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

Our Washington State Supreme Court has also reasoned that "the probable cause which will justify arrest for a misdemeanor without a warrant must be a judgment based on personal knowledge acquired at the time through the senses, or inferences properly to be drawn from the testimony of the senses." Sennett vs. Zimmerman, 50 Wash.2d 649, 314 P.2d 414 (1957). While this Court spoke in terms of warrantless arrests for misdemeanor offenses, its comments in regard to the specific factual basis necessary to establish probable cause is equally appropriate to a felony arrest.

Finally, Washington has overwhelmingly adopted, at a minimum, the federal standard for probable cause determinations, while

recognizing that the Washington State Constitution generally affords even greater privacy protections to its citizens under Article 1, Section 7 of our State Constitution. The Supreme Court set forth the probable cause test as articulated below:

> "In order to be justified in arresting without a warrant, an officer must believe and must have good reason to believe that a person has committed or is about to commit or is in the act of committing a [crime]. Not only must the officer have a real belief that the person is guilty, but that belief must be based upon reasonable grounds. Proper cause for arrest has often been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." (internal citations omitted) State v. Scott, 93 Wn.2d 7, 10-11, 604 P.2d 943 (1980).

While Washington courts have not had much opportunity to evaluate the injury element of the vehicular assault statute,[3] interpretations of probable cause as applied to arrest decisions have resoundingly held that unconfirmed speculation is simply insufficient. For example, in State vs. O'Cain, 108 Wash. App. 542, 31 P.3d 733 (2001), Division One ruled that a stop and arrest for a stolen vehicle was not supported by probable cause even where police relied on their own dispatch report of a stolen vehicle. There, an officer's suspicions were aroused by two vehicles situated in a 7-11 parking lot with the

[3] RCW 9A.04.110 defines substantial bodily harm as: "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes

occupants conversing even though neither appeared to be shopping at the store. Recognizing that his hunch was unsubstantiated, the officer did not initiate a traffic stop at that time, however he elected to run the license plate of one of the vehicles.

Shortly thereafter, the officer received information from dispatch that the vehicle had been reported stolen, after which he returned to the scene and seized the individuals. The Court, in assessing the reasonableness of the seizure and arrest, determined that the mere fact of a police dispatch was insufficient to establish probable cause. While the officer later received confirmation as to the source of the report, this information was not known to him at the time of arrest. As the court noted, where a warrantless seizure is challenged, the State cannot justify the officer's actions merely by establishing the fact of the dispatch without more. Although officers may often act on dispatch reports, "the good faith of officers in executing the seizure does not relieve the State of its burden to prove that there was a factual basis for the stop – probable cause on the even of an arrest, and reasonable suspicion in the event of a *Terry* stop." O'Cain at 552-553.

Previous appellate decisions also support a heightened specificity requirement in source reliability. In State vs. Mance, 82 Wash. App.

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a temporary but substantial loss or impairment of the function of any bodily part or organ,

539, 918 P.2d 527 (1996), the court found that reliance upon a police bulletin alone was likewise insufficient to establish probable cause. The court explained that while police can rely on their collective knowledge, deficiencies in the sufficiency or reliability of that information will still produce unlawful arrests. Mance at 542. *See Also* State vs. Sandholm, 96 Wash. App. 846, 980 P.2d 1292 (1999) (holding exclusive reliance on WACIC stolen vehicle report insufficient to establish probable cause to arrest).

Courts have reiterated a similarly exacting standard regarding source reliability in circumstances involving informant tips. For example, in State vs. Sieler, 95 Wash.2d 43, 621 P.2d 1272 (1980), the Supreme Court reaffirmed its holding in State vs. Lesnick, 84 Wash.2d 940, 530 P.2d 243 (1975), the law enforcement must have specific facts to substantiate the source's reliability as well as the nature of the allegation. Moreover, mere identification of the source, or the suspect, is not enough to substantiate the tip, even under the lesser standard for investigative detentions not amounting for formal arrests. There must be underlying factual justification supporting the reliability of the source as well as the conclusion. Sieler at 48. *See Also* State vs. Hopkins, 128 Wash. App. 855, 117, P.3d 377 (2005).

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or which causes a fracture of any bodily part;

As in other situations where police reply upon information to support probable cause determinations, there must also be a specific factual basis upon which to believe the injury element of vehicular assault has been satisfied at the time of arrest. Here, Officer Westphal did not have a reasonable belief that Mr. Elliot had committed the crime of vehicular assault.[4] When questioned as to his actions, Officer Westphal testified as follows[5]:

Q. Now isn't it true that you actually arrested initially Mr. Elliot for driving under the influence?

A. I went with the enhancement for the possibility of broken bones.

Q. For the enhancement?

A. The vehicular assault is a DUI with substantial injury, broken bones.

Q. Yes.

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[4] RCW 46.61.522 states: (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

(2) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.

(3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

[5] Transcript at 54, 57.

A. I arrested that with a possibility of broken bones...

Q. So you arrested him for vehicular assault before anyone really knew whether there were any broken bones or not?

A. Yes Sir.

Officer Westphal's only basis for the felony arrest was the mere suspicion of a broken wrist. Notably, Officer Westphal did not have any direct contact with either the driver or the medics, and was given no further details as to her medical condition. Officer Johansen learned only that the driver had complained of pain in the neck, back and wrist. Transcript at 83. He also did not observe anything visually unusual about the condition of the driver's wrist. Id. There was nothing unique about the standard evaluation procedures taken by the medics in this case, and no evidence to suggest the driver's complaint was anything other than the general report a person just involved in a traffic accident would be expected to make.

The trial court here was persuaded that the need for expeditious evidence-gathering supported the officer's action here. Transcript at 135. In fact, an equal opportunity to obtain BAC evidence existed by means of a breath test pursuant to RCW 46.20.308. Indeed, that statute even provides authority for an officer to obtain a search warrant

to conduct a blood draw notwithstanding an individual's withdrawal for his/her implied consent.[6]

Thus, law enforcement would have retained its ability to gather evidence of intoxication had Mr. Elliot been properly arrested for DUI. Mr. Elliot was also physically capable of transport to the police station for the administration of a breath test; he was only taken to the hospital by law enforcement for purposes of obtaining a blood draw. There is no suggestion that a breath test would not have been otherwise available.

The State's ability to charge the greater offense would also not be prejudiced by an arrest for DUI versus vehicular assault. In State vs. Higley, 78 Wash.App. 172, 902 P.2d 659 (1995), a driver was investigated and arrested for DUI after a car accident where the other driver had hit her head on the windshield and was treated at the hospital but did not appear to be seriously injured. Some months later, the driver was diagnosed with a closed head injury that resulted in substantial medical impairment.

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[6] RCW 46.20.308 states in part: "Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW

The State moved to dismiss the previously charged DUI misdemeanor and file a felony vehicular assault charge, even though Mr. Higley had already entered into and begun a deferred prosecution program. The Court of Appeals agreed that the State was permitted to charge the felony because jeopardy had not yet attached by virtue of the deferred prosecution and evidence of a more serious medical condition had not been available when the initial charging decision was made.

The State would have it that any time that a collision occurs wherein an involved person complains of some type of pain without more, law enforcement would have sufficient reason to invoke the special evidence warnings and require submission to a mandatory blood draw. Probable cause to arrest cannot be reduced to such indeterminate speculation; it requires a specific and articulated factual basis upon which the officer relies in making an arrest decision. Here Officer Westphal had no lawful basis to make an arrest for vehicular assault and invoke the special evidence warnings. While a DUI arrest would arguably have been lawful, Mr. Elliot then had the statutory right to implied consent warnings and an opportunity to submit to a breath test.

46.61.503. Neither consent nor this section precludes a police officer from obtaining a

Law enforcement became aware of a confirmed fracture approximately two hours after the time Mr. Elliot was arrested and a mandatory blood sample extracted. Transcript at 53. *At that time* the State could appropriately pursue a felony prosecution, and indeed it did so. Instead, Officer Westphal deprived Mr. Elliot of his right to implied consent warnings and forced a blood draw on the mere supposition that a broken bone might be diagnosed at a later time. Probable cause demands more than speculation, more than unsubstantiated possibilities and more than a hunch, even one made in good faith.

VI. Conclusion

The Appellant respectfully requests that this Honorable Court reverse the trial court's ruling that Mr. Elliot was lawfully arrested for vehicular assault and vacate his conviction.

DATED this 29th day of August, 2008.

Respectfully Submitted,

DIANA LUNDIN
Attorney for Appellant
WSBA#: 26394

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search warrant for a person's breath or blood."

FILED
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DIVISION II

08 SEP -3 AM 9:41

STATE OF WASHINGTON
BY_____
DEPUTY

IN THE COURT OF APPEALS
DIVISION TWO, STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent, vs. MICHAEL A. ELLIOTT, Defendant/Appellant.	NO. 37131-6-II DECLARATION OF SERVICE

I, Andrea M. Faoa, declare under penalty of perjury under the laws of the State of Washington that I served on the Deputy Prosecuting Attorney, on August 29, 2008, by placing in the services of ABC Legal Messenger, copies of: (1) Appellant's Amended Brief; and (2) Declaration of Service, with a routing slip directing service to the following address:

Deputy Prosecutor
Thurston County Superior Court
2000 Lakeridge Drive Southwest
Olympia, Washington 98502

Dated this 29th day of August, 2008.

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