

COURT OF APPEALS
DIVISION II

03 DEC 24 07 11:00

STATE OF WASHINGTON
BY SW
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 REPLY BRIEF

Diana Lundin
Attorney for Appellant
WSBA#: 26394
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1621-114th Ave. S.E., Suite 210
Bellevue, Washington, 98004
(425) 451-1995

PM 12-23-07

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| <u>Terry vs. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868 (1968). | 3 |
| <u>Whiteley vs. Warden, Wyoming State Penitentiary</u> , 401 U.S. 560, 91 S.Ct. 1031 (1971). | 3 |
| <u>State vs. O’Cain</u> , 108 Wash. App. 542, 31 P.3d 733 (2001). | 3 |
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I. Introduction

Appellant Mr. Michael Elliot respectfully submits the following argument and authority in reply to Respondent's Brief, filed on or about November 25, 2008.

II. Statement of the Case

Mr. Elliot hereby incorporates the statement of facts as set forth in his opening brief, with the following correction: Mr. Elliot withdraws any objection to findings not contained in the document identified at pages 72-74 of the Clerk's Papers.¹ Substantively, the error of law identified in Appellant's Opening Brief remains unchanged by the document substitution. Mr. Elliot asserts that the trial court erred in concluding that the officer's mere suspicion or conjecture of a broken bone was sufficient to invoke the mandatory blood provisions of RCW 46.20.308.

III. Argument

Respondent's Brief suggests that a law enforcement officer is entitled to rely on conjecture in making an arrest decision if the source of the speculation is generally considered reliable. Yet, the State cannot cite to a single case supporting the proposition that a mere suspicion or possibility of criminal activity meets the definition of

probable cause to arrest, and rightly so, since the law requires more. That is, specific articulable facts that would lead a reasonably cautious person to believe a particular circumstance. Terry vs. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

The State attempts to distinguish cases such as State vs. O'Cain, 108 Wash. App. 542 (2001), based on the general proposition that medical personnel are by definition reliable sources. It is not the source of the information that Mr. Elliot challenges, although it is noteworthy that Officer Westphal had no direct contact with the medics or the complaining driver. Rather, it is the sufficiency of the information received from that source which is lacking. Police are not insulated from erroneous arrests based on unsubstantiated information. Whiteley vs. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031 (1971).

In Whiteley, officers relied upon a police bulletin for two individuals wanted for suspicion of breaking and entering, along with their description and information about their vehicle. While agreeing that dispatch reports were presumptively credible and that the arresting officer was justified in relying thereon, the U.S. Supreme Court nonetheless found probable cause lacking where the basis of the

¹ See letter from Appellant's counsel filed concurrently herewith.

underlying information supporting the arrest warrant was insufficient to support probable cause to believe the individuals were engaged in criminal activity. Whiteley at 567-568.

Where a defendant challenges the sufficiency of information relied upon by law enforcement to support an arrest, it is the State's burden at an evidentiary hearing to establish a sufficient factual foundation to justify probable cause for arrest. State vs. O'Cain, 108 Wash. App. 542, 31 P.3d 733 (2001). The State cannot simply stand on the fact that the officer received particular information from a reliable source, but rather must show that the information itself comprises probable cause to the arrest. Id. This is so even if police officers relied on the information in good faith, which does not relieve the State of its later burden to prove the sufficiency of the information itself. Id. at 552-553. *See Also* Whiteley vs. Warden, Wyoming State Penitentiary (*infra*).

As in cases such as O'Cain and State vs. Mance, 82 Wash. App. 539, 918 P.2d 527 (1996), where officers improperly relied upon deficient information received from police dispatch, also generally considered a reliable source, here Officer Westphal relied upon the conjecture of others that the driver might have a broken bone. No specific observable physical or medical condition substantiated this

speculation, and the only information available to Officer Westphal at the time of arrest was that a broken bone was within the realm of possibility.

While the “substantial bodily injury” element of the vehicular assault offense can be established by evidence of a broken bone, that evidence was not available to Officer Westphal at the time he arrested Mr. Elliot. An officer is not entitled to rely on mere supposition, whatever the source, in making an arrest determination. Mere supposition, even if gleaned from a reliable source, equates to an unfounded suspicion insufficient to support an intrusion upon an individual’s privacy or liberty. State vs. McCord, 19 Wash. App. 250, 576 P.2d 892 (1978). “Where, however, the information of the defendant's criminal activity is merely in conclusory terms, such as here, credibility of the informant in the abstract will not suffice.” State vs. Bowers, 36 Wash. App. 119, 672 P.2d 753 (1983).

In this case, an auto accident resulted in general complaints of pain from one of the drivers. Transcript at 83. Medical personnel suspected a bone might have been broken, solely it appears from these complaints of pain and not from any observable physical condition, but did not make that determination until several hours after Mr. Elliot

had been arrested for vehicular assault and been subjected to a mandatory blood test.²

No reasonable person would conclude, based solely on general complaints from a person involved in a car accident of neck, back and wrist pain, that the person's wrist was in fact broken. A reasonable person would conclude, as did the medical personnel, that the person had sustained some level of trauma to those areas and that further evaluation was needed to determine the extent of any potential injury.

Officer Westphal's decision to arrest on the "possibility" that a broken bone might have been sustained was not reasonable, and effectively circumvented both Mr. Elliot's statutory rights under the implied consent law and precluded any possible contemporaneous judicial review.

Ultimately, the State would not have been foreclosed from pursuing its evidence gathering and ultimately criminal indictment had

² Had Officer Westphal invoked RCW 46.20.308, and attempted a warrant for blood evidence, judicial review of the circumstances of the arrest could have been had contemporaneously; yet Officer Westphal elected to circumvent the mandates of the implied consent law by arresting Mr. Elliot for the felony offense and invoking the special evidence warnings, which remove the option to withdraw consent for a blood test and do not require contemporaneous judicial review.

Officer Westphal made an appropriate arrest, while simultaneously upholding our constitutional safeguards against unreasonable invasions upon individual liberty. Thus, the trial court's basis for denying Mr. Elliot's motion is not substantiated by either the facts or the law as applied to this case.

IV. Conclusion

Mr. Elliot respectfully renews his request 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 19th day of December, 2008.

Respectfully Submitted,



DIANA LUNDIN
Attorney for Appellant
WSBA#: 26394

COURT OF APPEALS
DIVISION II

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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.

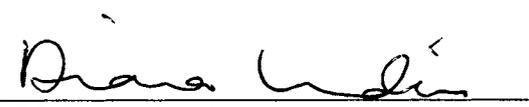
NO. 37131-6-II

DECLARATION OF SERVICE

I, Diana Lundin, declare under penalty of perjury under the laws of the State of Washington that I served on the Deputy Prosecuting Attorney, on December 23, 2008, by placing in the U.S. Mail, copies of: (1) Appellant's Reply Brief, (2) Letter to Court Clerk and (3) Declaration of Service thereof, addressed as follows:

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

Dated this 23rd day of December, 2008.



DIANA LUNDIN
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Attorney for Appellant

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RECEIVED
DEC 24 2008
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

December 21, 2008

Clerk of the Court
Court of Appeals Division Two

RE: State of Washington vs. Elliot (Cause Number 37131-6-II)

Dear Clerk of the Court:

Attached hereto please find Appellant's Reply Brief, which is filed in response to Respondent's Brief filed on or about November 25, 2008. Respondent raises a question regarding the Findings of Fact and Conclusions of Law referenced in Appellant's Amended Brief. Counsel extends her apologies to the Court and Respondent's Counsel for the confusion and respectfully requests that the Court consider the following details by way of explanation for the discrepancy.

Mr. Bill A. Bowman, trial counsel for Mr. Elliot, is a partner in my law firm and conveyed several details to me according to his best recollection about events occurring below, including his understanding that the Superior Court had adopted and entered the State's Proposed Findings of Fact and Conclusions of Law on August 16, 2008, outside of his presence.

Relying on Mr. Bowman's good faith representations in preparing the assignments of error, I failed to independently confirm this information through a physical review of the Designated Clerk's Papers, for which I sincerely apologize. Unfortunately, Mr. Bowman's understanding was incorrect because unbeknownst to him, the trial court adopted the defense's Findings/Conclusions in lieu of the State's.

At the time Appellant's Brief was prepared and filed, I was under the mistaken impression that the trial court had adopted the State's proposed version, and that my file copy was identical to Clerk's Sub Number 49 (Clerk's Papers at 72-74). Thus, the references in Appellant's Amended Brief to the Findings and Conclusions in the section

Clerk of the Court
December 21, 2008
Page 2

designated Assignments of Error are incorrect to the extent that they refer to the State's version of that document. Both versions are attached hereto for the court's reference.

My regrets to the Court and Respondent's Counsel for not independently confirming that the documents I utilized matched those contained in the Designated Record.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Diana Lundin".

Diana Lundin

EXHIBIT A

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**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL ANTHONY ELLIOT,

Defendant.

NO. 06-1-02132-4

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 3.6**

THIS MATTER having come on for hearing on July 9, 2007 pursuant to defendant's motion to suppress evidence brought under CrR 3.6, and the court having considered the testimony of Lacey Police Department Officers Ken Westphal and Dave Johansen, together with the memoranda and argument of counsel, and the file herein, the court now enters the following:

I. FINDINGS AS TO UNDISPUTED FACTS

1.1 On the afternoon of November 15, 2007 Officer Ken Westphal responded to the scene of a two-vehicle accident on Carpenter Road SE. Officer Westphal has had extensive training as a drug recognition expert. This means that he has been trained in recognizing the physical symptoms of intoxication by alcohol and drugs. He also has a lot of experience in investigating persons suspected of driving while under the influence of alcohol. As a result, on many occasions he has observed such suspects, formed an opinion as to their degree of intoxication, and then administered a blood or breath alcohol test and become aware of the results.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 3.6 -1**

EDWARD G. HOLM
Thurston County Prosecuting Attorney
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1 1.2 Thus, Officer Westphal's role in the investigation of the accident on Carpenter Road on
2 November 15, 2007 was to contact the defendant to see whether he might be under the
3 influence of alcohol. Emergency medical personal who had had contact with the defendant
4 had told Lacey officers that they noted that his breath smelled of alcohol and that they thought
5 he might be affected by drinking.
6

7 1.3 Upon his arrival at the scene, Officer Westphal contacted Officer Dave Johansen. Officer
8 Johansen has expertise in investigating vehicular collisions and had been assigned as the lead
9 investigator as to this accident. Officer Johansen told Officer Westphal that the defendant had
10 admitted that he had been driving the northbound vehicle which had been involved in a
11 collision with a southbound vehicle. Officer Johansen also told Officer Westphal that he had
12 examined the scene of the accident and concluded that the accident had occurred when the
13 northbound vehicle driven by the defendant had crossed the centerline into the southbound
14 and lane and struck the southbound vehicle head-on.
15

16 1.4 Prior to his contacting the defendant, Officer Westphal had learned from Lacey Officer
17 Newcomb that the emergency medical technicians who had been treating the driver of the
18 southbound vehicle were reporting that it appeared that the driver of the southbound vehicle
19 had a broken bone. Later, at St. Peter Hospital, Officer Westphal was told by other officers
20 that treating physicians also felt that the passenger had a broken bone.
21

22 1.5 When Officer Westphal contacted the defendant, he told him that he had been driving
23 northbound when he had to swerve to miss an oncoming car. The defendant said that when he
24 had attempted to correct his vehicle, the collision had occurred.
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26

1 1.6 During this conversation, the officer noticed that he could smell the odor of alcohol coming
2 from the defendant's breath. When the defendant spoke the officer noticed that he slurred his
3 words slightly. He also observed that the defendant had red, watery, droopy eyes.

4 1.7 Officer Westphal asked the defendant whether he had been drinking, and the defendant said
5 the he not been drinking and that he would not do any field sobriety tests. At this point, due
6 to his observations, and consistent with his training and experience, Officer Westphal felt that
7 the defendant's driving had been affected by alcohol, and he placed him under arrest for
8 vehicular assault. The officer later obtained a blood sample from the defendant for the
9 purpose of alcohol testing.
10

11 **II. FINDINGS AS TO DISPUTED FACTS**

12 2.1 No material facts were disputed at the hearing.

13 Having entered the above findings of fact, the court now reaches the following:
14

15 **III. CONCLUSIONS OF LAW**

16 3.1 Officer Westphal had probable cause for the arrest of the defendant on vehicular assault
17 charge. He was thus entitled constitutionally and by statute to obtain a sample of his blood
18 for the purpose of analysis, and this motion must be DENIED.
19

20 DATED this ____ day of July, 2007

21 _____
22 JUDGE

23 Presented by:

24 Approved as to form:

25 _____
26 David M. Soukup, WSBA # 18177
Senior Deputy Prosecuting Attorney

WSBA #
Attorney for Defendant

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 3.6 --3**

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EXHIBIT B

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IN THE THURSTON COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

vs.

MICHAEL ANTHONY ELLIOT,

Defendant.

NO. 06-1-02132-4

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 3.6

THIS MATTER having come on for hearing on July 9, 2007 pursuant to Mr. Elliot's motion to suppress evidence brought under CrR 3.6, and the court having considered the testimony of Lacey Police Officers Ken Westphal and Dave Johansen, together with the memoranda and argument of counsel, and the file herein, the court now enters the following:

FINDINGS OF FACT

1. On the afternoon of November 15, 2007 Officer Ken Westphal responded to the scene of a two car accident on Carpenter Road SE.
2. Upon arriving at the scene, Officer Westphal was approached by Officer Johansen. Officer Johansen told Officer Westphal that a Lacey Medic had approached him and said he could smell an odor of intoxicants coming from Mr. Elliot's breath. Officer

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draw provisions of the implied consent statute. Accordingly, Mr. Elliot's motion to suppress is DENIED.

Dated this 16th day of August, 2007.

JUDGE

Presented by:

Approved as to form:

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BILL A. BOWMAN
Attorney for Defendant
WSBA# 22502

DAVID M. SOUKUP
Senior Deputy Prosecuting Attorney
WSBA# 18177

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURUANT TO CRR 3.6 - 4

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