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COURT OF APPEALS
DIVISION II

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NO. 37663-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON CR
DIVISION TWO DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

DAVID GIBSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Brian Tollefson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence found in appellant's car because the State failed to prove the appellant was stopped for the sole purpose of enforcing the traffic code and not for the unconstitutional purpose of conducting a warrantless search.

2. The trial court erred in entering finding of fact 6 as to the disputed facts. CP 11.¹

3. The trial court erred in entering conclusions of law 1-6. CP 12 (appendix).

4. The trial court violated the appellant's constitutional right to privacy by denying his motion to suppress evidence found by police in his car after an unlawful search incident to arrest.

5. The trial court failed to comply with CrR 6.1 when it failed to enter written findings of fact and conclusions of law.

Issues Pertaining to Assignments of Error

1. Washington courts disapprove the use of pretext as a means of accomplishing otherwise unsupported intrusions into privacy as an offense of Article I Section 7's guarantee that no government intrusion in

¹ A copy of the court's written findings of fact and conclusions of law on the CrR 3.6 motion to suppress is attached as an appendix and incorporated herein.

citizens' private affairs is done without authority of law. Should this Court find that the traffic stop and subsequent search were done as a pretext to search for a person or drugs in violation of Article I, Section 7? (Assignments of Error 1, 2, and 3)

2. Does the Fourth Amendment require police to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest to justify a warrantless vehicular search incident to arrest conducted after the vehicle's occupants have been arrested and secured? (Assignment of Error 4).

3. Where the trial court failed to comply with CrR 6.1 when it failed to enter written findings of fact and conclusions of law should the case be remanded for entry of findings and conclusions? (Assignment of Error 5).

B. STATEMENT OF THE CASE²

1. Procedural Facts

The state charged David Gibson with manufacturing a controlled substance. CP 1. Gibson filed a motion to suppress all the evidence found in his car, contending, among other arguments, the stop was a pretext used

² The hearing on January 17, 2008 is referred to as 1RP; the hearing on January 18, 2008 is referred to as 2RP; the hearing on January 22, 2008 is referred to as 3RP. The hearings on April 1, 3, 7, and 10, 2008, are sequentially numbered and are referred to as 4RP.

by the police to conduct an unlawful search. CP 3-7. After an evidentiary hearing under CrR 3.6, the trial court denied Gibson's motion. CP 8-13; 3RP 24-27.

Gibson then waived his right to a jury trial. 4RP 2-3. The court found Gibson guilty as charged. CP 19-33. 4RP 190. The court imposed a sentence within the standard range. 4RP 201-202. The court did not enter CrR 6.1 findings of fact and conclusions of law.

2. Facts Pertaining to Assignment Errors 1, 2, 3 and 4

On February 22, 2007, at approximately 9:00 p.m. a group of five or six Pierce County Sheriff deputies went to a wrecking yard/residence to serve an arrest warrant. 1RP 12, 66; 4RP 11. The deputies were not successful. 3RP 14. While on the property, however, the deputies made contact with everyone they encountered (five to six people) and ran their names through a records check. 1RP 11, 66; 2RP 11-12. Deputy Tjossem testified drug activity was common at the wrecking yard and that all the people police contacted had a history of drug use or criminal activity. 2RP 12.

After approximately thirty minutes, the group of deputies started to leave property. 1RP 67. As Deputy Jeff England was leaving, he noticed a car, driven by Gibson, approach the property. 1RP 14. The car

turned onto the property without signaling. 1RP 17. England made a U-turn and stopped Gibson. 1RP 17. At the same time, the other deputies blocked the roadway and discussed the possibility that Gibson was someone they were looking for. 1RP 39; 2RP 15.

After he stopped Gibson, England took Gibson's driver's license, checked it through the records system and learned he was the subject of an Auburn arrest warrant. 4RP 20. None of the police witnesses were able to testify with any certainty why the arrest warrant was issued. 1RP 46.

After confirming the arrest warrant, Tjossem placed Gibson under arrest. 1RP 68; 2RP 23; 4RP 21. Gibson was handcuffed and placed in the back of a patrol car. Tjossem then went back to search Gibson's car. 1RP 70; 2RP 23; 4RP 38. Meanwhile, England issued a citation and put the citation in Gibson's jacket pocket. 1RP 48. England, however, did not include Gibson's failure to signal in his initial probable cause statement. 2RP 76.

Inside the car, Tjossem found a twenty pound bag of ammonium sulphate, drain cleaner, dry ice, toluene, coffee filters, a funnel, used coffee filters with white powder, a small bag of white powder, and a coffee grinder that had white residue on the inside. 1RP 70; 2RP 4-6; 4RP 38-40. The white residue was later revealed to be pseudoephedrine. 4RP 119.

Gibson was searched and Tjossem found a receipt for a twenty pound bag of ammonium sulphate. 4RP 42.

C. ARGUMENTS

1. THE STATE FAILED TO MEET ITS BURDEN OF SHOWING THE STOP WAS CONSTITUTIONALLY LEGITIMATE, THUS, THE EVIDENCE SEIZED AS A RESULT SHOULD HAVE BEEN SUPPRESSED.

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment in that article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations." State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

Under article I, section 7, warrantless searches are presumed unreasonable. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). Exceptions to the warrant requirement are narrowly drawn. Id. Recognized exceptions to the warrant requirement are limited by the reason that called them into existence and are not to be used creatively by officials to undermine the warrant requirement. State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999).

A pretext stop violates article I, section 7 of the Washington Constitution because it is a warrantless seizure that is predicated upon unreasonable and unpalatable police conduct. Ladson, 138 Wn.2d at 353. The essence of a pretext detention is that police justify stopping a citizen by pointing to some unlawful act, but in reality the motivation for the stop is to investigate suspicions unrelated to that unlawful act. Id. at 349. It is not enough for the state to show a traffic violation occurred; the question instead is whether the violation was the real reason for the stop. State v. Meckelson, 133 Wn. App. 431, 436-437, 135 P.3d 991 (2006) (citing Ladson, 138 Wn.2d at 358-59). As explained by the Washington Supreme Court:

[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.

Ladson, 138 Wn.2d at 351.

When determining if a stop is based on pretext, trial courts must consider both the officer's subjective motives and the objective reasonableness of the officer's behavior. Ladson, 138 Wn.2d at 343. In making the

determination, courts consider the totality of the circumstances. Id. at 358-59. The state bears the burden of proving a seizure was legitimate. Id. at 350. If the stop was pretextual, the subsequent search is deemed unlawful and all evidenced seized as a result is suppressed. Id. at 360 (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

A police officer's improper subjective motive for seizing a citizen will invalidate an otherwise objectively valid stop. Ladson, 138 Wn.2d at 451-53. An officer's subjective motivation is often inferred from the police function he is serving at the time of the seizure -- i.e. is the officer on regular patrol and using his authority to enforce general laws or is the officer investigating a specific offense. For example, in Ladson, the officers were part of a proactive gang patrol when they instigated a traffic stop. Id. at 346. They admitted that although they did not make routine traffic stops as part of their gang patrol duties, they did use traffic code violations as a means to initiate contact and question people about unrelated criminal activity. Id. The Ladson court held the use of a garden-variety offense, such as a traffic violation, as a means of justifying a seizure that is truly intended to facilitate unrelated criminal investigations, violates article 1, section 7. Id. at 353 (citing State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962)).

A similar result was reached in State v. DeSantiago, 97 Wn. App. 446, 938 P.2d 1173 (1999). There, the arresting officer saw the DeSantiago drive away from an apartment complex that was a known "narcotics hotspot." Id. at 448- 49. Profiling the DeSantiago as a drug-dealer, the officer pulled him over for making an illegal left-hand turn. Id. DeSantiago did not have a license or insurance, and there was an outstanding warrant for his arrest. Id. at 449. He was arrested and while searching his car incident to the arrest police found methamphetamine and a gun. Id. DeSantiago was convicted of unlawful possession of the methamphetamine and the gun. Id. at 448-49.

The DeSantiago court reversed the conviction because the drug and gun were the fruits of an unconstitutional pretextual stop. The court noted the arresting officer was not on routine traffic patrol but was looking for something else. Instead, he was watching a "narcotics hot spot," saw potential drug activity, and continued his investigation by stopping DeSantiago. Thus, the true motive for his stop was to investigate drug activities, not to cite De Santiago for violating the traffic code. DeSantiago, 97 Wn. App at 452-53.

In State v. Myers, 117 Wn. App. 93, 94, 69 P.3d 367 (2003), *review denied*, 150 Wn.2d 1027 (2004), the court ruled under the totality

of the circumstances the stop there was likewise pretextual. Myers drove past the officer who recognized him as someone whose driver's license had been suspended. Id. at 368. The officer checked Myers's driver's license status, but before receiving a reply Myers committed two traffic infractions. The officer testified he stopped Myers in part to contact him and verify his license status. Id.

Contrary to the officer's suspicion, Myers had a valid license. Myers, 117 Wn. App. at 368. The officer then asked a passenger for his identification because of a seat belt violation. Id. at 368-69. Because the passenger had an outstanding warrant, the officer arrested him and searched the car incident to the arrest. Id. at 369. The officer found methamphetamine in Myers's car and wallet. Id. at 369. After obtaining a telephonic warrant, the officer found a methamphetamine laboratory in the car's trunk. Id. at 369. The Myers court held the officer's proffered reason for the stop, the traffic infractions, was a pretext for the real reason, which was to investigate for suspected license violation. Id. at 368.

Here, the court's findings do not support its conclusions of law the stop was not a pretext stop, the officers had authority to search Gibson's car incident to arrest or that the search was lawful. CP 13. Although Gibson failed to use his turn signal, the true reason for the stop was to

search him and his car. When England stopped Gibson he was not on routine patrol but leaving the property, where police knew drug activity occurred, after attempting to execute an arrest warrant. While on the property, police made contact with everyone they encountered, and ran their names through a records check. 2RP 11. By the time police stopped Gibson, they knew everyone on the property either had a had a history of drug use or criminal activity. When England stopped Gibson, other deputies discussed the possibility that Gibson was one of the people they were looking for. 2RP 15. At no time was Gibson asked to provide proof of insurance and England did not include Gibson's failure to use his turn signal in his initial probable cause statement. 2RP 62, 76. The totality of the circumstances reveals the real reasons for the stop were to check Gibson, as the officers had done with the others on the property and to search his car for evidence of drug activity. The stop was pretextual.

Even though Gibson was arrested on an outstanding warrant, the subsequent search of the car, incident to the arrest, was illegal because the initial stop was pretextual. Thus, the court erred in denying Gibson's motion to suppress the evidence found in the car. Ladson, 138 Wn.2d at 360; Myers, 117 Wn. App. at 98. Without the pseudoephedrine and other

items found in the car, the state cannot sustain its burden of proof. As the trial court stated,

I must say, however, that if it hadn't been for the ground-up pseudoephedrine, I think Mr. Gibson, all he had was a bunch of items in his car that have equal value as legitimate uses or illegitimate uses, and it was simply the one item, the ground-up pseudoephedrine which convinced me that there was circumstantial evidence to find him guilty beyond a reasonable doubt of the crime. . . .

4RP 189. Therefore, this Court should reverse Gibson's conviction. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (because court concluded motion to suppress evidence should have been granted, no basis remained for conviction).

2. THE SEARCH VIOLATED THE FOURTH AMENDMENT BECAUSE SUFFICIENT EXIGENT CIRCUMSTANCES DID NOT EXIST TO JUSTIFY A SEARCH INCIDENT TO ARREST.

Even if this Court finds the stop legitimate under the Washington Constitution, the search of Gibson's car violated the Fourth Amendment to the United States Constitution.³

³ The Fourth Amendment 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.

a. This is a Manifest Constitutional Error

RAP 2.5(a)(3) permits an appellant to raise for the first time a manifest constitutional error. Erroneous suppression rulings have been found to constitute such error. See, e.g., State v. Littlefair, 129 Wn. App. 330, 339, 119 P.3d 359 (2005) (A trial court's failure to suppress evidence seized as the result of an unlawful search affects a constitutional right and may thus be raised for the first time on appeal.). Gibson asks this Court to answer a purely legal question; because he moved to suppress the evidence, the trial court held a hearing and all pertinent facts are of record. This court needs nothing more to determine whether Gibson raises a manifest error of constitutional magnitude. Cf. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ("If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."). This Court should therefore reject any assertion that RAP 2.5(a) precludes this Court from reviewing the merits of the above arguments."

b. There Were No Exigent Circumstances

The United States Supreme Court has set forth "jealously and carefully drawn," Jones v. United States, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958), exceptions to the long-established rule that

warrantless searches "are per se unreasonable under the Fourth Amendment. . . ." Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576 (1967) (footnote omitted). Warrantless searches incident to arrest are justified by two exigencies: the need to disarm the suspect in order to take him into custody or the need to preserve evidence. Knowles v. Iowa, 525 U.S. 113, 116, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998) (citing cases going back to Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914)); accord Thornton v. United States, 541 U.S. 615, 620, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (identifying exigencies as "the need to remove any weapon the arrestee might seek to use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence"); Chimel v. California, 395 U.S. 752, 764, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) (identifying exigencies as (1) "the need to seize weapons and other things which might be used to assault an officer or effect an escape" and (2) "the need to prevent the destruction of evidence of the crime-things"). The Court has also defined the scope of such searches with these two exigency rationales: a search incident to arrest "must be limited to the area 'into which an arrestee might reach.'" Cupp v. Murphy, 412 U.S. 291, 295, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (quoting Chimel, 395 U.S. at 763).

Following Chimel, the Court made clear that the operative time for assessing the exigencies justifying a warrantless search incident to arrest is the time of the search and, accordingly, held that authorities may search only the area that is within the arrestee's immediate control when the search is commenced. In United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), the Court held that a search of an area is invalid under this warrant requirement exception if the arrestee could not conceivably access it when it was searched.

There was no part of Gibson's car that was conceivably accessible to him when police initiated the search. By that time, police had immobilized Gibson, having handcuffed him and secured him in the back of a police car. 4RP 21,38. Thus, when police searched the car, there was no longer a concern for destruction of evidence or access to a weapon. See Chadwick, 433 U.S. at 15. As such, when the search was initiated no exigency existed. See Chadwick, at 15. Therefore, the search of Gibson's car was not incident to his arrest, as it did not serve to mitigate either of Chimel's twin exigency rationales.

c. No likelihood of finding evidence relevant to the crime of arrest

Additionally, there was no evidence the officers were aware of the nature of the warrant for which Gibson was arrested, thus there was no

conceivable prospect of uncovering evidence relevant to the crime of arrest. 4RP 20-21. As several courts have recognized, for example, driving on a suspended license is a crime for which no probative evidence might be found in the arrestee's car and for which authorities have all the evidence necessary to prosecute at the time of arrest. See United States v. Jackson, 415 F.3d 88, 93 (D.C. Cir. 2005) (It was "entirely implausible" that there was "additional evidence to support the charges of driving on a suspended license, operating an unregistered vehicle, and driving without required vehicle identification tags" in car and officer already had "all of the evidence that he needed to arrest the driver for the above offenses"); State v. Parker, 139 Wn.2d 486, 987 P.2d 73, 82-83 (1999) ("[W]here individuals are arrested for driving with license suspended, there is simply no evidence of the crime to be hidden or lost."); cf. United States v. Robinson, 414 U.S. 218, 223 n.2, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (quoting police manual that police may not search a vehicle following an arrest for driving after revocation "because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband or evidence of the offense of driving after revocation").

Likewise, Gibson's arrest on the outstanding warrant does not support the search. There is nothing in the record to indicate why the

warrant was issued or the underlying charge. 4RP 20-21. Police had no reason to believe that evidence relevant to the crime of arrest might be found in Gibson's car and the search plainly did not serve the government's interest in gathering evidence relevant to the crime of arrest. See Thornton, 541 U.S. at 629, 632 (Scalia, J., concurring in judgment).

Gibson therefore requests this Court to reverse the trial court's denial of his motion to suppress evidence and reverse his conviction.

d. Arizona v. Gant⁴

In New York v. Belton, 453 U.S. 454, 458, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), the Court was asked to determine the scope of Chimel to a vehicle search incident to the lawful arrest of four individuals who were removed from the car before the search. See Thornton v. United States, 541 U.S. 615, 619 (Belton Court "considered the constitutionally permissible scope of a search" of a vehicle incident to arrest where the occupants had been removed from the car).

The Belton Court found it necessary to formulate a standardized rule officers in the field could follow without regard to the particular facts of a case. Belton, 453 U.S. at 458-59. The Court therefore held that, incident to the lawful custodial arrest of a automobile occupant, the police

⁴ 128 S. Ct. 1443, 170 L. Ed. 2d 274 (2008).

may contemporaneously search the vehicle's passenger compartment without first assessing the need for such a search. Id. at 459-60. The Court hoped this would be a "workable rule" that would guide officers in determining the scope of their authority. Id. at 460.

This did not prove to be the case; rather, Belton has been the target of criticism and has left in its wake a tangled jurisprudential web. See, e.g., United States v. Caseres, 533 F.3d 1064, 1070-71 n.5 (9th Cir. 2008) ("Belton has been sharply criticized."); United States v. Weaver, 433 F.3d 1104, 1107 (9th Cir. 2006) (noting "Belton rule is broader than its stated rationale" because officer safety and preservation of evidence are not involved where arrestee is handcuffed and secured in a patrol car before search), cert. denied, 547 U.S. 1142 (2006); State v. Eckel, 185 N.J. 523, 533-534, 888 A.2d 1266 (2006) (noting "drumbeat of scholarly opposition to Belton has remained constant;" citing articles). Several states have rejected Belton's "bright-line" rule under their constitutions or statutes.

The Washington Supreme Court adopted Belton's general rule, but held article I section 7 of the State constitution prohibits the search of closed containers found in a vehicle incident to arrest. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986). Nevertheless, courts in subsequent cases have eschewed the "bright-line" rule and instead have adopted a case-by-

case factual analysis under article I, section 7. See, State v. Adams, ___ Wn. App. ___, 191 P.3d 93 (2008) (summarizing various theories courts have employed in determining the propriety of car searches incident to arrest).

Perhaps in response to the continuing controversy over Belton and the states varying treatment of its purported "bright-line" rule, the Court granted certiorari in Arizona v. Gant, 128 S. Ct. 1443, 170 L. Ed. 2d 274 (2008). The Court framed the issue as follows:

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

Gant, 128 S. Ct. 1443, 1444 (2008).

The Arizona Supreme Court in Gant held the only issue in Belton involved the permissible scope of a lawful search of a vehicle incident to arrest, given the exigencies of the arrest situation. State v. Gant, 216 Ariz. 1, 3, 162 P.3d 640 (2007). Belton did not, however, address the threshold question whether police may search a vehicle incident to arrest at all once the scene is secure. Gant, 216 Ariz. at 3. The Gant court answered that question in the negative, holding when an arrestee is secured and is no

longer a threat to officer safety or the preservation of evidence, the officer may not search the vehicle incident to arrest. Gant, 216 Ariz. at 4.

It is in this context that Gibson urges this Court to follow the Arizona Supreme Court's sound reasoning and reverse his conviction. Unlike Belton, the Gant rule is tethered to the twin rationales for the "search incident' exception articulated in Chimel -- officer safety and evidence preservation. Chimel, 453 U.S. at 457. See United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) ("[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find. This state of affairs should cause us to reexamine our thinking.") (Trott, J. concurring).

Moreover, Gant truly does draw a workable bright line: once police handcuff an arrestee and secure him in the police car, they cannot search the interior of the arrestee's vehicle incident to arrest. This rule would likely alleviate the need for the arbitrary, fact-based line drawing occurring in Washington and other jurisdictions.

Gibson acknowledges this court cannot ignore or overrule a federal constitutional question upon which the United States Supreme Court has directly ruled. State v. Hairston, 133 Wn.2d 534, 539-40, 946 P.2d 397 (1997). Gibson, however, asks this court to do neither. As in Gant, Gibson challenges the officers' authority to search his car at all rather than the scope of the search. Belton therefore does not apply. Gant, 216 Ariz. at 3-4. Nor does Stroud, which rests solely on state constitutional grounds. Stroud, 106 Wn.2d at 148. In contrast, Gibson bases his claim on the Fourth Amendment.

This Court should reach the issue and adopt Gant's rationale, which would put an end to the jurisdictional gymnastics required in the wake of Belton and Stroud. Application of Gant renders unconstitutional the search of Gibson's car because Tjossem conducted the search after Gibson had been secured in a police car. This Court should reverse the trial court's denial of Gibson's motion to suppress and remand for dismissal of the conviction with prejudice. If this Court instead feels constrained by the pending nature of Gant in the Supreme Court, Gibson requests this Court stay his appeal until the Supreme Court resolves the question presented.

3. THE FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A BENCH TRIAL REQUIRES REMAND.

CrR 6.1(d) requires written findings of fact and conclusions of law be entered after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 624, 964 P.2d 1187 (1998). The purpose of this rule is to enable effective appellate review. Id. at 622. Absent written findings of fact and conclusions of law, an appellant cannot properly assign error and this Court cannot review whether the findings of fact and conclusions of law are supported by the record. See, e.g., Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993) (appellate court only reviews whether findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

The court's oral findings are not binding and cannot replace written findings of fact and conclusions of law. Head, 136 Wn.2d at 622. The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to interpret oral rulings. Id. at 624.

The proper remedy for the failure to enter written findings of fact and conclusions of law under CrR 6.1(d) is remand to the trial court for entry of findings. Head, 136 Wn.2d at 622. Assuming written findings are ultimately entered, reversal will be required if the delay prejudices Gibson. Id. at 624-25. Gibson is entitled to the opportunity to offer further argument depending on the content of any written findings and conclusions.

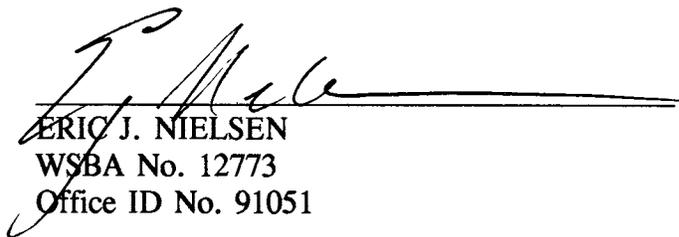
D. CONCLUSION

For the foregoing reasons, Gibson respectfully requests this Court reverse his conviction. Alternatively, Gibson requests the case be remanded and the trial court ordered enter findings and conclusions.

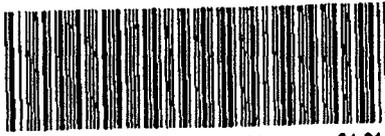
DATED this 28 day of October, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorneys for Appellant



07-1-01042-6 28488412 FNFL 04-01-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-01042-6

vs.

DAVID GIBSON,

FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6

Defendant.

THIS MATTER having come on before the Honorable Brian Tollefson on the 22nd day of January, 2008, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

FINDINGS OF FACT

1. On February 22, 2007, Deputies from the Pierce County Sheriff's Department went to 12124 State Route 165 East to attempt to serve an arrest warrant on an individual. The residence is located in Pierce County, Washington near the Pierce - King County line. The deputies confirmed the existence of the warrant prior to going to the property. The deputies were unsuccessful in locating the individual named in the warrant.

2. As the deputies were leaving, Deputy England was the first car down the driveway. As Deputy England was pulling up to the roadway to leave the property, he observed a vehicle traveling on State Route 165. The vehicle was a couple hundred feet down State Route

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1 165 when Deputy England first saw it. State Route 165 is a straight and flat road and Deputy
2 England was able to see a quarter to a half mile down the road.

3 3. Deputy England observed the vehicle turn from State Route 165 into the driveway
4 without signaling the turn. England contacted the driver of the vehicle who handed England his
5 driver's license. The driver was identified as the defendant, David Gibson. England went back
6 to his patrol car and ran a driver's status and warrants check. England discovered that Gibson
7 had an active non-extraditable warrant out of Auburn Municipal Court. Deputy England could
8 not recall whether he was told that the warrant was extraditable or not. Pierce County Sheriff's
9 Department policy does not prohibit deputies from arresting individuals on warrants, contacting
10 Auburn Police Department and transferring custody of the individual once the warrant is
11 confirmed. Deputies also have the option of transporting individuals directly to the Auburn jail
12 depending on call volume.

13 4. Deputy Tjossem was also one of the deputies who had gone to the property to
14 attempt to serve the arrest warrant. Deputy Tjossem was also leaving the property and saw that
15 Deputy England was conducting a traffic stop. Deputy England informed Tjossem of the
16 warrant for Gibson's arrest. The warrant was confirmed and Tjossem took Gibson into custody.
17 Deputy England informed Deputy Tjossem of the warrant prior to Tjossem making contact with
18 Gibson.
19

20 5. One of the deputies asked LESA records to contact Auburn Police Department to
21 set up a meeting location in order to transfer custody of Gibson to the Auburn authorities.

22 6. Deputy England is a patrol officer who has routinely patrolled the area where
23 Gibson was contacted for 4 ½ years. England's duties include regular enforcement of traffic
24 regulations. England writes 1-2 infractions per week for failing to use a turn signal.
25

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1 7. Deputy England routinely finds individuals with warrants for their arrest –
2 approximately one per week. During his 4 ½ years patrolling the area, Deputy England has
3 found 20-25 individuals with warrants out of the Auburn or Kent area and has made
4 arrangements to transport them to a location where they can be turned over to the appropriate law
5 enforcement agencies. On 5-10 occasions, Deputy England has transported the individuals
6 directly to the Auburn Jail.

7 8. Deputy Tjossem was also a patrol deputy, who has patrolled the area which
8 includes State Route 165 since November, 2004. During that time, Tjossem has transported
9 approximately 20 individuals with warrants out of Auburn to a location where he meets with
10 Auburn Police Department and transfers custody of the individual.

11 9. From the residence on State Route 165 where defendant was arrested to the
12 Auburn Jail is a 10 to a 25 minute drive. It is a 40 to 50 minute drive from the residence to the
13 Pierce County Jail in downtown Tacoma.

14 10. After confirming the warrant and placing Gibson under arrest, Deputy Tjossem
15 searched Gibson's vehicle. Deputy Tjossem is a member of the Pierce County Clandestine Lab
16 Team and has received training in the investigation and dismantling of suspected
17 methamphetamine labs. Deputy Tjossem has responded to approximately 70 suspected
18 methamphetamine labs during his law enforcement career.

19 20 11. During the search of Gibson's vehicle, Deputy Tjossem found a 20 pound bag of
21 ammonium sulfate, which can be used to produce anhydrous ammonia, a key ingredient in the
22 manufacture of methamphetamine. Tjossem also found dry ice which is used to condense
23 ammonia gas into the liquid form.
24
25

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1 12. During his search, Deputy Tjossem also found lye, Toluene, lithium batteries, a
2 baggie with white powder, a funnel and a coffee grinder with a white residue. Deputy Tjossem
3 recognized these items as commonly used during the manufacture of methamphetamine.

4 13. Deputy England issued Gibson a citation for Failing to Signal Turn (RCW
5 46.61.305), No splash Apron/Fenders (RCW 46.37.500) and Unsafe Tire Tread (RCW
6 46.37.425). Gibson did not sign the Notice of Infraction as he was in custody by that time.
7 Deputy England placed the notice of infraction in Gibson's coat pocket.

8 FINDINGS AS TO DISPUTED FACTS

9 1. During the course of his testimony, the defendant kept changing his story. The
10 Court finds that the defendant's testimony with respect to the events which occurred on February
11 22, 2007 is not credible. The Court adopts the factual pattern as set forth b y the State.

12 2. The deputies were not at the property on February 22, 2007 looking for Gibson.

13 3. Gibson did not use his turn signal when he made the turn from State Route 165
14 into the driveway of the property at 12124 State Route 165 East.

15 4. Defendant was identified and found to have an outstanding warrant for his arrest.

16 5. Given the location of the stop and the proximity to Auburn, the deputies could
17 make arrangements to meet Auburn Police Department and transfer custody of Gibson and it is a
18 routine practice for Deputies England and Tjossem to do so.

19 6. None of the deputies testified and there is no evidence that the deputies were
20 using the traffic stop to identify Gibson. Nor is it a fair inference from the officer's testimony
21 that they were using the stop to identify Gibson.

22 CONCLUSIONS OF LAW

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Approved as to Form:

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AARON TALNEY
Attorney for Defendant
WSB # 22154

djl

07-1-01042-6

1. The initial stop of defendant's vehicle was based on a reasonable suspicion that defendant had committed a traffic infraction by failing to use his turn signal.

2. As part of the investigation of the traffic infraction, Deputy England was justified in detaining defendant for a reasonable period of time in order to identify him, check for outstanding warrant and check the status of defendant's license and vehicle registration.

3. Once the deputies became aware of the existence of the warrant, they were not required to ignore the warrant. The Court has been presented with no authority to suggest that once the warrant was discovered, the police could not arrest on the warrant. Defendant's arrest was therefore lawful.

4. Once the defendant was arrested on the warrant, police had the authority to conduct a search of defendant's vehicle incident to his arrest. The search of defendant's vehicle was a lawful search incident to arrest.

5. The stop of defendant's vehicle was not a pretext stop as police did not stop the vehicle in order to conduct a criminal investigation unrelated to the traffic offense.

6. Defendant's Motion to Suppress is DENIED.

DONE IN OPEN COURT this 28 day of March 2008.

[Handwritten Signature]

JUDGE

Presented by:

[Handwritten Signature: Dione J. Ludlow]

DIONE JOY LUDLOW
Deputy Prosecuting Attorney
WSB # 25104

FILED
DEPT. 8
IN OPEN COURT
MAR 28 2008
Pierce County Clerk
By *[Handwritten Initials]*
DEPUTY

[Handwritten Signature]
Talney 22154

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 37663-6-II
)	
DAVID GIBSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF OCTOBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

- DAVID GIBSON
DOC NO. 310195
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

FILED
COURT OF APPEALS
DIVISION II
08 OCT 24 PM 1:29
STATE OF WASHINGTON
BY Car
DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF OCTOBER 2008.

x Patrick Mayovsky