

NO. 39040-0-II

COPIES
TO COURT
BY
Kor

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON, DEPARTMENT OF LICENSING

Respondent,

v.

DAVID M. RANDOLPH,

Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Mason County Superior Court
State of Washington
Cause No.: 08-1-00224-1

Robert A. Wolle, WSBA #11342
HOULE & GOODELL ATTORNEYS PLLC
Attorneys for Appellant
P.O. Box 1845
10 NE Creelman Lane
Belfair, WA 98528
Telephone: (360) 275-9505

ORIGINAL

PII 1-26-10

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

A. DID THE TRIAL COURT ERR AT CONCLUSION OF LAW NO. 1 AT THE CRR 3.6 HEARING BY HOLDING TROOPER MERRITT HAD REASONABLE ARTICULABLE SUSPICION SUFFICIENT TO STOP RANDOLPH’S VEHICLE?..... 1

B. DID THE TRIAL COURT ERR AT CONCLUSION OF LAW NO. 1 AT THE CRR 3.6 HEARING BY HOLDING THAT NO OTHER EVIDENCE IS REQUIRED TO STOP A VEHICLE OTHER THAN AN INADMISSIBLE SPEED MEASURING DEVICE RESULT?..... 1

C. DID THE TRIAL COURT ERR AT CONCLUSION OF LAW NO. 2 AT THE CRR 3.6 HEARING BY FAILURE TO SUPPRESS ALL EVIDENCE OBTAINED AFTER THE STOP OF RANDOLPH’S VEHICLE? 1

D. DID THE TRIAL COURT ERR AT CONCLUSION OF LAW NO. 3 AT THE CRR 3.6 HEARING BY FINDING THAT TROOPER MERRITT HAD PROBABLE CAUSE FOR AN ARREST FOR DRIVING WHILE UNDER THE INFLUENCE? 1

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS..... 1

A. SHOULD ALL EVIDENCE OBTAINED DURING THE ILLEGAL SEIZURE OF RANDOLPH BY TROOPER MERRITT HAVE BEEN SUPPRESSED BECAUSE TROOPER MERRITT LACKED ADMISSIBLE, ARTICULABLE FACTS TO STOP RANDOLPH FOR SPEEDING; AND FOR DUI FOR CROSSING THE CENTERLINE ONLY ONE TIME? 1

B. THIS COURT SHOULD REVERSE THE CRR 3.6 ORDER BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE ON THE RECORD FOR TROOPER MERRITT TO HAVE A FORMED REASONABLE BELIEF OF SPEEDING OR DUI? 1

C. DID THE TRIAL COURT ERR IN FINDING THAT ONLY A UNAUTHENTICATED SMD WAS A SUFFICIENT FACT OR CIRCUMSTANCE WITHIN THE ARRESTING OFFICER’S KNOWLEDGE AND WAS REASONABLY TRUSTWORTHY INFORMATION BY ITSELF TO WARRANT A PERSON OF REASONABLE CAUTION IN A BELIEF THAT RANDOLPH WAS SPEEDING? 1

D. SHOULD THE RESULTS OF SMD HAVE BEEN ADMITTED IF THE RESULTS WERE NOT AUTHENTICATED AND WERE NOT SUPPORTED BY ANY OTHER EVIDENCE? 2

E. WITHOUT VISUAL FACTS TO SUPPORT THE SMD, WAS THE STOP NOTHING MORE THAN AN UNCONSTITUTIONAL RANDOM STOP..... 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT..... 2

A. THE UNAUTHENTICATED SPEED MEASURING DEVICE WAS INSUFFICIENT EVIDENCE FROM WHICH TO FIND SUFFICIENT PROBABLE CAUSE TO WARRANT STOPPING MR. RANDOLPH’S VEHICLE. 2

B. AS A MATTER OF LAW AN UNAUTHENTICATED SPEED MEASURING DEVICE SHOULD REQUIRE CORROBORATING SUPPORT FOR THE PURPOSE OF A TERRY STOP. RP 128:23-28; RP 129:1-4. 2

C. CROSSING THE TURNING LINE WAS ALSO INSUFFICIENT TO WARRANT A STOP..... 7

V. CONCLUSION..... 9

TABLE OF AUTHORITIES

CASES

<u>City of Seattle v. Peterson</u> , 39 Wn.App. 524, 693 P.2d 757 (1985).....	5
<u>Clement v. Dept. of Licensing</u> , 109 Wn.App. 371, 375, 35 P.3d 1171 (2001).....	3, 4, 6
<u>State v. Allen</u> , 138 Wn.App. 463, 470, 157 P.3d 893 (2007).....	3
<u>State v. Avery</u> , 103 Wn.App. 527, 539, 13 P.3d 226 (2000).....	3
<u>State v. Cain</u> , 108 Wn.App. 541, 549, 31 P.3d 733 (2001).....	4
<u>State v. Jury</u> , 114 Wn.App. 726, 736, 60 P.3d 615 (2002).....	3
<u>State v. Ladson</u> , 183 Wn.2d 343, 979 P.2d 833 (1999).....	4
<u>State v. Prado</u> , 145 Wn.App. 646, 649, 185 P.3d 1186 (2008)	9

RULES

CrR 3.6.....	1
RCW 46.61.470.....	4

I. ASSIGNMENTS OF ERROR.

A. Did the Trial Court err at Conclusion of Law No. 1 at the CrR 3.6 hearing by holding Trooper Merritt had reasonable articulable suspicion sufficient to stop Randolph's vehicle?

B. Did the Trial Court err at Conclusion of Law No. 1 at the CrR 3.6 hearing by holding that no other evidence is required to stop a vehicle other than an inadmissible Speed Measuring Device result?

C. Did the Trial Court err at Conclusion of Law No. 2 at the CrR 3.6 hearing by failure to suppress all evidence obtained after the stop of Randolph's vehicle?

D. Did the Trial Court err at Conclusion of Law No. 3 at the CrR 3.6 hearing by finding that Trooper Merritt had probable cause for an arrest for Driving While Under the Influence?

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS.

A. Should all evidence obtained during the illegal seizure of Randolph by Trooper Merritt have been suppressed because Trooper Merritt lacked admissible, articulable facts to stop Randolph for speeding; and for DUI for crossing the centerline only one time?

B. This Court should reverse the CrR 3.6 order because there was no substantial evidence on the record for Trooper Merritt to have a formed reasonable belief of speeding or DUI?

C. Did the Trial Court err in finding that only a unauthenticated SMD was a sufficient fact or circumstance within the arresting officer's knowledge and was reasonably trustworthy information by itself to warrant a person of reasonable caution in a belief that Randolph was speeding?

D. Should the results of SMD have been admitted if the results were not authenticated and were not supported by any other evidence?

E. Without visual facts to support the SMD, was the stop nothing more than an unconstitutional random stop.

III. STATEMENT OF THE CASE

Randolph objects to several references in Respondent's brief that Randolph crossed "into the path of oncoming traffic". RB 1; 2; 5; 6; 7; 8; 9; Responsive Brief shall be referred to as "RB".

Other than Randolph's and the Trooper's vehicles, there were no other vehicles present during the left hand turn.

IV. ARGUMENT

A. The unauthenticated speed measuring device was insufficient evidence from which to find sufficient probable cause to warrant stopping Mr. Randolph's vehicle.

B. As a matter of law an unauthenticated speed measuring device should require corroborating support for the purpose of a Terry stop. RP 128:23-28; RP 129:1-4.

Fundamentally, our system of government is grounded in checks and balances. In this case, the balance is between the Trooper's desire to look for people committing crimes and a citizen's basic right to privacy and protection from unlawful stops and seizures in violation of Fourth

Amendment to the United States Constitution and Article 1, section 7 of the Washington State Constitution.

That check and balance is expressed in the requirement of probable cause that the Trooper “must be able to point to specific and articulable facts giving rise to a reasonable suspicion that the person” committed a crime or infraction.” State v. Allen, 138 Wn.App. 463, 470, 157 P.3d 893 (2007) (Stop was for a non-working tail light); State v. Jury, 114 Wn.App. 726, 736, 60 P.3d 615 (2002) (Unscientifically validated speed measuring device result was admitted when supported by Officer’s clear observation of speeding).

Protection for the citizen is provided by the requirement of probable cause for stops because the evidence required to warrant a stop must be “within the arresting officer’s knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed.” Clement v. Dept. of Licensing, 109 Wn.App. 371, 375, 35 P.3d 1171 (2001) (Unauthenticated SMD admissible to support probable cause because the result was supported by observations of fellow officers and observation that the driver had suddenly hit the brakes); State v. Avery, 103 Wn.App. 527, 539, 13 P.3d 226 (2000) (Probable cause encompasses reasonable grounds).

Therefore, for speeding, the line for probable cause is drawn somewhere between “no evidence” and the preponderance of the evidence standard which is required for speeding tickets and speed traps.

Random stops are not allowed. Speeding tickets require certification of the speed measuring devices. Speed traps require additional evidence. RCW 46.61.470.

This is the first time the Court has been asked to approve a traffic stop based solely on an unauthenticated speed measuring device. In previous decisions there has always been some tangible, empirical evidence to support the stop or seizure. State v. Ladson, 183 Wn.2d 343, 979 P.2d 833 (1999) (Tabs were expired); State v. Cain, 108 Wn.App. 541, 549, 31 P.3d 733 (2001) (A stop must be based upon more than the officer’s “inarticulable hunch”); Clement, supra at 376 (“where, as here, the Department can meet its burden without introducing foundational evidence, then the Department is not required to produce such evidence”).

In the case before this court, the only evidence of speeding was from an unauthenticated speed measuring device. The Trooper’s testimony showed that he was checking all of the cars for speeding. PR 3: 20; RP 14: 17-18; RP 35:24-5; RP 66:15-16. When the Trooper turned on the SMD, the only evidence that a car might be speeding was

that it was moving. He only looked at the radar to see IF the vehicle was going over the speed limit.

The police report stated:

I activated the radar in the moving mode while the defendant's vehicle was the only vehicle in the radar beam. RP 35: 4-6, State's Exhibit 14.

The Trooper clarified that the sequence of events was that first he saw the vehicle; he then flipped on or activated the radar in the moving mode; heard a tone; and then looked at the results as the vehicle went by. RP 36: 4-19.

There is not any testimony to the effect that the speed shown on the radar matched the Trooper's visual estimate of the speed. In fact, there is not any testimony that the Trooper thought the vehicle was speeding based on a visual estimate. He only looked at the SMD to see if the vehicle was speeding.

On cross-examination, the Trooper confirmed that in his report he never made a visual observation of the vehicle speeding. RP 39:9-11.

No matter how well the device was operated, a speed measuring device is not reliable if it is not certified. City of Seattle v. Peterson, 39 Wn.App. 524, 693 P.2d 757 (1985) (Wrong to take judicial notice of reliability of SMD). The visual observation under the circumstances was

not even enough for the Trooper to testify that he could see the vehicle was speeding.

There were also other reasons to doubt the conclusion of the SMD result, as the results were taken on a curve RP 74:6-21; RP 99: 19-22; the immediate and sudden stop by the Trooper RP 77:25, RP 78:1-2; the short time before the vehicle passed; that the officer could not be watching as the vehicle passed and he was turning on the SMD and looking at the SMD results; and the Trooper had to turn around. The inference of these facts was that the speeds of each of these vehicles were changing and unreliable. There was not any pacing or other typical supporting observations as in Clement when the car suddenly dropped, nor pulling away from other vehicles or pacing,

Therefore, without some objective, specific evidence to corroborate the SMD results, these results should not be relied upon to determine probable cause to stop a vehicle. The SMD result was not reasonably trustworthy enough to “warrant a person of reasonable caution in a belief that an offense has been committed.” There was not any admissible evidence within the Trooper’s knowledge.

The backbone of reasonable suspicion is probable cause, which has always been based only upon empirical evidence. The court should

require that there be some corroborating empirical evidence to support an unauthenticated SMD result.

C. Crossing the turning line was also insufficient to warrant a stop.

The State exaggerates if not misstates that Randolph, “crossed into the path of oncoming traffic.” There was not any other traffic for Mr. Randolph to cross in front of and the State abandoned this issue at the 3.6 hearing as a basis for the stop.

Where Mr. Randolph made the left turn from Highway 106 to Trail End Road, Highway 106 was divided into a southbound lane, a left hand turn lane, and a north bound lane. RP: 78:16-7; Defendant’s EX 5, and 6 - CP 29.1. The left hand side of the left turn lane extended way past where necessary to make a safe left hand turn. One had to actually turn more than ninety degrees if the vehicle goes all the way the end of the yellow line marking the left turn lane. Mr. Randolph simply cut the corner slightly short at an angle. No dangerous situation was created by taking the turn somewhat short as the line marking the left hand turn lane extended further than needed for the turn. RP 79: 11-21, Defendant’s Ex 5 and Ex 6.

Also, Randolph made the turn, “slowly”. RP 39: 18-25; RP 40: 1-3. Before turning, Randolph signaled and turned into the left turn lane.

RP 39: 15-16. There were no other cars at the time of the turn. RP 40: 12-14.

As one does when making any left hand turn, Randolph went across the lane of the road, “into the oncoming lane of traffic” and briefly went over the centerline of the “lane of traffic” coming down the hill and which intersected with Hwy 106. RP 78: 14-5.

The only reason for the stop was speeding.

Officer: It’s -- the purpose is to complete the investigation for the initial violation at that time, which was speeding. RP 17-18.

The State abandoned and did not rely upon the turn as a reason for the stop. In fact, the State objected to the admissibility of Defendant’s Exhibit 6 because crossing the lane was not relevant to probable cause for the stop.

Prosecutor: The trooper was very clear that he didn’t stop this defendant for the turn violation and that he had already determined that he was going to stop this vehicle for the speeding violation. And so, I fail to see any relevance whatsoever to this line of questioning or the exhibit. RP 81: 17-21; RP 82: 10

Court’s decision was not based upon crossing the turn lane line, just speeding. PR 128; CP 42; CP 48.1.

All of the evidence obtained after an unlawful stop was suppressed in State v. Prado, 145 Wn.App. 646, 649, 185 P.3d 1186 (2008) (Brief incursions over lane lines were held to be an insufficient basis for stopping a vehicle). The turn was not a basis for the stop.

V. CONCLUSION

The unauthenticated SMD was not sufficiently trustworthy enough by itself to warrant a person of reasonable caution in a belief that an offense has been committed. The result only adds up to an unsupported hunch. The line should be balanced in favor of requiring some empirical, corroborating evidence for an unauthenticated SMD result. Under these circumstances, the stop should never have happened. The Court erred as a matter of law by holding that nothing more than the unauthenticated SMD result established sufficient probable cause for the traffic stop. The Court erred in not suppressing the SMD result and all evidence obtained afterwards.

The issue of crossing the line was abandoned at the hearing, if it was ever an issue. It should not be allowed to be argued for the first time on appeal. The Trooper, prosecutor and Judge did not find that crossing the line was a basis for the stop. Even if so, the brief crossing was also not a sufficient basis for the stop.

The rulings of the court should be reversed and the matter remanded with instructions to suppress the unauthenticated and unsupported Speed Measuring Device result.

RESPECTFULLY SUBMITTED this 26th day of January, 2010.

HOULE & GOODELL ATTORNEYS PLLC



ROBERT A. WOLLE, WSBA #11342
Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned, declares under penalty of perjury that on this day she deposited into the mail, or otherwise caused to be delivered, one copy of the foregoing document to the following:

Mr. Monty Dale Cobb
Mason County Prosecutor's Office
521 North 4th Avenue, Suite A
P.O. Box 639
Shelton, WA 98584-0639

DATED this 26th day of January, 2010, at Belfair, Washington.



Cyndi Michelena
Legal Assistant to Robert A. Wolle