

COURT OF APPEALS  
DIVISION II

No. 40611-0-II

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STATE OF WASHINGTON  
DEPUTY

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

NORBERTO SERRANO

Appellant.

---

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. BECAUSE THE STOP OF THE CAR WAS PLAINLY PRETEXTUAL, THE SUBSEQUENT SEARCH WAS INVALID

[A] warrantless traffic stop based on mere pretext violates article I, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest.

State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.

State v. Ladson, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999).

The State contends the stop was not pretextual because "Sergeant Endicott explained that when he saw Youngker driving the car he immediately recognized him as a person driving on a suspended license." Brief of Respondent at 15-16. The officer's knowledge of Mr. Youngker's driving status is not in dispute. Instead, what plainly establishes the pretextual nature of the officer's actions is that despite this knowledge immediate recognition, Sergeant Endicott did not stop Mr. Youngker when he saw him driving toward the suspected drug house that the officer

had been surveilling. The officer did not approach Mr. Youngker while he waited outside the suspected drug house. Instead, the officer waited until Mr. Serrano exited the alleged drug house carrying a backpack and got into the car. And only after Mr. Youngker drove away from the suspected drug house, along with Mr. Serrano and the backpack did Sergeant Endicott elect to stop Mr. Youngker's car. And as further indication of the officers true intent, he called for the drug task force to respond to this mere traffic stop.

Mr. Serrano's seizure violated Article I, section 7.

2. THE COURT ERRONEOUSLY REQUIRED  
THE JURY TO REACH A UNANIMOUS  
VERDICT ON THE SENTENCE  
ENHANCEMENT

When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 145, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In both Bashaw and Goldberg, jurors were told their answer in a special verdict form, addressing an additional aggravating factor, must be unanimous for either a "yes" or "no" answer. Bashaw, 169 Wn.2d

at 139; Goldberg, 149 Wn.2d at 894. In both cases the Court held such an instruction is incorrect, and unanimity is required only when the jury answers “yes.”

The rule from Goldberg then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.

Bashaw, 169 Wn.2d at 146. Rather, any jury’s less than unanimous verdict “is a final determination that the State has not proved that finding beyond a reasonable doubt.” Id. The defendant in Bashaw did not object to the instruction.

Although it concedes the language of Instruction 18 creates the same error as in Bashaw, the State nonetheless claims Mr. Serrano is not entitled to relief because he did not object. Brief of Respondent at 20-21. But neither did the defendant in Bashaw. 144 Wn.App. 196, 199, 182 P.3d 451 (2009), reversed on review, 169 Wn.2d at 146.<sup>1</sup> The State does not explain what permits this Court to disregard the reasoning and holding of the Supreme Court when addressing the same issue.

The State relies heavily on the recent decision of Division Three in State v. Nunez, \_\_ P.3d \_\_, 2011 WL 536431 (2011). The

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<sup>1</sup> The Court of Appeals decision in Bashaw provides further details regarding the instructional issue and nature of objections lodged.

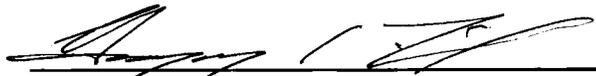
court in Nunez, concluded that despite the absence of any objection in Bashaw it was not required to follow Bashaw's reasoning. Nunez at 7. However, as this Court has recognized "Once the Washington Supreme Court has decided an issue of state law, its conclusion is binding on lower courts. State v. Zimmerman, 130 Wn.App. 170, 182, 121 P.3d 1216 (2005) (citing State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)). Thus, Nunez could not disregard the reasoning of Bashaw nor can this Court.

As in Bashaw, the jury here was incorrectly informed that their special verdict finding must be unanimous. CP 71. The special finding must be vacated. Bashaw, 169 Wn.2d at 147-48.

B. CONCLUSION

Because the search was a fruit of the pretextual stop, this Court must reverse Mr. Serrano's conviction and the trial court's suppression ruling. Additionally, this court must dismiss the school-zone enhancement.

Respectfully submitted this 9<sup>th</sup> day of March, 2011.

  
GREGORY C. LINK – 25228  
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Attorney for Appellant

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DIVISION TWO**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 40611-0-II
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	)	
NORBERTO SERRANO,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KITSAP COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
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PORT ORCHARD, WA 98366-4681		
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PO BOX 769		
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**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF MARCH, 2011.

X \_\_\_\_\_ 

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