

No. 40611-0-II

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

PM 11/2/10

STATE OF WASHINGTON,

Respondent,

v.

NORBERTO SERRANO

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's admission of the fruits of a pretextual seizure violated Article I, section 7 of the Washington Constitution.

2. The trial court erred in requiring jurors to rest their special verdict finding on unanimous agreement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Pretextual stops violate the Washington Constitution because Article I, §section 7 "requires we look beyond the formal justification for the stop to the actual one." Whether a stop is pretextual requires courts to consider (1) the subjective intent of the officer and (2) the objective reasonableness of the officer's behavior. Where the record establishes the officer was attempting to find evidence of drug trafficking involving Norberto Serrano, used a traffic offense as a pretext to stop the car in which Mr. Serrano was a passenger, and following the stop focused upon searching for evidence of drug crimes rather than the alleged traffic violation, was the seizure of Mr. Serrano pretextual?

2. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. The trial court, however, instructed the jury that it could not find the State had failed to meet its burden of proof unless

it reached this decision unanimously. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect instruction require dismissal of the enhancement drawn from the jury's special verdict?

C. STATEMENT OF THE CASE

A resident of a Bremerton house, at which Mr. Serrano also lived, was arrested for trafficking stolen property. 2/8/10 RP 7-8. Bremerton Police Sergeant Williams Endicott noted the home was also a suspected drug house, and explained that when drug dealers are arrested and jailed, people take advantage of the dealer's absence to "pick their bones:" i.e., steal money, drugs, and other belongings from the home. Id. Because of this, Sergeant Endicott and other police officers had been conducting regular surveillance of the home as often as time permitted "to see if we could substantiate actual narcotic trafficking out of there." 2/8/10 RP 7.

As part of that surveillance, on November 12, 2009, Sergeant Endicott was parked in a parking lot across the street from Mr. Serrano's home. 2/8/10 RP 7. While the officer was watching the house, a car driven by Shawn Youngker drove up and parked on the street in front of the house. Id. Based on an incident

two days earlier at the same house, the officer immediately recognized Mr. Youngker and knew his license to drive was suspended. 2/8/10 RP 9. Rather than conduct a traffic stop for the misdemeanor he had just witnessed, the officer continued watching as Mr. Serrano exited the house carrying a backpack and got into the car. Sergeant Endicott stated he would suspect Mr. Serrano of carrying drugs "any time I saw him." 2/8/10 RP 18.

Only after Mr. Youngker drove away from the house, with Mr. Serrano and the backpack in the car, did the officer initiate a traffic stop. 2/8/10 RP 10. The officer told Mr. Youngker he was under arrest, removed him from the car and asked if Mr. Youngker would consent to a search of the car. Id. Mr. Youngker consented to the search. Id.

The officer searched the backpack, finding methamphetamine and evidence of an intent to deliver the drug. 2/8/10 RP 16.

The State charged Mr. Serrano with possession of methamphetamine with intent to deliver. CP 38-42.

The trial court denied Mr. Serrano's motion to suppress the fruits of the officer's pretextual seizure. CP 121-26.

A jury convicted Mr. Serrano of the charged offense and returned a special verdict finding the offense occurred with 100 feet of school property. CP 72-73.

D. ARGUMENT

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

Article I, section 7 does not permit officers to seize an individual for purposes of a speculative criminal investigation. State v. Gatewood, 163 Wn.2d 534, 542, 182 P.3d 486 (2008). In addition, the Washington Constitution does not permit an officer to justify a stop based upon a pretextual, albeit lawful, basis where the officer's subjective basis for the seizure is insufficient. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999).

It is clear from the record that Mr. Serrano was seized. It is equally clear the police officer's stated basis for doing so was pretextual and thus violated the Washington Constitution.

a. Article I, section 7 prohibits pretextual traffic stops.

Article I, section 7 prohibits the government's intrusion into a person's private affairs absent authority of law. A traffic stop, no matter how brief, is an intrusion of one's private affairs. Ladson, 138 Wn.2d at 350. The need for a warrant is especially important

for Article I, section 7 analysis because “it is the warrant which provides the ‘authority of law’ referenced therein.” Id. at 350.

Under the Fourth Amendment, the police may stop a car for a traffic violation even if the traffic stop is a pretext to investigate unrelated criminal activity. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Washington residents, however, have a constitutionally protected interest against warrantless seizures used as a pretext to dispense with the warrant requirement. Ladson, 138 Wn.2d at 358.

“Pretext is, by definition, a false reason used to disguise a real motive.” Ladson, 138 Wn.2d at 359 n. 11 (quoting Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment’s Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1038 (1996)).

Thus, 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).

Recognizing the particular exigencies of evaluating improper motives, Ladson departed from the purely objective standard mandated for Terry stops under the Fourth Amendment¹ and articulated a new test:

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.

Ladson, 138 Wn.2d at 358-59. The court explained, "What is needed is a test that tests real motives. Motives are, by definition, subjective." Id. at 359 n. 11 (quoting Leary & Williams).

b. The stop in this case was plainly pretextual.

Despite Sergeant Endicott's stated intent of "see[ing] if we could substantiate actual narcotic trafficking out of there," 2/8/10 RP 7, the trial court opined his subjective intent was to address the driving offense. CP 124; 2/23/10 a.m. RP 56. The court concluded it would have been objectively unreasonable for the officer to fail to investigate the crime of driving with a suspended license. CP 124; 2/23/10 a.m. RP 58.

¹ The Terry objective standard requires the court to consider whether the officer's action (1) was justified at its inception and (2) was reasonably related in scope to the circumstances which justified the interference in the first place. Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

If the officer's subjective intent was to investigate the offense of driving with a suspended license he could have approached Mr. Youngker immediately after seeing Mr. Youngker drive the car to house, and while Mr. Youngker was parked at the curb. Instead, Sergeant Endicott waited for Mr. Serrano to enter the car and allowed Mr. Youngker to once again drive away knowing that he was committing a crime. From the standpoint officer safety, conducting a stop with a lone driver is a more reasonable alternative than waiting until a passenger is present as well. The officer's actions were neither a subjectively nor objectively reasonable response for an officer who claims to have been concerned only with arresting Mr. Youngker for the crime of driving with a suspended license.

Additionally, the officer's actions following the arrest provide further insight into his true intentions. Immediately upon removing Mr. Youngker from the car, the officer requested he consent to a search of the car. 2/8/10 RP 10. The officer certainly had no belief that evidence of the driving offense would be found in the car and stated as much. 2/8/10 RP 21. The officer explained he asked for consent to search the car because of "the known drug activity out of the house, the trafficking with stolen property out of the house . . . I

suspected there would probably be evidence of criminal activity in the car.” 2/8/10 RP 20. Finally, even before he searched the backpack, that is before he discovered any evidence of drug activity, the sergeant requested by radio that members of the police Special Operations Group respond to the scene. 2/8/10 RP 16. It seems unusual that a police department’s drug investigation unit would be summoned to investigate a mere driving offense.

Further, Mr. Youngker was never cited for, jailed for, nor charged with the driving offense on which the officer claimed to be focused. 2/8/10 RP 21; 2/23/10 p.m. RP 11. The officer’s actions before and after stopping the car plainly indicate his sole intent was to search the backpack Mr. Serrano had carried from the house. Mr. Youngker’s suspended license was merely a pretext to the officer’s real goal.

Sergeant Endicott’s actions were motivated by and consistent with his stated objective of “substantiat[ing] actual narcotic trafficking.” He was observing the house for that reason. He had a prior opportunity to stop Mr. Youngker for the alleged traffic offense but chose to wait until Mr. Serrano got into the car carrying the backpack. Immediately, upon removing Mr. Youngker from the car he requested his consent to a search. The officer

explained his desire to search the car was driven by his hope of finding evidence of drugs or stolen property connected with the house. Everything the officer did was driven by that goal.

That Sergeant Endicott articulated a lawful basis for the stop does not cure the unconstitutionality of the stop. The stop at issue in Ladson was not invalid because the officer could not articulate a lawful basis for it; in fact he did. Instead, the stop was invalid because when viewed in light of the facts surrounding it, that stated lawful reason was not the real reason but a pretext for a warrantless search in the absence of probable cause. Moreover, that the basis for the stop is itself lawfully sufficient is beside the point, as “our constitution requires we look beyond the formal justification for the stop to the actual one.” Ladson, 138 Wn.2d at 353.

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

c. The trial court erroneously admitted the fruits of the unlawful seizure. Article I, section 7 also requires exclusion of evidence obtained in violation of its terms. State v. White, 97 Wn.2d 92, 111, 640 P.2d 1061 (1982). The trial court erred in refusing to suppress the fruits of the unlawful seizure of Mr. Serrano.

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

a. The court must properly instruct the jury on the unanimity required for an aggravating circumstance. 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 Goldberg² 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

² In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either “yes” or “no.” 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

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.

Similarly to Bashaw, the trial court instructed the jury in this case that their special finding must be unanimous to decide the school enhancement either "yes" or "no." The court's instruction stated in pertinent part:

You will also be given a special verdict form for the crime charged in count 1 . . . Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

Because this is a criminal case, all twelve of you must agree to return a verdict. When you all have so agreed, fill in the verdict form to express your decision.

CP 71 (Instruction 18).

That instruction presents an identical error to that in Bashaw. The court erroneously told the jury that they could not vote "no" unless they were unanimous in finding the State had not proven this special verdict.

b. The clearly incorrect jury instruction requires reversal of the special verdict. The court in Bashaw characterized the problem as an error in “the procedure by which unanimity would be inappropriately achieved.” 169 Wn.2d at 147. This instructional error creates a “flawed deliberative process” and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id.

Bashaw looked to the similarly flawed deliberative process in Goldberg, where several jurors had initially answered “no” to the special verdict, but after the trial judge told them they must be unanimous, they returned with a “yes” finding on the aggravating factor. Id.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id. at 148-49. As in Bashaw, the jury was incorrectly informed that their special verdict finding must be unanimous. CP 71. This Court cannot guess as to the outcome of the case had the jury been correctly instructed and the special finding must be vacated. Bashaw, 169 Wn.2d at 147-48.

E. 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 12th day of November, 2010.



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DIVISION TWO**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING 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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