

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

State of Washington
Respondent

v.

SARA KAY LEWIS
Appellant

42679-0-II

On Appeal from the Superior Court of Skamania County
Superior Court Cause number 10-1-00001-0

The Honorable Brian Altman

BRIEF OF APPELLANT

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II. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. The trial court erred in ruling that Appellant's detention and arrest were lawful.
2. Appellant was prejudiced by the court's failure to enter written findings following either of two suppression hearings or a stipulated facts trial.

B. **Issues Pertaining to Assignments of Error**

1. Was the claimed reasons for police contact with Appellant pretextual, based on her apparent connection with a suspected drug house?
2. Was Appellant prejudiced by the trial court's apparent practice of not entering written findings as required by court rule?

III. STATEMENT OF THE CASE

On the afternoon of New Years Eve, December 31, 2009, Appellant, Sara Kay Lewis, aka Matilda Free, visited her friend, Robert Heater, who lived about 200 yards¹ north of the intersection of Washougal River Road and Salmon Falls Road, in Washougal, Washington. RP 46. Mr. Heater's residence was of particular interest to law enforcement because of suspected drug activity. RP 46, 47, 123, 125. Sheriff's Deputy Chadd Nolan drove by and noticed Ms. Lewis's car, a Thunderbird two-door passenger car, parked there. RP 47-48, 125. Nolan was familiar with Lewis's car. RP 19-20. Nolan was a rookie, having just recently graduated from the academy. RP 15, 126.

Deputy Nolan took up a position at the intersection facing the Heater place, where he could "just kind of hang[] out" and observe traffic. RP 16, 18, 46, 109.

At around 3:30 in the afternoon, Ms. Lewis concluded her visit and headed south toward the intersection. It was an hour and a half before sunset, when headlights would be required. RP 51-52. It was raining and snowing, but visibility was fair. RP 18, 111.

Nolan turned around and began following Lewis, but did not signal for her to stop. RP 20. When Lewis pulled over to attend to a jammed

¹ Approximately one eighth of a mile, or 220 yards. RP 46.
(1 mile = 1,760 yards.)

windshield wiper. Deputy Nolan also pulled over and approached Lewis on foot. RP 20, 111. He decided to practice his “community relations” and help Lewis fix her wipers. RP 39, 114, 118. Lewis was not interested. She ignored Nolan and made clear that any sort of social contact was unwelcome. RP 112.

Nolan persisted. He asked Lewis for her name which she declined to tell him unless she was under arrest. RP 21, 113. Nolan asked what happened, and Ms. Lewis told him about the jammed wipers and continued attending to them. RP 112. Nolan found this suspicious, and thought Lewis appeared nervous and “evasive.” RP 21, 112, 143. He asked her where she was coming from and where she was going. RP 141; CP 10. Deputy Nolan and Ms. Lewis worked together in a vain attempt to free the frozen wipers. RP 116, 118.

Lewis made a call on her cell phone for someone to come fetch her. Nolan wanted to know whom she was calling. RP 112. He attempted to verify the approximate address she gave him through dispatch. RP 115. The deputy wanted to know “just exactly what was going on, maybe who she was.” RP 33. Nolan’s curiosity had nothing to do with enforcing the traffic laws. RP 144.

Nolan did not tell Ms. Lewis he was contacting her about a traffic infraction and did not ask to see her license, registration, insurance, etc.,

because he was “trying to gather information from her.” RP 33. Instead, Nolan assured Lewis that his sole purpose was to help her with the wipers. RP 115.

When Nolan continued to press for her name, Lewis reluctantly gave him her alias, Matilda Free. RP 114. As soon as she did so, Nolan disclosed that the real reason he had followed her was to investigate a traffic infraction. He demanded her driver’s license. RP 22. Lewis said she did not have her license on her. RP 22. Nolan ran the name Matilda Free and the date of birth Lewis gave him, and dispatch reported a non-valid driver’s license. Nolan then asked Lewis for ID, which she declined to provide, although she did have identification in her purse. RP 22, 37, RP 119.

Nolan handcuffed Ms. Lewis and arrested her for NOVOL² without identification. RP 23, 41. Eleven minutes had elapsed between initial contact and arrest. RP 34.

Nolan searched Lewis incident to the arrest and found a small quantity³ of methamphetamine in a pocket. RP 23, 25. Nolan then read Lewis her Miranda rights. RP 25. He did not recall asking if she wished to waive her rights, but she did answer his questions. RP 26, 40. Nolan asked what the substance was that he had found in her pocket, and Lewis

² No Valid Operator’s License.

³ 0.70 grams. CP 11.

said she did not know. RP 26. He then asked: “[I]f a reasonable person saw the baggie ... what would they think it was?” Lewis replied, “Drugs.” RP 27.

Before she was arrested, Lewis had told Nolan she had an Alaska driver’s license. RP 119. It was only after she was in custody in the back seat of his patrol car, however, that Nolan ran a check and learned that the Alaska license was either invalid or suspended. RP 119, 120, 123. Nolan could not say whether dispatch said Lewis’s license was suspended or merely invalid. RP 41, 42. Nolan searched Lewis’s car at the scene and “logged the belongings inside the car.” He found a purse on the front seat and searched it. CP 11.⁴

Lewis was charged with one count of possession of methamphetamine in violation of RCW 69.50.4013(1). CP 1. She moved to suppress the methamphetamine on the grounds the stop was pretextual. CP 3-4. She also sought to suppress her statements to Nolan as fruit of the poisoned tree of the unlawful arrest. RP 122.

At the suppression hearing, Deputy Nolan would testify that, from his observation post at the intersection, he had noticed that Ms. Lewis’s Thunderbird had a defective “marker light.” RP 17, 109. He also thought

⁴ The police impounded the car and obtained a warrant to search it, but the State stipulated that the warrant was defective and did not offer the fruits of the search into evidence. CP 13-18; RP 51.

Lewis turned left without signaling for the required 100 feet, although he had no idea how many feet she was short. RP 30-31, 31-32, 39.

In an oral decision delivered from the bench, the court concluded that Nolan's investigation of Lewis was not pretextual for two reasons:

(a) Ms. Lewis did in fact turn left without signaling for 100 feet, and —

(b) Deputy Nolan was engaged in traffic control, not drug enforcement. The court denied the motion to suppress. RP 74.

Ms. Lewis was convicted following a stipulated facts trial. RP 187, 192, 198. At sentencing, the State amended the charge to attempted possession of methamphetamine, RCW 69.50.407. CP 73. Lewis was sentenced to 113 days on a standard range of zero to 12 months. RP 192, 198, 202. She appeals.

IV. ARGUMENT

1. NOLAN'S INVESTIGATION OF LEWIS CONSTITUTED A PRETEXTUAL STOP.

"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." U.S. Const. amend.

IV. “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. 1, § 7.

Under both the federal and state constitutions, a warrantless search and seizure is presumed invalid unless the State can establish one of the narrowly drawn exceptions to the warrant requirement. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Evidence seized during an illegal stop and search is subject to mandatory suppression under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

The exclusionary rule applies to evidence derived either directly or indirectly from illegal police conduct. *State v. Le*, 103 Wn. App. 354, 361, 12 P.3d 653 (2000). Derivative evidence will be suppressed unless it was obtained without exploiting the original illegality or by means sufficiently distinguishable to be purged of the primary taint. *Le*, 103 Wn. App. at 361. To prove that evidence has been purged of taint, the State must show either that: (1) intervening circumstances have attenuated the link between the illegality and the evidence or (2) the evidence was discovered through a source independent from the illegality. *State v. McReynolds*, 117 Wn. App. 309, 322, 71 P.3d 663 (2003), quoting *Le*, 103 Wn. App. at 361).

A pretextual stop occurs when an officer detains a person in order to conduct a speculative criminal investigation unrelated to driving and not

for the purpose of enforcing the traffic code. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). When determining whether a stop is pretextual, the Court considers the totality of the circumstances, including the objective reasonableness of the officer's behavior as well as his asserted subjective intent. *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). All evidence obtained during a pretextual stop must be suppressed. *State v. Montes-Malindas*, 144 Wn. App. 254, 259, 182 P.3d 999 (2008); *Ladson*, 138 Wn.2d 343, 353.

Here, the totality of the circumstances surrounding Nolan's stop of Lewis constitute a textbook example of pretext.

First, the trial court mischaracterized the issue as whether there was in fact a traffic infraction, in the erroneous belief that, if there was, the stop was not pretextual as a matter of law. RP 63.

Even where an officer has grounds to enforce the traffic code, enforcement of the traffic code must be "the actual reason for the stop." *State v. Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000). *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006), is illustrative. There, as here, an officer's suspicions were aroused, so he pulled a motorist over for turning left without the 100-foot signal required by RCW 46.61.021(1). But the question before the court was not whether the officer had the right to stop Meckelson for a minor traffic infraction. This

Court accepted that he did. Rather, as here, the question was whether the officer would have done so but for his unfounded suspicions. *Meckelson*, 133 Wn. App. at 436.

Second, the evidence confounds the court's finding that there was no connection between Nolan's presence at the intersection, the target residence 200 yards away, and his decision to follow Ms. Lewis. RP 182. Nolan had taken up an observation position a short distance from a known drug house. And he conceded that Lewis's apparent association with that house was the reason for his interest in her.

Q. Was that one of the reasons that you wanted to know more information from her? ...

A. No.

Q. Okay. Not at all?

A. I can't say whether it was or was not.

Q. Okay.

A. You know, if I had to guess, I would already have guessed that she was coming from Robert Heater's place. I wouldn't have to ask her."

RP 48. And:

Q. And you were aware — and you did believe she was coming from his house?

A. It could be concluded that, yeah.

RP 49. In fact, Nolan knew Ms. Lewis was at the suspect residence because he had seen her car parked there. RP 47-48. Nolan denied that this was the reason he stopped Lewis. RP 50. But unsupported subjective denials are insufficient to overcome obvious contrary implications based upon reasonable inferences from the objective facts. *Ladson*, 138 Wn.2d at 358-59.

Finally, before he arrested her for driving without a valid license, Deputy Nolan switched his asserted reason for detaining Ms. Lewis from a defective light to an illegal turn to DUI. “Well, with her behavior, I was seeing if she was under the influence.” RP 143. He said he was investigating “maybe a possible DUI.” RP 144.

The trial court erroneously implied that Lewis’s nervous appearance and Deputy Nolan’s hunch constituted sufficient grounds to detain her. (Nolan’s “instincts told him that something else was going on.” RP 65. Nervousness during a police contact is not unusual and is not grounds for an intrusion. *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008) (we do not permit searches merely because people do not have proper identification or documentation, are nervous, or tell inconsistent versions of events.) And more than an instinctive hunch is required. *State v. Marcum*, 116 Wn. App. 526, 531, 66 P.3d 690 (2003); *Terry v. Ohio*,

392 U.S. 1, 23, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Neither was Lewis's refusal to identify herself grounds for suspicion where she had no obligation to make any statement to Nolan whatsoever. *State v. Moore*, 161 Wn.2d 880, 886, 169 P.3d 469 (2007).⁵

Also, the court completely disregarded Nolan's testimony in finding that Nolan followed traffic infraction protocol. RP 65. In fact, Nolan concealed from Lewis that he had observed a traffic infraction, telling her instead that he merely wished to help her fix her wipers. He testified that, even as he approached her, his investigation had already "gone in a different direction." RP 144. He did not ask Lewis for her license, registration, or proof of insurance. RP 148. Instead, Nolan tried to gather personal information that might speculatively relate to some other criminal offense, because he thought she was "acting strange." RP 148. Moreover, no authority supports the court's notion that Nolan could not possibly have stopped Lewis on a pretext, because his duty that day was as a traffic patrol officer, not a drug investigator. RP 66, 182.

⁵ The trial court correctly concluded that the defective marker light scenario was spurious. Washington's traffic code requires so-called "marker lights" to be displayed only by vehicles such as buses, trucks, motor homes, and vehicles with mounted campers, and only when such vehicles are operated upon a highway. RCW 46.37.080 and RCW 46.37.090(1)(c). Lewis was driving a two-door passenger vehicle. RP 109; CP 4, 14. Moreover, Nolan did not usually ticket people during daylight hours for defective lights unless they were a hazard. RP 29. He did not recall any particular hazard from Lewis's defective "marker" light at 3:25 in the afternoon. RP 28.

Washington's exclusionary rule exists primarily to vindicate personal privacy rights. It strictly requires the exclusion of evidence obtained by unlawful governmental intrusions. *State v. Chenoweth*, 160 Wn.2d 454, 472 n.14, 158 P.3d 595 (2007). This record shows that Deputy Nolan intruded upon Ms. Lewis's privacy because her visit to Mr. Heater's home aroused his suspicion concerning possible criminal conduct completely unrelated to her driving. This was unlawful, and the evidence must be suppressed.

2. LEWIS WAS PREJUDICED BY THE LACK OF WRITTEN SUPPRESSION FINDINGS.

CrR 3.6(b) requires that at the conclusion of a hearing on a motion to suppress, the trial court shall enter written findings of fact and conclusions of law. The Court will reverse a conviction for tardy entry of findings if the defendant can establish that she was prejudiced by the delay. *State v. Gaddy*, 114 Wn. App. 702, 705, 60 P.3d 116 (2002), *aff'd*, 152 Wn.2d 64(2004). The Court will also reverse if the delay permitted the State to tailor its proofs to overcome deficiencies demonstrated by the defense. *State v. Byrd*, 83 Wn. App. 509, 512, 922 P.2d 168 (1996).

Pertinent Facts: Ms. Lewis was charged with one count of possession of methamphetamine. CPI. She pleaded not guilty in the

Skamania County superior court in January, 2010. RP 9. She filed a motion and supporting memorandum to suppress unlawfully obtained evidence. CP 3-18. The court conducted a combined CrR 3.5 and CrR 3.6 hearing on June 3, 2010. RP 14. Over a year later, on September 26, 2011, findings and conclusions from the June, 2010, hearing still had not been entered. RP 102, 105. By this time, moreover, both the prosecutor and defense counsel who did the hearing, were off the case. RP 102. The judge was the same but retained no memory of the testimony. RP 103.

In September, 2011, Ms. Lewis's substitute counsel wanted to raise additional suppression issues. RP 73-74. The State initially objected. RP 74. On September 1, 2011, however, the prosecutor asked the court to conduct further suppression proceedings so as to preclude the defense from raising the additional constitutional suppression issues for the first time on appeal. RP 96, 105. The defense seconded the request for a new hearing. RP 96. The court attempted to clarify whether the hearing that was about to take place was a supplemental hearing or whether they were "starting over." RP 103. The procedural status of the second hearing was never resolved. RP 105. Both counsel regarded it as an additional hearing. RP 96, 107.

At both hearings, the State's only witness was the arresting officer, Deputy Nolan, RP 15, 107. Nolan admitted he had absolutely no

independent memory either of the stop or of the arrest of Ms. Lewis. RP 28. Rather, he based his testimony solely on what he had written in his incident report and standard practice. RP 40. At the first suppression hearing, Nolan's report was admitted as Exhibit 1. RP 24.⁶ By the second hearing, the report was two years old. RP 115.

Because the prosecutor never submitted proposed findings from the CrR 3.6 hearing 15 months earlier, the court permitted a second hearing at which the State tailored its questioning of officer Nolan to overcome fatal defects in this testimony at the first hearing. Then, even after the second hearing, the court never did enter any written findings and conclusions. The judge merely ruled orally twice from the bench. RP 64-66; 177-183.

The court misrepresented Deputy Nolan's "testimony" by ruling that Nolan told Ms. Lewis about the infractions before he engaged her regarding the windshield wipers. The court also misrepresented the evidence by stating that Nolan learned about the invalid Alaska license before he arrested Lewis. RP 64. The court's failure to enter findings and conclusions after the first hearing allowed the State to rehabilitate Deputy Nolan's testimony at the second hearing.

⁶ It is in the Clerk's Papers at Ex. A of Lewis's suppression motion, beginning at CP 9.

At the first hearing, Nolan conceded that he was parked at the intersection because of its proximity to the suspected drug house. RP 15. At the second hearing, he said he was on patrol, taking calls and enforcing traffic and criminal laws and claimed it was entirely coincidental that he happened to have assumed an observation position near Mr. Heater's residence. RP 108, 127. At the first hearing, Nolan had no idea how many feet Ms. Lewis's turn signal was short of the statutory 100 feet. At the second hearing, he specified that she signaled for only 20-25 feet. RP110.

Without written findings, this Court cannot discern which conflicting elements of Deputy Nolan's testimony the court found persuasive or why.

The trial court also failed to enter written findings and conclusions following the stipulated facts trial.

In criminal cases tried to the court without a jury, the court is required to enter written findings of fact and conclusions of law. CrR 6.1(d); *State v. Silva*, 127 Wn. App. 148, 151, 110 P.3d 830 (2005). Those findings must address each element of the crime separately and indicate the factual basis for each element. *Silva*, 127 Wn. App. at 151, citing *State v. Banks*, 149 Wash.2d 38, 43, 65 P.3d 1198 (2003).

Here, the court announce oral findings from the bench. RP 197-98.

The prosecutor assured the court he would file findings and conclusions for both suppression hearings and the stipulated facts trial. RP 203. The superior court file contains no findings.

The Court should reverse the conviction and dismiss the prosecution.

VI. **CONCLUSION**

For the foregoing reasons, the Court should reverse Ms Lewis's conviction and dismiss the prosecution with prejudice.

Respectfully submitted this 13th day of February, 2012.

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CERTIFICATE OF SERVICE

Jordan McCabe served a copy of this Appellant's Brief upon opposing counsel, Yarden F. Weidenfeld, via the Division II upload portal: weidenfeld@co.skamania.wa.us.

A copy was deposited in the U.S. Mail, first class postage prepaid, addressed to:

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Jordan B McCabe February 13th, 2012