

**FILED**

**FEB 04 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 29164-2-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

GILBERTO CHACON ARREOLA, APPELLANT

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BRIEF OF RESPONDENT

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WSBA # 40513  
Grant County Prosecuting Attorney's Office  
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(509) 754-2011

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**A. ASSIGNMENTS OF ERROR**

The Respondent, State of Washington, asserts that no error occurred in the trial and conviction of the Appellant and respectfully requests that his conviction be affirmed.

**B. STATEMENT OF THE CASE**

The Appellant, Gilberto Chacon Arreola, was convicted following a jury trial of felony Driving While Under the Influence under RCW 46.61.502. 4/15/10 RP 66. CP 1, 74. Prior to trial, Mr. Chacon Arreola pled guilty to Driving While License Suspended or Revoked in the First Degree under RCW 46.20.342. CP 1, 76-77. A standard range sentence was imposed. 06/15/10 RP 87-88.

Prior to the jury trial, a suppression hearing was held, during which the court made the following pertinent findings:

On October 10, 2009 Officer Tony Valdivia of the Mattawa Police Department responded to the area of Rd. R SW and Rd. 24 SW in Grant County, Washington for a report of a possible DUI in progress. CP 47. Officer Valdivia's primary function at the Mattawa Police Department is that of a traffic patrol officer whose duties include enforcing the traffic code. CP 47. Upon his arrival in the area of Rd. 24 SW, Officer Valdivia

observed a vehicle matching the description of the suspect vehicle. CP 47.

Officer Valdivia did not initially observe any DUI-related driving. CP 47.

Officer Valdivia followed behind the vehicle for approximately half a mile, which took about 30 to 45 seconds. CP 47. Officer Valdivia noted that the vehicle had an altered exhaust or muffler in violation of RCW 46.37.390. CP 47. The officer eventually turned on his overhead emergency lights to stop the vehicle. CP 47. The driver refused to yield. CP 47. Officer Valdivia then activated his siren, but the driver still refused to yield. CP 47.

Officer Valdivia's primary motivation when he stopped the vehicle was to investigate the reported DUI. CP 47. Officer Valdivia would, however, have stopped the vehicle for the exhaust infraction absent having received the previous report of a possible DUI. CP 47. Officer Valdivia commonly stops vehicles for exhaust violations. CP 47. In this particular case, the officer would have stopped the vehicle for the exhaust infraction because he was out "with" the vehicle, a term the officer used to signify that he was following and observing the vehicle. CP 47.

The driver eventually pulled the vehicle over at 16293 Rd. 26 SW and stopped in the front yard of a residence. CP 47. Officer Valdivia approached the driver's side of the vehicle and noticed the driver was attempting to conceal his identity by pulling his hood over his head. CP

47. Officer Valdivia had to tap on the driver's side door to get the driver to roll down his window. CP 47. Once the driver rolled down his window, Officer Valdivia recognized him from prior contacts as Mr. Chacon Arreola. CP 47. Officer Valdivia also could then detect an odor of alcohol and observed that Mr. Chacon Arreola's eyes were red and watery. CP 47. Officer Valdivia could also see two passengers and several open containers of alcohol in plain view inside of the vehicle. CP 47.

Officer Valdivia did not have his firearm drawn when he approached the vehicle and once he was at the window he requested license, registration, and insurance from Mr. Chacon Arreola. CP 48. Up to the point where the officer observed signs that Mr. Chacon Arreola was intoxicated and impaired, he behaved as though this were a typical traffic infraction stop. CP 48.

MACC dispatch informed Officer Valdivia that Mr. Chacon Arreola had active warrants for his arrest. CP 48. Officer Valdivia placed Mr. Chacon Arreola under arrest and transported him to the Mattawa Police Department for the BAC process. CP 48. He also cited Mr. Chacon Arreola for the exhaust infraction and for failure to provide proof of insurance. CP 48.

Based on these findings, the court denied Mr. Chacon Arreola's motion to suppress evidence. CP 49. Mr. Chacon Arreola now appeals the court's findings of facts and conclusions of law regarding suppression.

### **C. STATEMENT OF THE ISSUES**

1. When Officer Valdivia, responding to a report of a possible DUI in progress, followed the vehicle driven by Mr. Chacon Arreola and eventually stopped it for an exhaust infraction, did the officer conduct an unconstitutional pretextual stop?

### **D. ARGUMENT**

1. Officer Valdivia did not conduct an unconstitutional pretextual stop when he pulled over the vehicle driven by Mr. Chacon Arreola because the officer was enforcing the traffic code and was not conducting a criminal investigation unrelated to driving.

Officer Valdivia did not conduct an unlawful "pretextual" stop when he pulled over the vehicle driven by Mr. Chacon Arreola. On the evening of October 10, 2009 Officer Valdivia was enforcing the traffic code when he initially followed and subsequently stopped the vehicle driven by Mr. Chacon Arreola. The officer was not conducting a criminal investigation unrelated to driving. There is no indication in the record that Officer Valdivia subjectively intended to search for drugs or other non-traffic related crimes.

Pretextual traffic stops do not violate the Fourth Amendment to the United States Constitution. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 1774-76, 135 L.Ed.2d 89 (1996). The Washington State Supreme Court, however, held in *State v. Ladson* that pretextual stops do violate Article 1, Section 7 of the Washington Constitution. 138 Wn.2d 343, 979 P.2d 833 (1999).

A traffic stop is considered pretextual when law enforcement officers perform the stop with an underlying goal of conducting a criminal investigation unrelated to driving, rather than with the intent to enforce the traffic code. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). To determine whether a pretextual stop has occurred, the court considers the totality of the circumstances surrounding the stop, including the subjective intent of the officer and the objective reasonableness of the officer's actions. *Ladson*, 138 Wn.2d at 349.

In *Ladson*, two officers working on proactive gang patrol admitted that, although they did not make routine traffic stops while on gang patrol, they used traffic infractions as a means to initiate contact on unrelated criminal activity. 138 Wn.3d at 345. In particular, one of the officers would selectively enforce traffic violations based on whether he believed there was a potential for to gather intelligence during the stop. *Ladson*, 138 Wn.2d at 346. After following a vehicle driven by a suspected drug

dealer, the officers found a legal reason, expired tabs, to stop the vehicle. *Id.* The officers then learned the driver had a suspended license, arrested the driver, and searched the vehicle incident to arrest. *Id.* During the search the officers found a handgun under a jacket belonging to a passenger in the vehicle, later identified as Ladson. *Id.* at 346-47. Ladson was arrested, searched, and found to have several baggies of marijuana in his possession. *Id.* at 347.

The Court's analysis in *Ladson* begins by recognizing that in every pretextual stop the police are not pulling the vehicle over to enforce the traffic code, but are instead conducting a criminal investigation unrelated to the driving. *Id.* at 349. The Court noted that there is a fundamental difference between a traffic stop by a gang unit detective looking for gang intelligence and a traffic stop made by an officer tasked with enforcing the traffic code. *Id.* at 358 n.10.

Subsequent to the Court's ruling in *Ladson*, 138 Wn.2d 343, other Washington courts have found that traffic officers do not conduct a pretextual stop by enforcing the traffic code. *See State v. Hoang*, 101 Wn.App. 732, 6 P.3d 602, *review denied*, 142 Wn.2d 1027 (2001). In *Hoang*, a traffic officer saw several people approach the vehicle driven by the defendant which led the officer to believe that a drug transaction might be occurring. *Id.* at 735. The officer did not, however, specifically see

such a transaction. *Id.* He followed the defendant and eventually stopped him for failing to signal. *Id.* The officer also noticed that the vehicle had no license plates. *Id.* Hoang was later arrested for driving on a suspended license, and cocaine was found in his possession during a search incident to arrest. *Id.* at 736. The trial court found that the officer acted within his normal traffic control duties when he stopped the defendant for failing to signal. *Id.* at 737. In particular, based on his testimony, the trial court found that the officer would have made the same decision to contact the defendant in the course of a general traffic patrol. *Id.*

Distinguishing the situation in *Hoang* from *Ladson*, Division One held that the stop was not a pretext for conducting a drug search and upheld Hoang's controlled substance conviction because the officer treated the situation like any other traffic stop in that he initially asked for license, registration, and insurance. *Id.* at 741-42. The court specifically held that under *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. *Id.* Further, the court held that the fact that the officer elected not to cite Hoang for a traffic infraction or issue a criminal citation for driving while license suspended was not dispositive under *Ladson* in determining whether a pretextual stop occurred. *Id.* at 742. Instead, it would merely be one factor to consider,

among all the others, in determining the officer's subjective intent for the stop. *Id.*

In the present case, Officer Valdivia stopped the vehicle driven by Mr. Chacon Arreola because he believed Mr. Chacon Arreola had committed an equipment violation by having an altered or defective exhaust, a traffic infraction in violation of RCW 46.37.390. CP 47. Officer Valdivia was on routine traffic patrol. CP 47. Officer Valdivia did not follow Mr. Chacon Arreola in hopes of finding a reason to stop him to investigate a crime unrelated to Washington's traffic laws. Instead, Officer Valdivia responded to the area of Mr. Chacon Arreola's vehicle after receiving a report of a possible violation of the traffic code, driving while under the influence. CP 47. He located the vehicle, followed in momentarily, and then attempted to initiate a traffic stop for defective exhaust. CP 47. Officer Valdivia issued a citation for defective exhaust. CP 48. Up to the point where he observed independent evidence at the window that Mr. Chacon Arreola was impaired, Officer Valdivia conducted the stop just like any other traffic stop. CP 48. There is no indication that Officer Valdivia had any subjective intent to look for drugs or other non-traffic related crimes.

The scope of a Terry investigatory stop may be enlarged or prolonged if the stop confirms or arouses further suspicions. *State v.*

*Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990). Here, Officer Valdivia's suspicions were aroused after he made the initial decision to stop the vehicle for the equipment violation. CP 47. Based upon the driver's initial failure to yield, the attempt to conceal his identity, and the signs of impairment and consumption, Officer Valdivia at that moment had at least a reasonable suspicion that Mr. Chacon Arreola was driving under the influence. There is no indication that this was a pretextual stop.

**E. CONCLUSION**

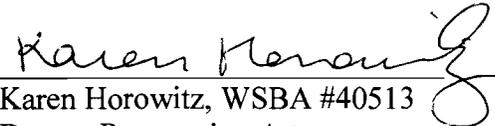
For the reasons set out above, the State respectfully requests that the Court affirm the trial court's convictions.

DATED: February 2, 2011

Respectfully submitted:

D. ANGUS LEE,

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