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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

AUG 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 302377

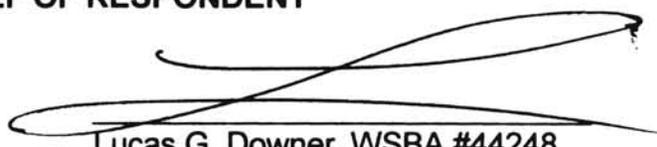
STATE OF WASHINGTON,
Respondent,

vs.

TONY CANTU,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 10-1-00136-1

BRIEF OF RESPONDENT



Lucas G. Downer, WSBA #44248
Deputy Prosecuting Attorney

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Attorney for Respondent

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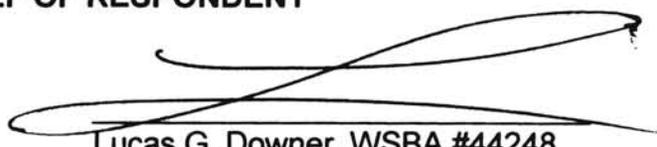
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I. RESPONSE TO ASSIGNMENTS OF ERROR

The trial court did not err in denying the Appellant's motion to suppress evidence as the State met its burden of showing that the arrest of Mr. Cantu was not pretextual.

II. STATEMENT OF THE CASE

At approximately 1:00 am on October 7, 2010, Adams County Deputy Jason Erickson observed a vehicle travelling in a densely populated, residential area initially at a speed of 60 miles per hour in a 25 mile per hour zone. RP 29-30. The vehicle subsequently accelerated to a speed of 72 miles per hour. RP 29-30. At one point, the vehicle hit a bump in the road and the driver nearly lost control of the vehicle. RP 42-43. Based upon his observations, Deputy Erickson decided to initiate a traffic stop. RP 37.

Deputy Erickson initiated a stop of the defendant's vehicle and advised the defendant that his excessive speed was nearly three times the posted limit. RP 41. Prior to contacting the driver, Deputy did not recognize the vehicle or the driver. RP 68. Upon contacting the driver, Deputy Erickson recognized him as Mr. Cantu (Appellant) based upon previous contacts, which included prior

burglary, theft, and drug investigations. RP 49. Deputy Erickson requested that the Appellant produce his license, registration, and proof of insurance. RP 41. The Appellant was unable to provide proof of insurance. RP 41. Deputy Erickson returned to his patrol car, found that Appellant was clear, and determined to place him into handcuffs and arrest Appellant. RP 41. Deputy Erickson stated that at a traffic stop, he will "typically contact people, get their information, go back, determine if they're clear, and then I make my determination." RP 53. Based on Appellant's excessive speed, with respect to the residential location, Deputy Erickson testified that he felt that nearby persons or property were in danger:

"He hit that bump and I thought he was going to lose it ... There were vehicles right there along the road as he crossed that bump on 7th Avenue... [I]f he'd lost it he could've nailed one of those cars. People do walk late at night if they, you know, if they work nights." RP 42-43.

Deputy Erickson advised Appellant he was under arrest and to step out of the vehicle. RP 43. Deputy Erickson testified that during the stop he had a heightened concern for his safety as the Appellant "... was nervous, he was sweating. When I advised him he was under arrest he was not responding, and then started to mumble under his breath." RP 55. Deputy Erickson proceeded to

search the Appellant's person for weapons and contraband prior to placing him in his patrol car. RP 44. Deputy Erickson found a large pocketknife, as well as a hard rectangular object which contained a digital scale, a blue cloth, and a clear, plastic bag with a large amount of a crystal substance inside, which later tested positive for methamphetamine. RP 44-46.

Prior to arresting the Appellant, Deputy Erickson stated that he saw large electronic equipment and bags in the backseat of the vehicle, which 'piqued his interest.' RP 56. However, Deputy Erickson did not search the vehicle, prior to, nor after he arrested the Appellant. RP 57.

Deputy Erickson testified that he was the only one on patrol, and he had previously pulled over one other person for reckless driving during his career. RP 51-52, 57. Deputy Erickson did not arrest the other driver as he was only travelling 25 miles per hour over the speed limit. RP 52. Another Deputy with the Adams County Sheriff's Officer had previously arrested a woman for reckless driving. RP 51-52.

After Deputy Erickson's testimony at the 3.6 CrR hearing and a brief argument by the state, the court denied the Appellant's motion to suppress, finding that the officer was justified in placing

the Appellant under custodial arrest, and that it was apparent that Deputy Erickson's intent in placing the Appellant under arrest was not a mere pretext to investigate any other crime. CP 65, 67-70; RP 66-72.

The Appellant was later found guilty of Unlawful Possession of Methamphetamine after a brief jury trial. RP 243.

III. ARGUMENT

The trial court was correct in finding that the custodial arrest of Mr. Cantu was lawful and without pretext.

In reviewing a suppression ruling, an appellate court determines whether substantial evidence supports the trial court's findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Conclusions of law are reviewed de novo. Id.

Under Article I, Section 7 of the Washington State Constitution, warrantless searches are per se unreasonable unless they fall under a specific exception to the warrant requirement. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Such exceptions are limited and narrowly drawn. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Search incident to lawful arrest is one such recognized exception. State v. Pulfrey, 154 Wn.2d 517 (2005).

To determine whether a traffic stop or an arrest is a pretext for accomplishing a search, “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, 359, 979 P.2d 833 (1999). To satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code. Id. See also State v. Montes-Malindas, 144 Wn.App. 254, 260, 182 P.3d 999 (2008). A search or arrest is pretextual unless the State meets its burden to “show that the officer’s motivation in making the stop was to enforce the traffic code and not to discover evidence of crimes. Montes-Malindas at 259-60.

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 (or arrest). State v. Hoang, 101 Wn.App. 732, 6 P.3d 602 (2000). “An officer with suspicions, who stops a vehicle to enforce the traffic code, should limit himself to the questions that would be asked on a routine traffic stop: Do you have a drivers license? May I see the vehicle registration? May I

see the certificate of insurance?" Id. at 742. Certain traffic offenses, such as reckless driving, are criminal offenses. State v. Reding, 119 Wn.2d 685, 688-89, 691, 835 P.2d 1019 (1992) (citing LAWS OF 1979, 1st Ex. Sess., ch. 136, Sec. 2, codified as RCW 46.63.020). Accordingly, an officer that has probable cause to believe that a person committed or is committing the offense of reckless driving has authorization to place the driver under custodial arrest without a warrant. RCW 10.31.100(3)(c) ("Any police officer having probable cause to believe that a person has committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person: (c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles"); State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004)". Police are not required to make a full custodial arrest for the crime reckless driving; officers may opt instead to issue a citation and notice to appear in court. RCW 46.64.015; CrRLJ 2.1(b)(1).

In this case, the Appellant relies heavily on State v. Montes-Malindas, which held that State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code. Id. at 260. The trial court properly considered the

totality of the circumstances, including Deputy Erickson's subjective intent, as well as the objective reasonableness of his behavior, and found that the arrest of the Appellant was not pretextual.

In Montes-Malindas, after viewing the suspicious behavior of occupants of a van in a parking lot, an officer decided to observe the parties. Id. at 257. The van left the parking lot without its headlights on and the officer followed. Id. After the headlights were turned on a short time later, the officer pulled the van over. Id. No evidence was ever presented to indicate that the defendant's driving without his headlights on presented any endangerment to pedestrians and property. Id. at 262. The officer also failed to issue a citation for the headlight violation. Id. ("Although failure to issue a citation for the underlying infraction is one of the factors to be considered when assessing objective reasonableness, it is not dispositive.") The officer approached the vehicle on the passenger side, and spoke with the passenger first. Id. at 261-62. Furthermore, the officer was not on routine patrol, and he requested backup, which suggested more than a routine traffic stop. Id. at 262. Given the totality of the circumstances, it was held that the officer's stop was pretextual. Id. at 263.

Here, Deputy Erickson made the decision to arrest the Appellant because his driving exhibited a “willful or wanton disregard for the safety of persons or property.” (See RCW 46.61.500). The Appellant was travelling at a rate nearly three times the posted limit, in a heavily populated area. Deputy Erickson stated he believed the Appellant’s driving posed a great danger to both the Appellant and immediate area. Furthermore, arresting an individual for reckless driving is not unusual. State v. Reding held that an officer is justified when arresting for reckless driving. Id. 119 Wn.2d 685, 688-89, 691, 835 P.2d 1019 (1992). Deputy Erickson testified that prior to the Appellant’s arrest for reckless driving, another deputy had arrested a woman for the same offense as she was travelling at over 100 miles per hour. RP 52.

The Appellant attempts to point to the fact that Deputy Erickson noticed bags and electronics in the back seat of the Appellant’s vehicle, and argues that those items were the real reason Deputy Erickson arrested the Appellant. Deputy Erickson testified that those items ‘piqued his interest. RP 56. Part of Deputy Erickson’s training is to be cognizant of suspicious behavior. RP 55. However, State v. Hoang held that an officer, during a traffic stop,

may have suspicions that the suspect may have committed other crimes as long as the officer only questions the driver about the infraction (i.e. Do you have a drivers license? Do you have proof of registration? Do you have a certificate of insurance?) Id. at 741.

From the record, not only did Deputy Erickson never search the suspicious items in the car before or after arrest, he never even questioned the Appellant about the items in his car. Deputy Erickson's testimony that his reason for placing the Appellant in custodial arrest was the excessive, and dangerous speeding in a residential area is fully supported by the record.

Unlike Montes-Malindas on which the Appellant heavily relies, it is clear that the State has shown that Deputy Erickson, both subjectively and objectively, was actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code, and that Deputy Erickson's 'piqued interest' in the items in the car had no influence in his decision to arrest the Appellant. Considering the totality of the circumstances, including Deputy Erickson's subjective intent, as well as the objective reasonableness of his behavior the trial court properly found that the Appellant's arrest was not pretextual.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's decision denying the Appellants motion to suppress evidence as the State met its burden of showing that the arrest of Mr. Cantu was not pretextual.

DATED this 14th day of AUGUST, 2012.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

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