

32964-0-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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**Sep 25, 2015**  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON, RESPONDENT

v.

SHANE D. HOLMAN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF KITTITAS COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering Finding of Fact No. 1: “On July 19, 2014, at 11:02 p.m., Deputy Grant was driving southbound on Canyon Road when he saw a car driving on private property. Deputy Green was with Deputy Grant and told Deputy Grant that the private commercial property was owned by John Eaton and had recently been burglarized twice. At this point, Deputy Grant turned his patrol car around and got behind the car. When he was behind the car, he noticed the car had no rear license plate and no temporary tag displayed as required by law.” (Supp CP 1)
2. The court erred in concluding the officers acted on reasonable suspicion after seeing the car being driven on private property. (Supp CP 2)
3. The court erred in concluding the stop was lawful. (Supp CP 2)
4. The court violated Mr. Holman’s rights under the Fourth Amendment and Const. Article 1, section 7 by denying the motion to suppress the fruits of the stop.

## B. ISSUES

1. Evidence showed the deputy sheriff was aware of some previous thefts in the area and, in particular, of thefts that occurred on the Eaton property two-and-a-half years earlier. He saw a passenger car driving along a dirt road on Mr. Eaton's property at 11:00 p.m. Did these facts support an articulable suspicion of criminal activity sufficient to justify an investigative stop of the car?
2. Sheriff's deputies saw a passenger car driving on private property in an area where thefts had occurred. The deputies turned their patrol car around and overtook what they considered a suspicious vehicle and, upon seeing that the car had no rear license plate, immediately effected a traffic stop. Absent evidence that either deputy made an independent and conscious determination that a traffic stop to address a suspected traffic infraction was reasonably necessary in furtherance of public safety, did the trial court err in failing to find the traffic stop was a mere pretext for an otherwise unlawful seizure of the car and its occupants?

### C. FACTS

Around 11:00 p.m. on the evening of July 19th, 2014, Kittitas County Deputy Sheriff Zack Green was a passenger in a patrol car driven by Deputy Grant Thompson. (CP 19; RP 11-12) He saw a car approaching Canyon Road from a dirt road on private property belonging to John Eaton. (RP 12-14) Deputy Green considered the vehicle suspicious and told Deputy Thompson to turn the patrol car around and follow it. (RP 12, 20)

The deputies had not received any calls that evening regarding possible trespassing on the Eaton property. (RP 14) The road was in a primarily agricultural area about three miles south of Ellensburg, north of some storage units and a forklift company. (RP 15) Deputy Green was aware of prior reports of thefts and burglaries in the area and he considered the presence of a passenger vehicle, as opposed to a flatbed pickup, to be a suspicious circumstance. (RP 15-16) About eighteen months earlier, he had spoken to Mr. Eaton after he had several thefts of electrical wire on his property. (RP 17)

Deputy Thompson turned the patrol car around and overtook the passenger car, which by then was apparently traveling on the public road. (RP 18-19) Deputy Thompson attempted to run a license check on the vehicle to determine whether it belonged to Mr. Eaton when he realized

there was no rear license plate on the car. (RP 20) He made a traffic stop based on the lack of a license plate. (RP 20)

Shane Holman was identified as the driver of the suspected car. (RP 156) He was charged with theft and burglary based on information he provided following the stop. (CP 1-2) He moved to suppress the fruits of the stop, arguing it was a pretext stop in violation of his Fourth Amendment rights. (CP 23-26) The trial court entered the following findings:

1. On July 19, 2014, at 11:02 p.m., Deputy Grant was driving southbound on Canyon Road when he saw a car driving on private property. Deputy Green was with Deputy Grant and told Deputy Grant that the private commercial property was owned by John Eaton and had recently been burglarized twice. At this point, Deputy Grant turned his patrol car around and got behind the car. When he was behind the car, he noticed the car had no rear license plate and no temporary tag displayed as required by law.
2. Deputy Green made contact with the defendant, who was driving the car and he did not have a driver's license in his possession and a search for his driving status indicated he had no valid operator's license. Mr. Holman told Deputy that the license plate had been stolen sometime in the last four days, but that he had not reported it. He gave an expired registration and did not match the front license plate. He also noticed that the passenger was sitting on three flashlights.
3. As he investigated the traffic offenses, Deputy Thompson contacted the owner, John Eaton and asked about giving anyone permission to be on his commercial property. He denied giving anyone

permission and the defendant and his passenger were then detained for trespassing. An investigation ensued that led to further felony charges.

(Supp CP 1)

The court concluded the officers acted on a reasonable suspicion after seeing the car being driven on private property and there was an actual violation of the law because the car did not have a proper license plate. (Supp CP 2) The court denied Mr. Holman's suppression motion and a jury subsequently convicted him of burglary and misdemeanor theft. (Supp CP 2; CP 194)

#### D. ARGUMENT

Article I, section 7 of the Washington Constitution prohibits unreasonable seizures. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). A warrantless seizure is per se unreasonable. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Const. Article I, section 7 "grants greater protection to individual privacy rights than the Fourth Amendment." *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). "Evidence obtained in violation of this constitutional provision must be suppressed, and evidence obtained as a result of any subsequent search must also be suppressed as fruit of the poisonous tree." *Kennedy*, 107 Wn.2d at 4

(citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

A warrantless seizure is valid if it falls within the scope of one of the narrowly drawn exceptions to the warrant requirement. *Ladson*, 138 Wn.2d at 349-50. Investigatory detentions, including warrantless stops for traffic infractions, are a recognized exception. *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997); *State v. Duncan*, 146 Wn.2d 166, 174-75, 43 P.3d 513 (2002). Law enforcement officers may conduct a warrantless traffic stop if they have a reasonable and articulable suspicion that a traffic violation has occurred or is occurring. *Ladson*, 138 Wn.2d at 349. The State bears the burden of proving by clear and convincing evidence that a warrantless seizure falls within an exception to the warrant requirement. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218, *review denied*, 272 P.3d 850 (2011); *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

The objective reasonableness of the officers' behavior in this case and their subjective intent present factual issues. In reviewing the trial court's ruling, this court determines whether the record supports the trial court's written findings and the court's conclusions:

When reviewing the denial of a suppression motion, we first decide whether substantial evidence supports the findings of fact. *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999); *State v. Hill*, 123 Wash.2d 641, 644, 647, 870 P.2d 313 (1994). We then review de novo the trial court's conclusions of law. *Mendez*, 137 Wash.2d at 214, 970 P.2d 722.

*State v. Meckelson*, 133 Wn. App. 431, 435-36, 135 P.3d 991 (2006);  
*Nguyen v. City of Seattle*, 179 Wn. App. 155, 163-64, 317 P.3d 518 (2014)

The issues before the court were whether the deputies had sufficient evidence of criminal activity to support stopping Mr. Holman's car and, if not, whether the stop based on lack of a license plate was a pretext for the otherwise impermissible stop. Since the second and third findings relate to what occurred after the stop had been made, the court's first finding is all that is relevant to the issue before the court. See *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008), quoting *Ladson*, 138 Wn.2d at 350 ("The officers' actions must be justified at their inception.")

The record does not support the court's finding that Deputy Green told Deputy Thompson that the "private commercial property was owned by John Eaton and had recently been burglarized twice." (Supp CP 1) Deputy Green merely told the driver of his suspicions and directed him to follow the vehicle. (RP 11-12)

Despite the absence of any evidence that Deputy Green conveyed to Deputy Thompson the detailed information underlying his suspicions, the finding may be viewed as summarizing the reasons relied on by the deputies to justify following the car driven by Mr. Holman, namely “the private commercial property was owned by John Eaton and had recently been burglarized twice.” But the record of the suppression hearing does not provide any evidence Deputy Green considered this to be commercial property. He described it merely as “private” property. (RP 13, 16) Deputy Green testified he and other deputies had “dealt with . . . prior thefts and burglaries in that area.” (RP 15) He also stated “I had spoke to Mr. Eaton approximately a year and a half earlier about several thefts he was having on his property where the electrical wire for his irrigation pivots was being stolen.” (RP 17) The record does not support the court’s finding that Deputy Green knew or believed the property owned by Mr. Eaton had “recently been burglarized twice.”

More significantly, the record does not support the court’s conclusion that “the officers in this case acted on reasonable suspicion in this case after seeing the car being driven on private property.” (Supp CP 2) “A seizure is reasonable if the state can point to ‘specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.’ ” *State v.*

*Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997), quoting *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993). This means the stop must be based on more than an officer's "inarticulable hunch." *State v. Pressley*, 64 Wn. App. 591, 597, 825 P.2d 749 (1992); *State v. O'Cain*, 108 Wn. App. 542, 549, 31 P.3d 733 (2001). "The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so." *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006).

In *Armenta*, two men asked a uniformed officer for help with their car. 134 Wn.2d at 4-5. The officer became suspicious, because the men had large amounts of cash and gave only sketchy accounts of their recent whereabouts. *Id.* at 5-6. The reviewing court held that a seizure occurred when the officer put their money in his patrol car. *Id.* at 16. The possession of large amounts of cash by a couple of Hispanic men was not, by itself, a reason to detain them. *Id.* at 13.

In *State v. Larson*, the officers regularly patrolled the area and "knew it suffered a high burglary rate." 93 Wn.2d 638, 649, 611 P.2d 771 (1980). But in *Larson*, the officers also had discovered the automobile "parked in a no-parking zone more than one foot from the curb . . . at 3 o'clock in the morning . . . next to a closed park and immediately across

from an apartment building which had been repeatedly burglarized.” *Id.* at 646, 649.

A hunch alone does not warrant police intrusion into people’s everyday lives. *State v. Doughty*, 170 Wash.2d 57, 63, 239 P.3d 573 (2010). And innocuous facts alone do not justify a stop. *State v. Tijerina*, 61 Wash.App. 626, 629, 811 P.2d 241 (1991). Being in a high-crime area at night, for example, is not enough to justify a stop when there is no evidence that a particular crime had been committed.

*State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812, *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

The presence of a car being driven in an area in which burglaries and thefts had been reported in the past, on private property from which wire had been stolen eighteen months earlier does not without more give rise to a reasonable suspicion that the car’s occupants have committed a specific crime or are about to do so. The record does not support the court’s conclusions that the stop was lawful because the officers “acted on reasonable suspicion in this case after seeing the car being driven on private property.” (Supp CP 2, conclusions 4 and 6) The only basis for stopping the car driven by Mr. Holman was the missing license plate.

Where the asserted basis for a traffic stop is a pretext for a warrantless investigation, the stop violates Article I, section 7 of the Washington Constitution. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). A traffic stop is pretextual if a law enforcement officer

makes the stop “not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.” *Ladson*, 138 Wn.2d at 349. In this situation, the officer “relies on some legal authorization as ‘a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.’ ” *State v. Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012) (quoting *Ladson*, 138 Wn.2d at 358). But even if “the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason,” the stop is not pretextual where the officer has an “actual, conscious, and independent” reason to make the stop. *Arreola*, 176 Wn.2d at 297-300.

“Whether a vehicle stop is pretextual is a factually nuanced question.” *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). The court must consider “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. In *Meckelson*, this court noted: “[T]he necessary inquiry here was: Was the officer’s stop solely for the driver’s failure to signal, or was the officer’s purpose (as he candidly suggests) to look for evidence of another crime?” 133 Wn. App. at 437.

The Supreme Court has clarified the significance of the officer’s subjective intent: “Thus, if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic

infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual.” *Arreola*, 176 Wn.2d at 298-99.

The trial court made no finding respecting Deputy Thompson’s subjective intent in stopping Mr. Holman. The only evidence in the record comes from Deputy Thompson’s testimony:

A. I turned around on the vehicle to run the license plate to see who it was coming out of there to see if it was Mr. Eaton and that’s when I observed that there was no license plate and I initiated the traffic stop.

Q. And did you stop the car?

A. I did.

Q. Why did you stop it?

A. For no -- not having a license plate.

(RP 19-20)

The record provides no support for the conclusion Deputy Thompson made an independent conscious determination that a traffic stop was reasonably necessary in furtherance of traffic safety. He was investigating Deputy Green’s suspicions when he saw grounds for effecting a traffic stop and therefore made the stop. The entire record supports the inference the deputies had a general suspicion of possible criminal activity and were attempting to find a basis for further investigation when the lack of a license plate presented itself as a pretext for stopping the car and making inquiries.

Under *Ladson* and its progeny, the court erred in finding the stop was lawful

E. CONCLUSION

The evidence supporting Mr. Holman's conviction was the fruit of an unlawful traffic stop. The charges against him should be dismissed.

Dated this 25th day of September, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32964-0-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
SHANE DAVID HOLMAN,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on September 25, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Gregory Zempel  
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I certify under penalty of perjury under the laws of the State of Washington that on September 25, 2015, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on September 25, 2015.

  
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