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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 MAR 12 AM 11:56

No. 62142-4-I

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION ONE

King County No. 07-1-08126-3 SEA

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STATE OF WASHINGTON,

Respondent,

v.

ROGER SINCLAIR WRIGHT,

Appellant.

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APPELLANT'S REPLY BRIEF

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ALLEN, HANSEN, & MAYBROWN, P.S.  
Attorneys for Appellant

Richard Hansen

600 University St.  
Suite 3020  
Seattle, WA 98101  
(206) 447-9681

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**I. FACTS RELEVANT TO REPLY**

The undisputed facts, as agreed by the State in its brief, make clear that Officer Gregorio considered the neighborhood where he stopped and searched Roger Wright to be a “hot spot” based on a heightened number of burglaries and car prowls. State’s Brief at 3, RP 8, 32-33. Even before the stop, Officer Gregorio “requested that another officer respond to the scene.” State’s Brief at 6, RP 13, 35. As the State concedes:

The vehicle had not been driving in a reckless manner and was not committing any other traffic infractions. RP 29. The vehicle pulled over in a safe and lawful manner after the officer initiated the traffic stop with his emergency lights. RP 31. . . . Wright was the only person in the vehicle. RP 13.

State’s Brief at 6.

According to the State: “The officer told Wright why he had stopped him and indicated that the area was a hot spot for stolen cars, burglaries and car prowls. RP 15, 20-21.” State’s Brief at 7. Wright was immediately arrested by Officer Gregorio, who “then passed him over to Officer Larned who had arrived at the scene. RP 15.” State’s Brief at 8 (fn. omitted). The State notes that Officer Gregorio testified that he “told Wright . . . that the area was a hot spot for stolen cars, burglaries, and car prowls. RP 20-21.” State’s Brief at 9.

It is Appellant's position that the true reason for this stop had nothing to do with Roger Wright's headlights being off, which was not illegal that time of day. Rather, Officer Gregorio was looking for an excuse to stop him because of his generalized concern "that the area was a hot spot for stolen cars, burglaries and car prowls." RP 15, 20-21, *cf.* State's Brief at 7.

However, none of these generalized "hot spot" factors could justify the stop and subsequent search, nor is it justified by the fact Mr. Wright did not have his headlights turned on because he was not legally required to do so since less than half an hour had passed since "sunset occurred at 4:21 p.m." and the law did not require that headlights be turned on. State's Brief at 10.

## **II. REPLY TO STATE'S LEGAL ARGUMENTS**

The State argues that Officer Gregorio had a "reasonable and articulable suspicion" to stop Wright's car because he erroneously believed Mr. Wright was obliged to turn his lights on even though the law did not require it. State's Brief at 11. The State urges this Court to affirm the stop because "Officer Gregorio testified that he did not know what time the sun set that day." *Id.*, *citing* RP 24-25. Apparently, the State wants to excuse Officer Gregorio from the time honored adage that "ignorance of the law is no excuse."

**A. The Standard for Warrantless Automobile Stops**

The Fourth Amendment's prohibition of unreasonable searches and seizures extends to the brief investigatory stop of a vehicle. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). An officer may not detain a motorist without a showing of "reasonable suspicion." *See, e.g., United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1 (1968). This "objective basis, or 'reasonable suspicion,' must consist of 'specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.'" *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9<sup>th</sup> Cir. 2000) (citations omitted). *See also United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1121 (9<sup>th</sup> Cir. 2002). "Each individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime." *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

**B. Burden of Proof**

Appellant agrees that the State "carries the burden of showing that the particular search of seizure in question falls within one of [the] exceptions" pursuant to a *Terry* stop. State's Brief at 11, *citing Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d

266 (1997) and *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

As the Court explained in *State v. Grande, supra*:

Our cases require us to presume warrantless searches and seizures invalid unless an exception applies. *State v. Rankin*, 151 Wn.2d 689, 699 (2004). The burden is on the State to show one of those exceptions applies, such as probable cause that a crime is being committed. In *Rankin*, we held that the freedom from disturbance in private affairs afforded to vehicle passengers in Washington under article I, section 7, prohibits law enforcement officers to effect a seizure against that passenger unless the officer has an articulable suspicion that that person is involved in criminal activity. *Rankin*, 151 Wn.2d at 699.

*Id.*

**C. The Stop Was Not Legally Justified**

The State argues that this stop was justified because Officer Gregorio had “a reasonable and articulable suspicion that the individual is involved in criminal activity,” quoting *State v. Walker*, 66 Wn.App. 622, 626, 834 P.2d 41 (1992). State’s Brief at 12. The State also relies upon *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986), setting forth the standard of “substantial possibility that *criminal conduct* has occurred or is about to occur.” State’s Brief at 12-13 (emphasis added).

The State would have this Court extend that rationale to “traffic infractions,” even where no traffic infraction had been committed since

Officer Gregorio was wrong in his assumption that Mr. Wright had an obligation to switch his headlights on. State's Brief at 13, citing *State v. Johnson*, 128 Wn.2d 431, 454, 909 P.2d 293 (1996); *State v. Day*, 161 Wn.2d 889, 897, 168 P.3d 1267 (2007) and *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

However, in *Day*, our Supreme Court recently suppressed evidence of a stolen firearm and methamphetamine manufacturing equipment from a vehicle, holding that evidence of a civil infraction did not justify a *Terry* stop. In reaching this conclusion, the Court expounded at length upon the heightened privacy interest created by Article I, Section 7 of the Washington Constitution, emphasizing that "officers of the State must obtain a warrant before intruding into the private affairs of others, and we presume that warrantless searches violate both constitutions." 161 Wn.2d at 893.

The Court explained the purpose of the suppression rule as follows:

We suppress such evidence not to punish the police, who may easily have erred innocently. We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power. See generally *Olmstead v. United States*, 277 U.S. 438, 484-85 (1928) (Brandeis, J., dissenting).

*Id.* at 894 (fn. omitted). The “erred innocently” language is applicable to Officer Gregorio who, perhaps “innocently” (or more likely as a pretext), assumed that Mr. Wright was obligated to have his headlights on when, in fact, that was not the case because half an hour had not yet passed since the sun had set.<sup>1</sup>

In its response, the State argues that suspicious circumstances can authorize an investigatory or *Terry* stop without probable cause, *citing State v. Glover*, 116 Wn.2d 509, 515, 806 P.2d 760 (1991) and *State v. Pressley*, 64 Wn.App. 591, 597-98, 825 P.2d 749 (1992). State’s Response at 4. However, the circumstances in this case do not come close to meeting that standard, as the Washington Supreme Court recently made clear in *State v. Setterstrom*, 163 Wn.2d 621, 183 P.3d 1075 (2008).

In *Setterstrom*, the police received

an anonymous call claiming Setterstrom was under the influence, heard a lie about his name, and observed his nervous, fidgety behavior. The record shows no threatening gestures or words. Setterstrom did not even stand. At most, the record shows that Setterstrom was under the influence; this is not a crime in itself.

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<sup>1</sup> It is also noteworthy that the Court expressly noted “Charlie Day has made no pretext arguments before this Court, and thus we do not consider whether this search should have been suppressed under *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).” *Id.* at 892, fn. 1. In this case, the *Ladson* argument, based upon a pretextual stop, is Appellant’s primary basis for reversal on appeal. *See* Appellant’s Opening Brief and Section F, *infra*.

*Id.* at 626-27. The Court found that these circumstances did not justify a *Terry* stop and “frisk without probable cause to arrest,” as set forth in *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). *Id.* at 626.

We hold that the officer did not have justification to frisk Setterstrom. Unless already holding a suspect legitimately, officers must have some basis beyond nervousness and lying to justify the intrusion of a frisk.

*Id.* at 627. Accordingly, all the evidence was suppressed, including methamphetamine found in the defendant’s pocket and drugs subsequently seized pursuant to a search warrant based on the initial, illegal frisk. *Id.* at 628. *Accord: State v. Webb*, 147 Wn.App. 264, 195 P.3d 550 (2008) (evidence of car search suppressed where search conducted after drunk driver removed from vehicle and placed under arrest).

The State’s reliance on *State v. Johnson, supra*, has no relevance to this case because that driver was arrested in his vehicle on an outstanding bench warrant, which provided a clear basis to search the vehicle. *State v. Duncan, supra*, actually supports Appellant’s position because there the Court declined “to extend the *Terry* principles to encompass civil infractions,” and the Court further held “the officers lacked a reasonable and justifiable basis for stopping and detaining Duncan” where he was seen with an open bottle of liquor in public, which was clearly prohibited by the Seattle Municipal Code. 146 Wn.2d at 168-69. The Court refused

to find that this arrest and search were justified by *Terry* because there were no “reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*.” *Id.* at 172 (emphasis in original, *citing Terry*, 392 U.S. at 21).

Similarly, the *Kennedy* case involved a legal stop of a vehicle based upon probable cause that the defendant was involved in a drug transaction based “on an informant tip” as well as the officer’s personal observations. As the Court reasoned:

The two independent sources of information each provided support for the other’s veracity. On the basis of the two tips, the officer’s experience with drug investigations, and his own eye witness corroboration of some of the information, Officer Adams had sufficient articulable suspicion to stop Kennedy as he drove away from the Smith house.

107 Wn.2d at 9.

The facts of *Kennedy* stand in stark contrast to the pretextual basis for stopping Roger Wright based upon his headlights, especially in light of Officer Gregorio’s repeated assertions that he had a generalized concern about the entire neighborhood being “a hot spot for stolen cars, burglaries, and car prowls.” This kind of generalized search is exactly what the Fourth Amendment, as well as Article I, Section 22 of the Washington Constitution, strictly forbid. *See* Section D, below.

Appellant's position is further supported by *State v. Freepons*, 147 Wn.App. 689, 197 P.3d 682 (2008), where the Court suppressed evidence of a marijuana operation inside appellants' home because the police lacked a warrant or probable cause to enter the house and failed to give warnings pursuant to *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), advising the occupants of their right to refuse to give consent for the search. The Court reasoned that, "because the deputies' primary purpose was to investigate a crime and look for the perpetrator," the search was illegal without *Ferrier* warnings. *Id.* at 683. That case is pertinent because of Officer Gregorio's thinly veiled and clearly enunciated concerns about the suspicious nature of the neighborhood in general.

**D. Generalized Concerns are Insufficient for a Terry Stop**

A *Terry* stop requires something more than a generalized suspicion or a hunch. *See State v. Martinez*, 135 Wn.App. 174, 182 (2006). In fact, there must be some suspicion of a particular crime connected to a particular person, rather than a mere generalized suspicion that the person detained may have been up to no good. *See id.* Innocuous facts do not justify a police investigation or a subsequent seizure. In *State v. Richardson*, 64 Wn.App. 693, 825 P.2d 754 (1992), the court held that a person's presence in a high crime area does not give rise to a reasonable suspicion to stop him.

The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. *See generally United States v. Cortez*, 449 U.S. 411 (1981). The defense submits that Officer Gregorio's conduct was unreasonable from its inception. Simply put, the deputy had no legitimate cause – and certainly no specific or articulable facts that Mr. Wright was involved in criminal conduct – when he decided to pull him over. *See, e.g., State v. Rowe*, 63 Wn.App. 750 (1991) (no reasonable basis to stop based upon gang signals); *State v. Larsen*, 93 Wn.2d 638 (1980) (no reasonable basis to question car occupants based upon “an inarticulable hunch”).

Here, the officer had less to go on than the investigators in *State v. Gleason*, 70 Wn.App. 13 (1993), where the court held that a stop was not justified where the defendant was seen leaving an apartment complex with a history of drug sales.

**E. Officer Gregorio's Mistaken Belief Does Not Render the Stop Legal**

In this case, Mr. Wright had not committed a crime and Officer Gregorio's questionable claim that he erroneously thought Roger Wright had an obligation to turn on his headlights is clearly insufficient to justify the stop and subsequent search.

In *State v. Melrose*, 2 Wn.App. 824, 470 P.2d 552 (1970), the Court held very clearly that an officer is allowed to arrest based on an excusable mistake of fact but not on an inexcusable mistake of law. *Id.* at 828. More recently, in *State v. Nall*, 117 Wn. App. 647, 72 P.3d 200 (2003), the Court rejected “a good faith exception to the probable cause requirement” under Washington’s Constitution because Article I, Section 7, “unlike the federal constitution, explicitly protects the privacy rights of Washington citizens. . . . As a result, we have yet to recognize a ‘good faith’ exception to the valid warrant requirement.” *Id.* at 651-52 (numerous citations omitted). In that case, even though the police acted on an Oregon warrant, which proved to be invalid, the Court suppressed evidence seized in connection with the Defendant’s arrest, which included drugs and drug paraphernalia.

**F. The Search Was Invalid as a Pretext**

These facts also strongly justify Appellant’s argument that this was a pretext search within the meaning of *State v. Ladson*, 138 Wn.2d 343, 909 P.2d 833 (1999). See Appellant’s Opening Brief at 16-21. As noted in *State v. Hoang*, 101 Wn.App. 732, 738, 6 P.3d 602 (2000): “The essence of every pretextual traffic stop is that ‘the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.’” *Citing Ladson*, 138 Wn.2d at 349.

In *Hoang*, as opposed to this case, the officer observed the defendant engaged in drug transactions as he drove down the street, stopping several times to contact pedestrians late at night, but the officer did not stop the vehicle until it clearly violated the law by making a left-hand turn without signaling. After the stop, the driver was unable to “produce a driver’s license,” and a records check determined that Hoang’s “license had been suspended,” so the officer arrested him. Only then the officer “proceeded to search the passenger compartment” finding cocaine “in plain view, in the space between the driver’s seat and driver’s door, near where Hoang had rested his right hand on his left hip.” *Id.* at 736.

In this case, the opposite was true because Mr. Wright had not committed a traffic infraction nor did the officer make any observations consistent with illegal conduct, such as drug dealing. *Accord: State v. Larson*, 88 Wn.App. 849, 946 P.2d 1212 (1997) (search incident to stop was valid because defendant was “speeding in his pickup truck” and attempted to elude the officer; furtive movements then justified limited *Terry* search resulting in seizure of syringe and narcotics in plain view).

### **III. CONCLUSION**

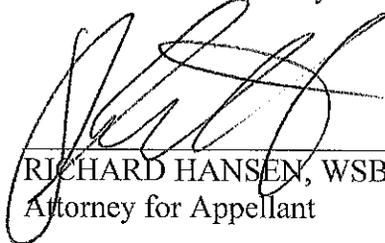
It is clear from his testimony and from his incident report that Officer Gregorio’s overriding concern was his general belief “that the area was a hot spot for stolen cars, burglaries and car prowls.” RP 15, 20-21.

That is why he immediately called for a backup, and discussed these “hot spot” concerns with Roger Wright as soon as he was pulled over. This kind of investigative approach violates the fundamental basis of the Fourth Amendment prohibiting the issuance of “general warrant” as well as forming the basis for suppression under the pretext doctrine. *Cf. Andresen v. Maryland*, 427 U.S. 463, 479-80 (1976) and *State v. Ladson*, *supra*.

Similarly, this Court should resoundingly reject the State’s argument that “ignorance of the law” is an excuse when applied to police officers who erroneously believe a driver should have his headlights on when the law does not require it.

Accordingly, this Court should invalidate the stop and suppress all evidence that was seized following Mr. Wright’s unlawful arrest and the search of his vehicle.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of March, 2009.

  
\_\_\_\_\_  
RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

**PROOF OF SERVICE**

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 12<sup>th</sup> day of March, 2009, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Reply Brief directed to attorney for Respondent:

Stephen Hobbs  
Deputy Prosecuting Attorney  
Appellate Division  
King County Prosecutor's Office  
516 Third Ave., W554  
Seattle, WA 98104

And mailed to Appellant:

Roger Sinclair Wright  
3208 - 25<sup>th</sup> Ave. S.  
Seattle, WA 98144

DATED at Seattle, Washington this 12<sup>th</sup> day of March, 2009.

  
\_\_\_\_\_  
RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

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