

FILED
DEC 27 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29164-2-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

GILBERTO CHACON ARREOLA,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John M. Antosz, Suppression Hearing
Honorable Evan E. Sperline, Jury Trial

APPELLANT'S OPENING BRIEF
(Corrected)

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....5

1. Mr. Chacon’s right to privacy under Article 1, Section 7 of the Washington Constitution was violated because the traffic stop was a pretext to investigate the officer’s suspicion of criminal activity unrelated to the traffic infraction.....6

a. Article 1, section 7’s protection against warrantless seizures is violated when a traffic stop is used as a pretext to avoid the warrant requirement.....6

b. The trial court did not apply the *Ladson* test but instead looked solely at one of the officer’s subjective reasons for the stop.....7

2: The stop of Chacon’s car was not justified at its inception as a Terry stop because there was no reasonable and articulable suspicion of criminal conduct.....14

D. CONCLUSION.....16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	14
<u>Whren v. United States</u> , 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).....	6, 7, 9
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	14

<u>State v. Broadway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	5
<u>State v. DeSantiago</u> , 97 Wn. App. 446, 983 P.2d 1173 (1999).....	9, 13
<u>State v. Jeannotte</u> , 133 Wn.2d 847, 947 P.2d 1192 (1997).....	5
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	14, 15
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	6, 7, 8, 9, 13
<u>State v. Larson</u> , 93 Wn.2d 638, 611 P.2d 771 (1980).....	14
<u>State v. Meckelson</u> , 133 Wn. App. 431, 135 P.3d 991 (2006), <i>rev. denied</i> , 159 Wn.2d 1013 (2007).....	8
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	7
<u>State v. Montes-Malindas</u> , 144 Wn. App. 254, 182 P.3d 999 (2008).....	8, 9, 10, 11, 13
<u>State v. Myers</u> , 117 Wn. App. 93, 69 P.3d 367 (2003).....	6
<u>State v. Nichols</u> , 161 Wn.2d 1, 162 P.3d 1122 (2007).....	13
<u>State v. Ross</u> , 145 Wn.2d 1016, 41 P.3d 483 (2002).....	5
<u>State v. Samsel</u> , 39 Wn. App. 564, 694 P.2d 670 (1985).....	15
<u>State v. Thornton</u> , 41 Wn. App. 506, 705 P.2d 271 (1985).....	15
<u>State v. Tijerina</u> , 61 Wn. App 626, 811 P.2d 241 (1991).....	14
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	14

Statutes

U.S. Const. amend. 4.....	6, 7, 9
WA Const. art. 1 § 7.....	6, 7

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 2.3 at CP 47:

2.3 Upon arrival in the area of Rd. 24 SW, Officer Valdivia located a vehicle matching the description of the suspect vehicle, but did not initially observe any DUI-related driving. Officer Valdivia followed behind the vehicle for approximately ½ mile, which took about 30 to 45 seconds. CP 47.

2. The trial court erred in entering Finding of Fact 2.5 at CP 47:

2.5 Officer Valdivia’s primary motivation in pulling the car over was to investigate the reported DUI, but he would have stopped the vehicle anyway for the exhaust infraction even without the previous report. These are not inconsistent with one another. The officer’s investigation of the DUI was not the sole reason for the stop. CP 47.

3. The trial court erred in entering Finding of Fact 2.6 at CP 47:

2.6 Officer Valdivia would have stopped the vehicle for the exhaust [violation] because he was out “with” the vehicle and he commonly stops vehicles for exhaust violations. “With” a vehicle according to Officer Valdivia means following and observing a vehicle. The court found Officer Valdivia credible as a witness, including when he opined that he probably would have pulled the vehicle over, once “with” it, even if he wasn’t suspicious of a DUI. CP 47.

4 The trial court erred in entering following Conclusions of Law at

CP 48:

3.1 The stop in this case by Officer Valdivia would have occurred regardless of the report of the possible DUI. This stop was not unconstitutionally pretextual under State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) or State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173 (1999).

...

3.3 The muffler/exhaust violation was an actual reason for the stop because the court concludes the officer would have stopped the vehicle, once following it, even if he wasn't suspicious of a DUI, and even though his primary purpose for stopping the vehicle was to further investigate a possible DUI.

5. The trial court erred in denying the CrR 3.6 motion to suppress evidence.

Issues Pertaining to Assignments of Error

1. Does a *de novo* review of the totality of the circumstances demonstrate the stop of the vehicle for a traffic infraction was a pretext to investigate the officer's suspicions of other criminal activity?¹

2. Was the stop of the vehicle unjustified at its inception as an improper Terry stop, where there was no reasonable and articulable suspicion of criminal conduct?²

B. STATEMENT OF THE CASE

City of Mattawa Police Officer Anthony Valdivia responded to a report of a possible DUI in progress, in Grant County, Washington. RP³ 17, 19; 4/14/10 RP 41. The officer followed and eventually stopped a car

¹ Assignments of Error 1, 2, 3, 4 and 5.

² Assignment of Error 5.

³ The pre-trial and post-trial proceedings, including the suppression hearing, are contained in one volume and will be referred to as "RP ____". The two days of trial are reported in two separate volumes and will be referred to by date, e.g. "4/14/10 RP ____".

matching the report description, which was being driven by the defendant, Gilberto Chacon Arreola.⁴ RP 17–26.

Prior to trial, defense counsel filed a CrR 3.6 motion to suppress, contending that the stop was pretextual and therefore illegal. CP 17–25. In part, the officer testified at the suppression hearing as follows.

Officer Valdivia was dispatched during daylight hours of an early October evening to a “possible DUI in progress”, and given a vehicle description. RP 18–20. He responded to an area several miles out into the county from the Mattawa city limits. RP 19, 42; 4/15/10 RP 30–31.

Officer Valdivia encountered the car southbound on Road R, about halfway between Roads 25 and 26, which run east and west. RP 20–21. As the officer came up behind, he immediately heard a loud noise from the car’s after-market exhaust, which is a traffic infraction.⁵ RP 34–35.

⁴ The documents in the superior court file use the name “Gilberto Chacon Arreola” in the pleading captions. Because the defendant refers to himself as “Gilberto Chacon”, only the surname “Chacon” will be used throughout this brief. 4/14/10 RP 6.

⁵ “(3) No person shall modify the exhaust system of a motor vehicle in a manner which will amplify or increase the noise emitted by the engine of such vehicle above that emitted by the muffler originally installed on the vehicle, and it shall be unlawful for any person to operate a motor vehicle not equipped as required by this subsection, or which has been amplified as prohibited by this subsection. A court may dismiss an infraction notice for a violation of this subsection if there is reasonable grounds to believe that the vehicle was not operated in violation of this subsection.” RCW 46.37.390(3).

Officer Valdivia didn't pull the car over for the muffler violation at that time because he "was intent on looking for visual cues with the report of the possible DUI." RP 35–36.

The officer followed the car south for about 45 seconds, travelling a distance of approximately ½ mile, and saw no evidence of DUI driving. RP 21, 35.⁶

The driver, Chacon, then made a legal left turn onto Road 26, heading eastbound. RP 21. As the car accelerated, the muffler noise increased. RP 41–42, 45. The officer followed the car onto Road 26 and at some point activated his overhead lights and then his siren and "intersection clearing horn" to get the car to pull over. RP 22–23, 35.

Approximately three quarters of a mile after the left turn, Chacon parked in the yard of a residence on Road 26. RP 23. Officer Valdivia did not tell Chacon he was being stopped for having committed a traffic infraction, although the officer later issued a citation for the exhaust violation. RP 24–26.

⁶ Assignment of Error 1. The court's finding of fact states that the officer followed Chacon for "30 to 45 seconds." Officer Valdivia originally testified it took 15 seconds to travel the ½ mile distance. RP 21. In response to the Court's questioning, the officer agreed that it more likely took approximately 45 seconds. RP 35.

The trial court denied the motion to suppress, and entered written findings of fact and conclusions of law. RP 62–69; CP 46–49. Following a jury trial, Chacon was found guilty of felony driving while under the influence as charged.⁷ CP 1, 74. The judge imposed a standard range sentence. RP 87. This appeal followed. CP 96–97.

C. ARGUMENT

A trial court's denial of a suppression motion is reviewed by examining whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. State v. Ross, 145 Wn.2d 1016, 41 P.3d 483 (2002). Substantial evidence is that sufficient to persuade a fair-minded person of the truth of the declared premises. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). This Court reviews the trial court's conclusions of law *de novo*. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

⁷ Prior to trial, the defendant pled guilty to Count 2, first degree driving with license suspended. CP 1, 76.

1. Mr. Chacon’s right to privacy under Article 1, Section 7 of the Washington Constitution was violated because the traffic stop was a pretext to investigate the officer’s suspicion of criminal activity unrelated to the traffic infraction.

a. Article 1, section 7’s protection against warrantless seizures is violated when a traffic stop is used as a pretext to avoid the warrant requirement. A pretextual traffic stop occurs when police make a stop, not to enforce the traffic code, but to conduct an investigation unrelated to driving. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Pretextual stops “generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for which the officer does not have probable cause.” State v. Myers, 117 Wn. App. 93, 94-95, 69 P.3d 367 (2003). The central feature of a pretextual stop is that the stop is a pretext for an investigation to discover grounds for a more extensive search, regardless of whether the pretextual arrest was facially valid. Ladson, 138 Wn.2d at 353-54.

Pretextual stops do not violate the Fourth Amendment, so long as the underlying stop is based on an actual traffic violation. Whren v. United States, 517 U.S. 806, 809-13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Under the federal standard, the motivations of the individual

officers involved are entirely irrelevant to the determination of the reasonableness of the stop. Id. at 812-13.

However, while pretext stops are permitted under the Fourth Amendment, they are not permitted under article I, section 7 of the Washington Constitution. Ladson, 138 Wn.2d at 352-53, 979 P.2d 833. Under the more restrictive state standard, courts are required to “look beyond the formal justification for the stop to the actual one.” Id. at 353. Nevertheless, the police may still enforce the traffic code, so long as they do not use that authority as a pretext to avoid the warrant requirement for an unrelated criminal investigation. Id. at 357. When determining if a stop is pretextual, courts look to the totality of the circumstances. Id. at 358-59. The court must look both to the objective reasonableness of the officer's behavior and to the subjective intent of the officer. Id. at 359.

b. The trial court did not apply the *Ladson* test but instead looked solely at one of the officer’s subjective reasons for the stop. This Court reviews conclusions of law concerning a motion to suppress evidence *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Here, the court concluded that the stop of Chacon’s car was not pretextual because Officer Valdivia was enforcing the traffic code and would have stopped it for the exhaust violation regardless of the report of a possible

DUI and the officer's stated primary purpose to stop the car to further investigate the possible DUI. Conclusions of Law 3.1 and 3.3. "It is not enough for the State to show there was a traffic violation. The question is whether the traffic violation was the real reason for the stop." State v. Montes-Malindas, 144 Wn. App. 254, 261, 182 P.3d 999 (2008) (*quoting State v. Meckelson*, 133 Wn. App. 431, 437, 135 P.3d 991 (2006), *rev. denied*, 159 Wn.2d 1013 (2007)). The trial court's reasoning misses the point because the court did not address the officer's primary subjective intent or the objective reasonableness of his actions in its factual findings or conclusions of law.

In Ladson, gang emphasis officers testified that while they did not make routine stops on patrol, they used the traffic code to pull over people in order to initiate contact and questioning. Ladson, 138 Wn.2d at 346. The officers in Ladson were familiar with Ladson's co-defendant because of an unsubstantiated street rumor that he was involved in drugs, and accordingly stopped his car on the grounds that his license plate tabs were expired. Id. They used this pretext to arrest Ladson's co-defendant and search Ladson. Id. The Washington Supreme Court reversed the conviction, holding the pretextual stop violated the Washington Constitution. Id. at 352--53.

Similarly, in DeSantiago, an officer watching a narcotics hotspot pulled over an automobile for an illegal left turn in order to investigate whether the driver was involved in the narcotics activity. State v. DeSantiago, 97 Wn. App. 446, 448, 983 P.2d 1173 (1999). This Court reversed, finding the stop was pretextual. Id. at 452. In both DeSantiago and Ladson, presumably relying upon the Fourth Amendment analysis of Whren, *supra*, the officers testified candidly about their improper subjective motives.

Since Ladson, diving improper motives from officers' testimony has required a more nuanced inquiry, as officers no longer admit to the use of pretext. This Court looked at the totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions in Montes-Malindas, *supra*, finding a pretext stop when an officer stopped a vehicle for driving without its headlights. The officer in Montes-Malindas was in a parking lot investigating an unrelated case when he noticed people in a van acting nervously and changing vehicles and seats within a vehicle; he decided to watch them when he completed his interview. Montes-Malindas, 144 Wn. App. at 256. The officer saw the people enter and leave a drug store and followed as this car traveled down the street without its headlights on. Id. at 256-57. The officer

stopped the car for the headlight infraction, but not until after the headlights were activated. Id. at 257.

Although the trial court believed the officer's testimony that he did not follow the van in hopes of finding a legal reason to stop it, this Court found his testimony about his subjective intent was not dispositive. Montes-Malindas, 144 Wn. App. at 260. The officer had testified he was suspicious of the activity he saw earlier and admitted those suspicions were in his mind when he decided to stop the van. Id. at 261. This Court also looked to the objective facts, such as the officer's action in going to the passenger side of the van and speaking to the passengers rather than the driver, and stopping the car only after it had turned on its headlights, which suggested he was conducting surveillance on the van. Id. at 261–62. Based on the totality of the circumstances, this Court therefore concluded it was a pretext stop. Id. at 262.

Here, the trial court believed Officer Valdivia's statements that the reason for stop was the modified exhaust traffic code violation and that the officer would have pulled the car over even if he weren't suspicious of a DUI. RP 23, 38, 43. However, this belief is not supported by substantial evidence when viewing the totality of the officer's testimony.

Officer Valdivia testified that in the past he has stopped drivers for a defective exhaust more than ten times. RP 22, 38. He doesn't always pull people over for driving with a loud muffler because it's not a mandatory stop and he sometimes doesn't have time to deal with it. RP 38–39. If the officer is simply following someone that has a bad muffler, he won't necessarily pull the person over. RP 39. If he's instead "with" a vehicle, i.e., actively investigating a particular car, the officer doesn't always pull it over for having a bad muffler. RP 40–41. While Officer Valdivia suggests the problem of noise from modified exhausts is common and annoying in his local community, it is unreasonable to assume that loud mufflers pose an equal problem several miles out into the countryside and away from town. RP 44. By his own testimony, Officer Valdivia pulled Chacon's car over because this was the particular car he was investigating as a possible DUI in progress, and the stop could lead to a warning about the loud exhaust or possibly yield evidence/confirmation of DUI. RP 38–41. In stopping the car, he was primarily motivated to further investigate whether the driver was impaired. RP 37, 46.

What an officer has done or might do on other occasions is irrelevant to what the officer did do in this case. Montes-Malindas, 144 Wn. App. at 262. When viewed in totality, Officer Valdivia's testimony

does not establish with any certainty when he in fact will make a stop based solely on a defective exhaust. As such, the evidence does not support the trial court's conclusion that the stop in this case would have occurred regardless of the report of a DUI in progress.

Moreover, the totality of the circumstances shows the stop was clearly a pretext for a criminal investigation. Subjectively, Officer Valdivia had seen no evidence of impaired driving and candidly testified his primary motive for initiating the stop was to investigate further in the hopes of finding other evidence of a possible DUI.

Objectively, the officer's actual behavior was unreasonable if the motive was simply to issue a traffic citation. Officer Valdivia noticed the noise from the defective exhaust immediately upon locating Chacon's car, yet he followed the car for 45 seconds and over a half a mile before attempting to stop the car. RP 34–35. The officer admitted he waited so long because he was still investigating the possible DUI and looking for evidence of impaired driving, but he couldn't find such evidence. RP 35–37. And when Officer Valdivia approached the parked car, he did not tell Chacon why he was being stopped or that he was being stopped for having a defective muffler. Looking at the officer's subjective motive and

objective actions, the traffic stop was a pretext to search for evidence of criminal activity.

The trial court here misapplied Ladson's test. In evaluating the propriety of the stop, the court focused only on the officer's secondary reason for stopping the car and ignored the officer's testimony that his primary reason for the stop was to continue to investigate the report of a possible DUI despite his inability to observe any erratic driving. The court further failed to make any findings or conclusions that Officer Valdivia's behaviors were reasonable given the circumstances. The record does not establish that the officer would have stopped the car for the traffic infraction even if he had not been responding to a report of a possible DUI in progress. Conclusions of Law 3.1 and 3.3; Ladson, 138 Wn.2d at 358–59; State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The pretext stop was unconstitutional under Ladson. When an unconstitutional seizure occurs, all subsequently recovered evidence becomes fruit of the poisonous tree and must be suppressed. Ladson, 138 Wn.2d at 359; Montes-Malindas, 144 Wn. App. at 259. Accordingly, the evidence gathered as a result of the stop should have been suppressed, and Chacon's convictions must be reversed and remanded for dismissal. Ladson, 138 Wn.2d at 360; DeSantiago, 97 Wn. App. at 453.

2: The stop of Chacon's car was not justified at its inception as a Terry stop because there was no reasonable and articulable suspicion of criminal conduct.

Another exception to the warrant requirement is an investigative stop pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The stop of an automobile is a seizure of its occupants and must therefore be reasonable. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); State v. Tijerina, 61 Wn. App 626, 629, 811 P.2d 241 (1991). If the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. Kennedy, 107 Wn.2d at 4, 726 P.2d 445, (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980)).

In evaluating investigative stops, the court must determine: (1) Was the initial interference with the suspect's freedom of movement justified at its inception? (2) Was it reasonably related in scope to the circumstances which justified the interference in the first place? Tijerina 61 Wn. App at 629, 811 P.2d 241 (citing Terry v. Ohio, *supra*); State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

It is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. Kennedy, 107 Wn.2d at 5-6, 776 P.2d 445. There must be sufficient articulable facts supporting a reasonable suspicion of criminal activity to justify a temporary investigative stop. See State v. Thornton, 41 Wn. App. 506, 705 P.2d 271 (1985); State v. Samsel, 39 Wn. App. 564, 694 P.2d 670 (1985).

Herein, the “facts” preceding the stop did not support a reasonable suspicion of criminal activity by Chacon. The officer was responding to a report of a “possible DUI in progress” and given a vehicle description. Officer Valdivia had no information about the situation prompting the call, such as causing an accident, erratic driving or even an instance of road rage. Officer Valdivia simply got a bare-bones call and admitted he was simply looking for any signs of driver impairment. He searched for a car matching the description. After finding the car and while following it for 45 seconds and over half a mile, the officer observed no erratic driving or failure to signal a left turn or other possible indicia of impairment.

“I at that point did not have driving for DUI.” RP 32. Officer Valdivia then followed the car when it turned left “because I’d been given

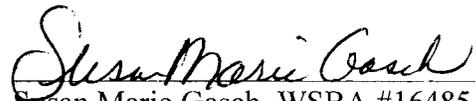
a report of a possible DUI.” Id. He turned on his overhead lights to attempt to pull the car over for a traffic infraction “because – I was there to investigate the possibility of a DUI.” RP 35. “The activation of the lights, too, was – was to – pull the subject over, because not every DUI – not every DUI expresses, so to speak, lane travel – or severe lane travel or slight lane travel. And this has been my experience. But at that point I had nothing --.” RP 37.

The totality of circumstances known to Officer Valdivia at the inception of the stop was that Chacon was driving in a normal manner and observing the rules of the road. These facts are insufficient to support a reasonable suspicion of criminal activity, and did not justify a temporary investigative stop. The stop was therefore unlawful.

D. CONCLUSION

For the reasons stated above, this Court should reverse the trial court’s denial of the motion to suppress evidence, and reverse Chacon’s convictions with prejudice.

Respectfully submitted December 26, 2010.


Susan Marie Gasch, WSBA #16485

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DIVISION III

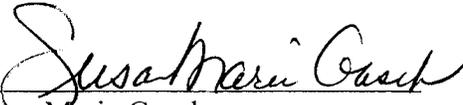
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)
)
GILBERTO CHACON-ARREOLA,) PROOF OF SERVICE (RAP 18.5(b))
Defendant/Appellant.)

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 27, 2010, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or personally served, a true and correct copy of brief of appellant (corrected):

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