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Court of Appeals
Division III
State of Washington

29164-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

86610-4

STATE OF WASHINGTON,

Petitioner,

v.

GILBERTO CHACON ARREOLA,

Respondent.

FILED
OCT 18 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. IDENTITY OF RESPONDENT	1
II. CITATION TO THE COURT OF APPEALS OPINION..	1
III. ISSUE	1
IV. STATEMENT OF THE CASE	1-4
V. ARGUMENT	4-12
A PATROL OFFICER SHOULD NOT BE DISCOURAGED FROM ENFORCING THE TRAFFIC CODE SIMPLY BECAUSE THE OFFICER SUSPECTS THE OFFENDER MAY BE COMMITTING A MORE SERIOUS OFFENSE	4-12
Considerations governing review	4-5
Background of State v. Ladson and the definition of a pretextual stop	5-6
Division III's incorrect alteration of the Ladson test.....	7
The correct application of the Ladson test.....	8-12
VI. CONCLUSION	12

TABLE OF AUTHORITIES

<i>Cases</i>	Page
<u>State v. Arreola</u> , LEXIS 2144 (2011).....	1, 7
<u>State v. DeSantiago</u> , 97 Wn. App. 446, 983 P.2d 1173 (1999) ..	9, 10
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	3 - 11
<u>State v. Ming Hoang</u> , 101 Wn. App. 732, 6 P.3d 602 (2000).....	8, 11
<u>State v. Myers</u> , 117 Wn. App. 93, 69 P.3d 367 (2003).....	9, 10
<u>State v. Nichols</u> , 161 Wn.2d 1, 162 P.3d 1122 (2007)	8 - 10
<u>Whren v. United States</u> , 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).....	5

Statutes and Other Authorities

RAP 13.4.....	1,4
RCW 46.37.390.....	2
U.S. Const. amend. IV	5
Wash. Const. art. 1 § 7.....	5, 6

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Petitioner herein.

II. CITATION TO THE COURT OF APPEALS OPINION

The opinion of Division III of the Court of Appeals in *State v. Arreola*, LEXIS 2144 (2011) is attached to this petition in accordance with RAP 13.4(c)(9). The opinion was filed on September 15, 2011.

III. ISSUE PRESENTED FOR REVIEW

Must a police officer ignore violations of the traffic code, which the officer would ordinarily enforce, simply because the officer suspects that the offender may be committing a more serious offense?

IV. STATEMENT OF THE CASE

On October 10, 2009, Officer Tony Valdivia, a Mattawa, Washington police officer, was on routine patrol. Clerk's Papers (CP) at 47. Officer Valdivia's primary responsibility involved enforcing the traffic code. *Id.* Early in the evening on October 10th, Officer Valdivia received a report of a vehicle that was possibly being driven under the influence. *Id.* Officer Valdivia soon located the vehicle and began to follow it to see if there were any indicia that the driver was under the

influence. *Id.* While traveling behind the vehicle for 30 to 45 seconds Officer Valdivia did not observe any readily apparent signs of impaired driving--but he did notice that the vehicle had an altered muffler/exhaust in violation of RCW 46.37.390. *Id.* As a matter of practice, Officer Valdivia regularly stops vehicles for an altered muffler/exhaust, especially if he is already traveling behind them. CP at 47. Therefore, Officer Valdivia activated his lights and siren and the vehicle, driven by Gilberto Chaco Arreola, eventually stopped. CP at 47.

Until Officer Valdivia actually contacted Mr. Chacon, he treated the situation just like any other traffic stop. CP at 48. However, upon contacting Mr. Chacon, Officer Valdivia observed Mr. Chacon was exhibiting signs of intoxication. *Id.* Officer Valdivia also discovered Mr. Chacon had outstanding warrants. *Id.* Officer Valdivia arrested Mr. Chacon based on the outstanding warrants, issued him a citation for the muffler/exhaust infraction and failing to provide proof of insurance, and referred a report to the Prosecutor's Office, resulting in charges of Driving Under the Influence (DUI). CP at 48.

After an extensive examination of Officer Valdivia during a pre-trial suppression hearing, the trial court concluded that Officer Valdivia had two motives for stopping Mr. Chacon. On the one hand, Officer Valdivia was interested in whether Mr. Chacon was driving under the

influence and the court concluded this was Officer Valdivia's primary interest in the stop. CP at 48. However, the court concluded Officer Valdivia also wanted to cite Mr. Chacon for the muffler/exhaust violation and he would have done so regardless of his interest in whether Mr. Chacon was driving under the influence. CP at 48.¹ Accordingly, the trial court denied Mr. Chacon's motion to suppress because it determined that the muffler/exhaust infraction was an actual, independent, reason for the stop, and was not unconstitutionally pretextual under *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). CP at 48-49.

At trial, Mr. Chacon was convicted of felony DUI² and Driving While License Revoked in the 1st Degree. See RP 77-78 (6/15/2010). Mr. Chacon appealed his convictions, citing error in the trial court's findings of fact and conclusions of law stemming from the suppression hearing. Division III of the Court of Appeals upheld the trial court's findings of fact, but disagreed with its conclusion that the stop did not violate this Court's holding in *State v. Ladson*. *State v. Arreola*, LEXIS 2144 at 14-15. The Court of Appeals concluded that even though Officer Valdivia genuinely intended to enforce the traffic code (ie. the exhaust/muffler

¹ RP at 43-46 is attached as Exhibit 1 and helps clarify the trial court's finding. At the end of Officer Valdivia's questioning, the court asked a number of clarifying questions which appear to have formed the basis for the judge's findings and conclusions.

² Mr. Chacon stipulated that he had been convicted of three prior DUI offenses and one DUI offense that was amended to Reckless Driving within the previous 10 years, thereby making this a *felony* DUI offense. CP at 50; RP at 78 (6/15/2010).

infraction) his primary interest in whether Mr. Chacon was driving under the influence compelled the court to find the stop was pretextual. *Id.* at 15-16. The State now petitions this Court to reverse the Court of Appeals, clarify its holding in *State v. Ladson*, and reject the “primary purpose” or “primary reason” test created by Division III.

V. ARGUMENT

A PATROL OFFICER SHOULD NOT BE DISCOURAGED FROM ENFORCING THE TRAFFIC CODE SIMPLY BECAUSE THE OFFICER SUSPECTS THE OFFENDER MAY BE COMMITTING A MORE SERIOUS OFFENSE.

Considerations governing review

The State petitions this Court to accept review of this case and decide whether a patrol officer must ignore violations of the traffic code, which the officer would ordinarily enforce, simply because the officer suspects that the offender may be committing a more serious offense. Under RAP 13.4(b) there are four different considerations governing whether this Court will accept a petition for review. All four of these considerations are present in the current case: (1) the decision is in conflict with *State v. Ladson*, a Washington State Supreme Court decision; (2) the decision is in conflict with *State v. Ming Hoang*, a Division I decision; (3) the issue presents a significant question of law under Article I, section 7 of

the Washington State Constitution; and (4) the issue involves a substantial public interest regarding restrictions on officers legitimately enforcing the traffic code. Therefore, the State respectfully asks this Court to grant the State's petition for review and overturn the decision of Division III of the court of appeals.

Background of State v. Ladson and the definition of a pretextual stop

Over 10 years have passed since this Court decided *State v. Ladson*. In *Ladson*, officers were on proactive gang patrol and did not make routine traffic stops. *Ladson* 138 Wn.2d at 345-46. Instead, these officers selectively used traffic violations to investigate potential gang activity. *Id.* at 346. On one particular occasion the officers tailed a vehicle that interested them "looking for a legal justification to stop the car" and eventually did so based on a traffic violation. *Id.* at 346. Although the United States Supreme Court held in *Whren v. United States* that such traffic stops did not violate the Fourth Amendment, *see Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 1774-76, 135 L. Ed. 2d 89 (1996), this Court departed from the federal holding under an analysis of Article I, section 7 of the Washington State constitution. *Ladson*, 138 Wn.2d at 348-49.

Finding that pretextual stops violated article I, section 7, of the Washington State Constitution, this Court adopted a test, combining both

objective and subjective elements, to assist in determining whether a stop was pretextual. *Ladson*, 138 Wn.2d at 358-59. Under the *Ladson* test, “[w]hen determining whether a given stop is pretextual, 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. *Id.*

This Court defined a pretextual traffic stop as one in which “the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.” *Ladson*, 138 Wn.2d at 349. The definition was expounded further as “a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason.” *Id.* at 351. The *Ladson* test and its definitions of pretext have been applied in a large number of cases in each division of the Court of Appeals with conflicting interpretations and results. In the present case, Division III’s determination of what constitutes a pretextual stop presents a restrictive and potentially damaging alteration to what this Court held in *Ladson*.

Division III's incorrect alteration of the Ladson test

In the present case Division III “accept[ed] the trial court’s finding that the muffler violation was ‘an actual reason’ for the stop.” *State v. Arreola*, LEXIS 2144 at 14-15 (emphasis original). However, the two judge majority held it was not “the actual reason for the stop...” *Id.*(emphasis original). The majority felt Officer Valdivia was more interested in whether Mr. Chacon was driving under the influence and that this was dispositive for finding pretext. *Id.* at 14-15. The majority accepted but disregarded the fact that Officer Valdivia would have stopped Mr. Chacon for the muffler/exhaust infraction independent of his concern for whether Mr. Chacon was driving under the influence.³ *Id.* Therefore, the majority felt bound to suppress all evidence resulting from the stop. *Id.* Judge Brown, dissenting from the two judge majority, noted the flaw in this reasoning when he wrote “[c]ertainly, a stop can serve multiple, legal, complimentary purposes so long as an actual stop reason passes legal muster.” *Id.* at 18-19 (Brown, J. (dissenting)).

³ The court wrote that “[w]hether Officer Valdivia would have pulled over Mr. Chacon for the muffler violation had he not been concerned about drunk driving is irrelevant to our analysis; our concern is only with why the stop was made in this particular case. While we accept the trial court’s finding that the muffler violation was ‘an actual reason’ for the stop, it was clearly subordinate to the officer’s desire to investigate the DUI report. The muffler violation therefore cannot be characterized as *the* actual reason for the stop.” *State v. Arreola*, LEXIS 2144 at 14-15.

The correct application of the Ladson test

The inquiry before this Court is to determine which interpretation of *Ladson* is correct: (a) a traffic violation must be an actual reason for a stop, and not just an excuse to permit an unlawful investigation (as interpreted by Division I in *State v. Ming Hoang* and by the dissent in the present case); or (b) a traffic violation must be the only reason for a stop in order to not be considered a pretext (as interpreted by the majority in the present case).

This Court has given passing indications in both *Ladson* and *Nichols* that a traffic violation must be an actual reason for a stop as opposed to the only reason for a stop. In *Ladson*, this Court wrote that “the police may enforce the traffic code, a function similar to the community caretaking function....They may not, however, use that authority as a pretext or justification to avoid the warrant requirement for an unrelated criminal investigation.” *Ladson*, 138 Wn.2d at 357. In *Nichols*, this Court cited favorably to Division I of the Court of Appeals, which wrote that “[u]nder *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.” *State v.*

Nichols, 161 Wn.2d 1, 11, 162 P.3d 1122 (2007)(citing *State v. Minh Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000)).

Put simply, this language suggests that when an officer stops an individual for a traffic infraction, but is also interested in unsubstantiated potential criminal activity, the traffic infraction must be an actual reason for the stop and not merely an excuse to investigate other criminal activity. This interpretation of *Ladson* provides a workable definition of pretext. Under this understanding of *Ladson* an officer is not forced to either a) deliberately avoid enforcing the traffic code; or b) close his or her eyes and ears to other suspected criminal activity that may have aroused the officer's suspicions, but did not ultimately influence the decision of whether to stop the vehicle.⁴

Additionally, this understanding of *Ladson* is supported by subsequent decisions from this Court and from Division I. In *Nichols* this Court reviewed a number of cases in which a pretextual stop occurred. These cases included *Ladson*, *State v. DeSantiago*, and *State v. Myers*. The *Nichols* court noted that “[i]n each of these cases, officers suspected

⁴ In essence, a “but for” test seems appropriate. A reviewing court should ask “but for the officer’s suspicions of criminal activity, would the officer have stopped the vehicle for the traffic violation?” If the answer is “yes,” a reviewing court should uphold the stop as non-pretextual. Division III even appeared to adopt this type of test in *State v. Meckelson* when it wrote “[t]he question is whether Sergeant Thoma would have done so but for the legally insufficient reason that he thought the driver looked at him funny when he pulled alongside the car. *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006).

criminal activity and followed vehicles waiting for commission of a traffic infraction so the vehicle could be stopped.” *Nichols*, 161 Wn.2d at 12 (citing *State v. Ladson*, 138, Wn.2d at 346; *State v. DeSantiago*, 97 Wn. App. 446, 452, 983 P.2d 1173 (1999); and *State v. Myers*, 117 Wn. App. 93, 69 P.3d 367 (2003)). What made these stops pretextual was that the officers had no intention of enforcing the traffic code. Instead, the officers were merely looking for a reason to stop the suspect vehicles.

In *Ming Hoang*, an officer, on routine patrol duty, suspected an individual was involved in an illegal drug transaction. 101 Wn. App. at 734-35. The officer watched the vehicle make a turn without signaling and stopped the vehicle. *Id.* at 735. The trial court found that the officer would have made the same decision to pull over the individual for failing to signal even if the officer had not just observed the individual acting suspiciously. *Id.* at 737-38; 741. Division I upheld the conviction on these facts and this Court has cited favorably to Division I’s opinion in *State v. Nichols*. See *State v. Nichols*, 161 Wn.2d at 11. Division I concluded that “[u]nder *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. What they may not do is to utilize their authority to enforce the traffic code as a

pretext to avoid the warrant requirement for an unrelated criminal investigation.” *Id.* at 742.

The facts of the present case are analogous to *Ming Hoang*. Officer Valdivia was following Mr. Chacon because he was concerned Mr. Chacon might be driving under the influence. There was no finding, however, that Officer Valdivia was looking for a reason to stop Mr. Chacon to contact him about this suspicion. Instead, Officer Valdivia, a traffic patrol officer, noticed Mr. Chacon was committing a traffic violation which Officer Valdivia intended to enforce regardless of the possible DUI. Therefore, as found by the Court of Appeals, the muffler/exhaust violation was an actual reason for the stop. This finding is not compatible with the Court of Appeals’s conclusion that the stop was pretextual because the officer was still interested in whether Mr. Chacon was driving under the influence. In short, a mixed motive does not equal a false motive. A patrol officer should not be prohibited from enforcing traffic violations simply because the officer was initially drawn to suspicious criminal behavior or, as in this case, a report of impaired driving.

A holding by this Court in this case would help to clarify the *Ladson* test. While a police officer may not actively search for a traffic violation in order to investigate unrelated criminal activity, an officer

should not be discouraged from enforcing the traffic code because he or she suspects criminal activity. This matter is of vital interest to the public and to law enforcement officers who enforce the traffic code. The State respectfully asks this Court to accept review, reverse the Court of Appeals, and uphold the trial court's determination that Officer Valdivia did not use the traffic code as a pretext to contact Mr. Chacon for driving under the influence.

VI. CONCLUSION

This Court should accept review of this case to clarify the definition of pretext. An officer should not ignore violations of the traffic code, which the officer would ordinarily enforce, simply because the officer suspects that the offender may be committing a more serious offense.

Dated this 12th day of October 2011.

D. ANGUS LEE
Prosecuting Attorney

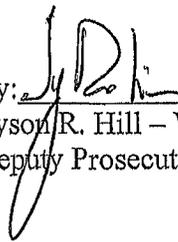
By: 
Tyson R. Hill – WSBA # 40685
Deputy Prosecuting Attorney

EXHIBIT 1

RP at 43-46

INTERROGATION

BY THE COURT:

Q But, -- what was the reason for the stop? It was the -- Well, I'll let you answer that.

A The noise violation.

Q Okay.

A --modified exhaust.

Q And what -- what motivated you to pull him over for that?

A I was out there, investigating the possibility of a DUI.

Q And you believe you would have -- pulled that car over even if you weren't suspicious of a DUI?

A Yes.

Q And the reason for that is--?

A I was with the vehicle.

Q And you've said that when you've been with the vehicles before you didn't -- always pull them over?

A Not always, no.

Q But this one you did because -- why?

A Because I was already with it. And I'll repeat it again,--

Q Okay,--

A --if you want me to.

Q Yeah. Go ahead.

A Yea. It's -- I was there -- the preliminary reason to be out there was to try and identify whether this subject was DUI or not. And -- because I saw no visual cues that the subject was DUI, -- that didn't mean he wasn't, but I had no idea. I -- I had no idea. I was going off of a short-term information report given to dispatch.

Q If you hadn't gotten that call from dispatch but yet had been following the car would you have pulled it over?

A I probably would have, yes.

Q And why do you say that? Even if you hadn't gotten the call from dispatch.

A No particular reason. It's -- you know, there was nothing unusual about the -- vehicle except for the large foil in the back, and the -- modified exhaust. And down in that area, that's -- not necessarily foils any more, but the -- modified exhaust is fairly common. And the guys try and keep it down when they're going by the police officer. And -- and again, I live in the community. It's a thing of -- it -- case and point, a subject was jumping on it the other day. And

I could hear it. I could not see it; I could hear it. And then I was able to come into view of the vehicle, and it's like, "okay, I need to contact this subject." And so I did, and he wound up having a warrant. I had no idea who the guy was. And he was also – didn't have a driver's license. So, it depends – it depends on the individual, it depends on me, it depends on what's taking place at the time.

Q Well, if the individual is not doing anything suspicious other than has a loud muffler but you're with that vehicle, as you've described "with" being it is actively looking at it, but does nothing besides have a loud muffler, will you still commonly pull that vehicle over?

A Yeah, there's a high probability I might. Yes.

Q Again, if there hadn't been a call from dispatch here, but yet you were following the vehicle you would – you would expect in this case, even without the call from dispatch about a DUI, you would have pulled this car over for a loud muffler.

A Right. After he made the turn and the noise increased – You know, I was looking at that muffler anyway just prior to the – to the turn. But then once the noise increased it's – it's like, "Well,

okay, that is a modified exhaust that I see there hanging off the end of the vehicle.”

Q Earlier you’d testified, I thought – and you could correct me if my understanding’s wrong – is that your primary goal was to – see if there was any evidence of DUI – or, primary motive, maybe, was the word we use. Does that sound like what you testified to earlier?

A I – I was dispatched to try and locate this vehicle –

Q But as far as your motive, what your own thinking was when you pulled the vehicle over, was it primarily to investigate the DUI – or was it for the loud muffler, to issue an infraction?

A Not necessarily to issue an infraction. It was to contact the subject with the loud muffler, and if there – and if the DUI came into play, which I had no clue whether it would or not, then I could continue the investigation that I was ordinarily dispatched to.

Q Are you able to say what was your primary motive of the two?

Either—

A Again, I think I answered this, and if there was a weighted scale on this it would have to be the DUI.

Q Okay.

A Because I’m – if it’s a weighted scale.

Q As far as your motive, to pull the car over, correct? That's what we're speaking of?

A Yes and no. I mean, at that point it was – if –Ethically, yes, it's the DUI. But I had nothing visual on the subject – on anything being driven.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)

Respondent.)

v.)

GILBERTO CHACON ARREOLA,)

Appellant.)

No. 29164-2-III

DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

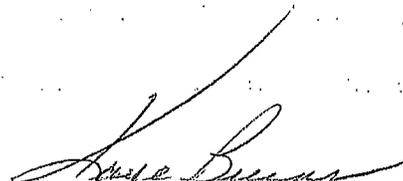
That on this day I served a copy of the Petition for Discretionary Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch
gaschlaw@msn.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Petition for Discretionary Review in the above-entitled matter.

Gilberto Chacon Arreola - A#98697899
Northwest Detention Center
1623 East "J" St, Ste 5
Tacoma WA 98421

Dated: October 12, 2011.



Kaye Burns

Declaration of Service.

GRANT COUNTY PROSECUTOR

October 12, 2011 - 4:18 PM

Transmittal Letter

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Case Name: State of Washington v. Gilberto Chacon Arreola

Court of Appeals Case Number: 29164-2

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Proof of service is attached and an email service by agreement has been made to gaschlaw@msn.com.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 29164-2-III

Respondent,

Division Three

v.

GILBERTO CHACON ARREOLA,

PUBLISHED OPINION

Appellant.

Siddoway, J. — Pretextual traffic stops are prohibited by the Washington Constitution. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). In this case, a patrol officer followed Gilbert Chacon Arreola's blue Chevy Cavalier for over a half mile because it fit the description of a car reportedly driven by a suspected drunk driver. While watching for signs of impaired driving, the officer noticed the car was equipped with a modified muffler in violation of state vehicle equipment requirements. Without having seen any evidence of impaired driving, the officer pulled over Mr. Chacon¹ with the primary motive of investigating whether he was driving under the influence of alcohol (DUI), in violation of RCW 46.61.502. At a hearing on Mr.

Chacon's motion to suppress the State's evidence, the officer testified that the muffler was an additional reason for the stop and, hypothetically, would have caused him to stop and cite Mr. Chacon even absent suspicion of drunk driving.

The principal issue on appeal is whether the trial court's finding of the officer's secondary, hypothetically sufficient reason for the stop supports its conclusion that the stop was nonpretextual and constitutional. We hold that it does not. The court's findings that the officer was following Mr. Chacon to investigate a possible DUI and stopped him principally for that reason compel the conclusion that the stop violated the Washington Constitution. We reverse Mr. Chacon's conviction and remand with directions to dismiss the charges with prejudice.

FACTS AND PROCEDURAL BACKGROUND

Gilberto Chacon Arreola was found guilty of felony DUI. He also pleaded guilty to driving with a suspended license in the first degree. Prior to trial Mr. Chacon unsuccessfully sought to exclude the State's evidence, arguing that he had been subjected to a pretextual stop in violation of the Washington State Constitution.

Officer Anthony Valdivia of the Mattawa Police Department was the only witness to testify at the suppression hearing. He testified that while on routine patrol on the

¹ Mr. Chacon prefers to go by this surname, which was used in the trial court. Report of Proceedings (RP) (Apr. 14, 2010) at 6.

evening of the arrest he responded to a citizen report of a possible drunk driver on a state highway in the southwest section of Grant County. Upon arriving in the area of the reported sighting, he began following Mr. Chacon's car, which matched the description provided by the citizen report. He did not see any behavior suggesting that Mr. Chacon was under the influence of alcohol but could hear that the car was equipped with an after-market exhaust system, amplifying the noise of the engine in violation of RCW 46.37.390(3).² He followed the Chevy southbound for roughly a half mile, at which point Mr. Chacon made a legal left turn. After following Mr. Chacon eastbound for a short distance, Officer Valdivia activated his overhead lights. Mr. Chacon did not immediately pull over, but before long made a left turn into a yard and stopped. Upon approaching the car, Officer Valdivia recognized Mr. Chacon from prior encounters, noticed that his eyes were bloodshot and watery, saw open containers of beer in the car, and smelled alcohol. He arrested Mr. Chacon on several outstanding warrants after issuing citations for the

² RCW 46.37.390(3) provides:

“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.

“This subsection (3) does not apply to vehicles twenty-five or more years old or to passenger vehicles being operated off the highways in an organized racing or competitive event conducted by a recognized sanctioning body.”

modified muffler, DUI, and driving with a suspended license.

At the suppression hearing, Officer Valdivia's explanation why he stopped Mr. Chacon's car was found by the court to be forthright but it was complicated, so the trial court questioned him at length. Overall, the officer testified that he thought he had probable cause to stop Mr. Chacon for suspicion of DUI; it was his interest in investigating for drunk driving that was his primary motive for the stop, although he had noticed the modified muffler and considered it a reason for stopping the car as well.³ He testified that he had pulled over at least 10 drivers in the past for muffler infractions but has not always stopped and cited the driver upon noticing a noncompliant muffler. He testified that modified mufflers—which he referred to at one point as “noisemaker[s]”—are “fairly common” in the Mattawa area. Report of Proceedings (RP) (Mar. 24, 2010) at 38, 44.

³ In response to a leading question by the State, Officer Valdivia testified that he decided to pull the vehicle over because of the muffler infraction. RP (Mar. 24, 2010) at 22. When asked by the trial court why he waited 45 seconds to stop Mr. Chacon for the muffler violation, he answered that he wanted “to investigate the possibility of a DUI” and would not have pulled Mr. Chacon's car over for the muffler violation alone. *Id.* at 35-36. He also agreed that his primary motive for pulling the car over was to investigate for a DUI violation rather than to ticket for a nonconforming muffler. *Id.* at 37. During a second round of questioning by the court, Officer Valdivia testified that the reason for the stop was the muffler violation and that he believed he would have probably pulled the car over even if he were not suspicious of a DUI. *Id.* at 43-44. However, he again confirmed that his primary motive for stopping the car was to investigate the DUI report: “if there was a weighted scale on [why I stopped the car,] it would have to be the DUI.” *Id.* at 46.

The trial court denied Mr. Chacon's motion to suppress, concluding that the stop "was not unconstitutionally pretextual under *State v. Ladson* or *State v. DeSantiago*, 97 Wn. App. 446, 983 P.2d 1173 (1999)." Clerk's Papers (CP) at 48 (Conclusion of Law 3.1) (citation omitted). Mr. Chacon challenges this conclusion⁴ as well as three of the findings on which it was based.

ANALYSIS

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." "Authority of law" requires a valid warrant unless one of a few jealously guarded exceptions to the warrant requirement applies. *In re Pers. Restraint of Nichols*, 171 Wn.2d 370, 379, 256 P.3d 1131 (2011) (Fairhurst, J., dissenting). The Washington Supreme Court has repeatedly affirmed that Washingtonians retain their privacy while in an automobile. *Ladson*, 138 Wn.2d at 358 n.10. But for Mr. Chacon's modified muffler, the State does not argue that Officer Valdivia was justified in pulling him over to investigate for DUI under *Terry v.*

⁴ Mr. Chacon also assigns error to the trial court's conclusion of law 3.3, which repeats the substance of finding of fact 2.5, addressing Officer Valdivia's reasons for stopping the vehicle. A determination of an officer's motivation or reason for making a traffic stop is a finding of fact. *State v. Minh Hoang*, 101 Wn. App. 732, 741, 6 P.3d 602 (2000), *review denied*, 142 Wn.2d 1027 (2001); *State v. Weber*, 159 Wn. App. 779, 794, 247 P.3d 782 (Sweeney, J., dissenting), *review denied*, 171 Wn.2d 1026 (2011). We therefore treat it as such and subsume its consideration in addressing whether substantial evidence supports finding of fact 2.5. *See State v. Evans*, 80 Wn. App. 806, 820 n.35, 911 P.2d 1344, *review denied*, 129 Wn.2d 1032 (1996).

No. 29164-2-III

State v. Chacon Arreola

Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The citizen's report triggering the officer's investigation was uncorroborated and any details it might have contained are not in the record. *See State v. Hart*, 66 Wn. App. 1, 6-7, 830 P.2d 696 (1992) (an uncorroborated tip must possess enough objective facts to justify detention of the suspect).

For Fourth Amendment purposes, Officer Valdivia's observation of the muffler infraction would have been justification enough for stopping Mr. Chacon in order to investigate suspected drunk driving; the United States Supreme Court has held that an officer wishing to investigate a crime can stop a driver for any traffic infraction he observes. *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Of concern to our Supreme Court in *Ladson*, in light of our constitution's broader privacy guaranty, was the extensiveness of traffic regulation, such that "virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter." 138 Wn.2d at 358 n.10 (quoting Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 Am. J. Crim. L. 627, 633 (1997)). *Ladson* considered "whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent [the] 'authority of law' represented by a warrant," and concluded it should not. *Id.* at 352

(footnotes omitted). “[T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason.” *Id.* at 351.

To determine whether a given stop is pretextual, a 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. *Id.* at 358-59. 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.* at 359. A court is required to “look beyond the formal justification for the stop to the actual one” when assessing whether a stop is pretextual. *Id.* at 353.

Evidence relevant to the officer’s actual motive includes the nature of the patrol in which he or she is engaged, either by assignment, or because his or her suspicion has been specifically aroused. *See id.* at 346 (officers working proactive gang control); *DeSantiago*, 97 Wn. App. at 452-53 (patrol officer engaged in narcotics investigation at the time he observed infraction); *State v. Myers*, 117 Wn. App. 93, 69 P.3d 367 (2003) (patrol officer following driver suspected of having a suspended license when infraction observed), *review denied*, 150 Wn.2d 1027 (2004); *State v. Montes-Malindas*, 144 Wn. App. 254, 261, 182 P.3d 999 (2008) (patrol officer surveilling suspicious van when

No. 29164-2-III

State v. Chacon Arreola

infraction observed); also relevant is whether or not the officer stops the offender immediately upon seeing the infraction, *see State v. Minh Hoang*, 101 Wn. App. 732, 741-42, 6 P.3d 602 (2000) (traffic infraction committed adjacent to officer's surveillance point, with officer immediately pulling over the driver), *review denied*, 142 Wn.2d 1027 (2001); whether or not the officer cites the offender for the traffic infraction, *see id.* at 742 (whether the offender is cited is a factor to be considered, but is not dispositive); and the officer's testimony as to his or her motivation, although an officer's candid admission to pretextual conduct is more probative than a denial of pretextual conduct. *Montes-Malindas*, 144 Wn. App. at 261 (citing *Ladson*, 138 Wn.2d at 359).

When reviewing the denial of a suppression motion, we determine whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. *Id.* We review de novo whether the totality of the circumstances supports a conclusion that an unlawful pretext stop has occurred. *State v. Weber*, 159 Wn. App. 779, 786-87, 247 P.3d 782, *review denied*, 171 Wn.2d 1026 (2011).

Mr. Chacon assigns error to three of the trial court's findings of fact:

- 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.

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- 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.
- 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 O[fficer] Valdivia means following and observing a vehicle. The court found O[fficer] 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 at 47.

Mr. Chacon challenges finding 2.3 only for the court’s determination that Officer Valdivia followed Mr. Chacon’s car for “about 30 to 45 seconds” before activating his overhead lights, arguing that any amount of time under 45 seconds is not supported by the record. Br. of Appellant at 4 n.6. The officer originally estimated it had taken 15 seconds to follow Mr. Chacon for the half mile but agreed, when presented with the judge’s calculation of the amount of time required to travel a half mile at 40 miles an hour, that the lapse would have been “more like 40 [or] 45 seconds.” RP (Mar. 24, 2010) at 35. Given that the officer testified to approximate distance and speed and his original estimate of a 15-second following time, the court’s finding that the car was followed for

“about 30 to 45 seconds” was within the range of the evidence.

Turning to finding 2.5, evidence supporting the finding that “Officer Valdivia’s primary motivation in pulling the car over was to investigate the reported DUI” was extensive; the officer repeatedly testified that his primary motive for stopping the car was to investigate the reported DUI. The finding in 2.5 and in finding 2.6 that Officer Valdivia “would have stopped the vehicle anyway for the exhaust infraction even without the previous report” is not as clearly supported because the officer testified that sometimes he will stop a vehicle for such an infraction and sometimes he will not; he also testified in response to one of the court’s hypothetical questions that he “probably” would have pulled the car over had he not received the report of the suspected DUI. *Id.* at 44. As the court found in finding 2.6, the officer was most consistent that once “with the vehicle” (in the sense of “actively looking for [a] particular vehicle” or, in this case actively investigating the possibility of a crime) he *would* stop it for a muffler infraction. *Id.* at 39-40. He testified at least twice that he would have pulled the car over even absent suspicion of a DUI. *Id.* at 38, 43. We cannot say that the court’s reconciliation of the officer’s explanations and qualifications is not a rational, fair-minded one. The remainder of finding 2.6—that Officer Valdivia was credible—is a determination we do not disturb on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The three challenged findings are therefore supported by substantial evidence.

No. 29164-2-III

State v. Chacon Arreola

The findings do not support the court's conclusion that the stop was not pretextual, however. As observed in earlier decisions of this court, whether Officer Valdivia would have pulled over Mr. Chacon for the muffler violation had he not been concerned about drunk driving is irrelevant to our analysis; our concern is only with why the stop was made in this particular case. *See Myers*, 117 Wn. App. at 97. While we accept the trial court's finding that the muffler violation was "an actual reason" for the stop (CP at 48 (emphasis added)), it was clearly subordinate to the officer's desire to investigate the DUI report. The muffler violation therefore cannot be characterized as *the* actual reason for the stop under *Ladson*. *Ladson* observes that in the analogous context of suppressing evidence obtained in pretextual searches that rely on the emergency exception, Washington courts have held that the search "must not be *primarily* motivated by intent to arrest and seize evidence." 138 Wn.2d at 357 (emphasis added) (quoting *State v. Angelos*, 86 Wn. App. 253, 256-57, 936 P.2d 52 (1997) (citing *State v. Nichols*, 20 Wn. App. 462, 464, 581 P.2d 1371, *review denied*, 91 Wn.2d 1004 (1978)), *review denied*, 133 Wn.2d 1034 (1998)). In every case presenting a pretextual stop issue a traffic infraction will be offered as the justification, and thereby an actual reason, for the stop. The reasoning of *Ladson* compels the result that a traffic stop is without authority of law where it cannot be constitutionally justified for its primary reason (speculative criminal investigation) but only for some other reason (enforcing the traffic code) which is at once

lawfully sufficient but only a secondary reason.

The State nonetheless suggests that pretext is never an issue when an officer stops a citizen for a traffic infraction in order to investigate a *driving-related* crime. Its argument is predicated on the statement in *State v. Nichols* that “[a] pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code.” 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (citing *Ladson*, 138 Wn.2d at 349, 351). Both *Nichols* and *Ladson* involved stops whose real purpose was alleged to be investigation for drugs, so it was accurate in those cases to contrast a “speculative criminal investigation *unrelated to the driving*” with pretextual enforcement of the traffic code. But the rationale of *Ladson* cannot be reconciled with the State’s position that an officer lacking probable cause to stop a driver in order to investigate a *driving-related crime* may rely pretextually on a civil traffic infraction for an investigatory stop. This same misreading of *Ladson* was addressed in *Myers*, in which this court found pretextual a traffic stop for an illegal lane change where the officer’s real motive was to investigate whether the driver had a suspended license, a driving offense. 117 Wn. App. at 97. In rejecting the State’s argument that the stop was justified by the mere fact that the officer was investigating a “driving” offense, this court pointed out that “*Ladson*’s reference to the investigation of suspicions ‘unrelated to the driving’ plainly refers to a driving infraction,

No. 29164-2-III
State v. Chacon Arreola

not the criminal investigation.” *Id.* at 98. *But see Weber*, 159 Wn. App. at 791 (attaching unspecified significance to the fact that the officer “was not conducting an investigation *unrelated to traffic offenses*”).

The traffic stop that yielded the evidence on which the State charged Mr. Chacon was without authority of law because the reason for the stop—to investigate for drunk driving—was not exempt from the warrant requirement. When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *Ladson*, 138 Wn.2d at 359. We reverse the conviction and remand with directions that the trial court dismiss the charges with prejudice.

Siddoway, J.

I CONCUR:

Sweeney, J.

No. 29164-2-III

Brown, J. (dissenting) — In my view, we should defer to the fact-finding discretion of this judge who determined from disputed facts “an actual reason for the stop” was the muffler violation. Clerk’s Papers at 48 (Conclusion of Law 3.3). The officer cited Gilberto Chacon Arreola for the muffler violation. Certainly, a stop can serve multiple, legal, complimentary purposes so long as an actual stop reason passes legal muster. We should not expect investigating officers to be blind to other potential concurring violations detected when investigating an actual stop reason. While Officer Anthony Valdivia may have had suspicions regarding whether Mr. Chacon was involved with driving under the influence of alcohol, the trial court believed the officer’s testimony regarding his muffler-violation stop practices. Although Mr. Chacon asserts a pretext stop, this court recognized in *State v. Minh Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), that under *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) suspicious patrol officers “may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop.” I would affirm. Accordingly, I respectfully dissent.

Brown, J.