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No. 96884-5

No. 35304-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

DAVID JOSEPH BROWN,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 16-1-00431-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Andrew J. Clark
Deputy Prosecuting Attorney
BAR NO. 46667
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENTS OF ERROR

A. The Superior Court correctly determined the defendant was lawfully stopped after failing to signal a left turn, correctly finding that a left turn requires signaling continuously for 100 feet.

II. STATEMENT OF FACTS

On March 22, 2015, around 2215 hours, Trooper Morris was riding with then Trooper Cadet Acheson, serving as his field Training Officer. CP 11; 02/18/2016 Transcript of Proceedings of Suppression Hearing ("RP")[1] at 5-6. Trooper Acheson was driving eastbound on Clearwater Avenue when he observed the defendant's vehicle commit a number of alleged violations. CP 11; RP at 6-13. Relevant to the inquiry before this Court, the defendant entered into the designated left turn lane to turn left at the controlled intersection of Clearwater and SR 395. CP 12; RP at 13-14. While in the designated turn lane, the defendant approached and came to a stop at the stop line. *Id.* After the light turned green, the defendant entered the intersection and turned left onto SR 395. *Id.* Critically, as shown on the dash camera, the undisputed fact is that at no time while in the last 100 feet traveled before the turn, while stopped at the traffic light, or while making the turn, did the defendant activate his left turn indicator or use a

[1] Incorporated into the record by the supplemental designation of clerk's papers filed herein on April 2, 2018.

hand signal. RP at 13-14; CP 28 (Ex. 1 – dash camera video). Troopers Acheson and Morris pulled the defendant over into a parking lot off of Yelm Street, and the defendant was ultimately arrested for DUI and subsequently provided a breath test of .266/.254 and .269/.257. CP 12, 72, 79.

Subsequently, this matter came before the District Court on February 18, 2016, on the defendant's Motion to Suppress, CP 41-50, 57-58, which the District Court granted, CP 11-14, RP at 3-39. The matter was then before the Court on March 31, 2016, on the State's Motion for Reconsideration, which the District Court denied. CP 3, 11, 21-24. At a hearing regarding findings on April 28, 2016, the State timely filed a notice of appeal. CP 2, 5-7. The District Court accepted the defendant's written findings over those of the State and signed them on April 29, 2016. CP 2, 11-14. On appeal, the Superior Court reversed the District Court and correctly found the defendant was required to signal his left turn onto SR 395. CP 111-12. The defendant's Motion for Discretionary Review was granted by this Court on October 17, 2017, and this appeal follows.

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III. ARGUMENT

A. Washington traffic code clearly defines when a signal is required and how that signal can be given.

The defendant's position on appeal is that "when required" is not defined in the statute and that an intent to turn can be signaled by entering a turn-only lane. Both positions lack support in the clear language of the statute that the legislature has enacted.

1. "When required" is defined in the statute.

First, the relevant statute, RCW 46.61.305, aptly named "When signals required-Improper use prohibited," provides:

> (1) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.
> (2) A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.
> (3) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.
> (4) The signals provided for in RCW 46.61.310 subsection (2), shall not be flashed on one side only on a disabled vehicle, flashed as a courtesy or "do pass" signal to operators of other vehicles approaching from the rear, nor be flashed on one side only of a parked vehicle except as may be necessary for compliance with this section.

RCW 46.61.305. Relevant here is subsection (2) requiring the signaling of an intention to turn must be provided for the last one hundred feet before

turning. Defense maintains that "when required" in this subpart is undefined by the legislature. However, such position overlooks subsection (1), which discusses "when" and provides that an appropriate signal must be given prior to any person turning a vehicle or moving right or left when on a roadway.[2] Noticeably unregulated are turns and right/left movements when not on a roadway. Tellingly, subsection (1) ends with "giving an appropriate signal in the manner *hereinafter* provided." RCW 46.61.305(1) (emphasis added). The very next provision of the statute sets forth the manner of signaling for 100 consecutive feet. RCW 46.61.305(2). Accordingly, far from being undefined, the legislature wrote a statute that specifically provides for when signaling is required.

2. An intent to turn is not signaled by being in a turn-only lane.

The defendant also takes the position that the intent to turn was shown by being in a designated left-turn-only lane. *See* Br. of Appellant at 9-10. However, that overlooks the practical reality of intersections as well as the relevant statutes that regulate how to signal.

First, while Troopers Acheson and Morris, being behind the

[2] Subsection (1) also adds a requirement that in addition to signaling, before making the turn, or left or right movement, the driver must ensure the turn or movement will be safe. This is principally so the driver does not cut another vehicle off, or worse, strike another vehicle. Absent the reasonable safety requirement, a driver could signal and then sideswipe a vehicle without committing an offense.

defendant and seeing the same lane markings and traffic signals, could accurately anticipate where the defendant intended to travel, the other three directions of travel are not as well informed. Seldom at an intersection can a driver read the pavement markings of the oncoming lanes, what arrows may or may not be painted into those lanes, or see the traffic signals that are directly facing the opposite direction. Thus, other drivers at intersections are not able to anticipate the direction a vehicle will travel by the mere existence of being in any specific lane. Thus, the requirement of hand or arm signals, which other drivers can see. *See State v. Trenary*, 183 Wn. App. 1005, 2014 WL 4197558 (2014) (unpublished)[3] (upholding a traffic stop for failing to continuously signal when the driver repeatedly turned the signal on and off before initiating the turn, the court found regarding RCW 46.61.305 that "[i]t is clear from the language of the statute that it is the 'flashing' that must occur 'continuously' to notify other drivers of the intention to turn.").

Second, of the manners "hereinafter provided" after RCW 46.61.305(1) are the further sections of RCW 46.61.310 and .315. First, RCW 46.61.310(1) provides that "[a]ny stop or turn signal when required herein shall be given either by means of the hand and arm or by signal

[3] This unpublished opinion, attached as App. A, is a nonbinding authority that has no precedential value but is cited for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite v. DSHS*, 197 Wn. App. 539, 389 P.3d 731 (2017).

lamps, except as otherwise provided in subsection (2) hereof." Subsection (2) then sets forth certain vehicles that require signal lamps, disallowing the use of hand and arm signals for those sizes of vehicles. Under the clear language of RCW 46.61.310, there are only two means to provide a signal, 1) by signal lamp, and 2) by hand and arm. RCW 46.61.315 then sets forth the manner of providing hand and arm signals. Nothing in RCW 46.61.310 or .315 provide for signaling an intention to turn by entering a designated turn-only lane. Nor did the legislature exclude designated turn-only lanes from the requirement of signaling. Accordingly, the defendant's request this Court create such an exception to the unambiguous statute is misdirected at the courts and should instead be directed to the legislature.

This is similar to the request made by defense in *State v. Huffman*, 185 Wn. App. 98, 100-01, 340 P.3d 903 (2014). In *Huffman*, the Court found the defendant violated RCW 46.61.100 when on a single occasion she crossed the centerline. *Id.* The *Huffman* Court specifically rejected the argument that "the 'as nearly as practicable' language of RCW 46.61.140 must be read into RCW 46.61.100, such that minor deviations over the centerline are permissible as long as the driver remains as nearly as practicable within a single lane." *Id.* at 105-06. The Court further noted that "[the courts] are not at liberty to add language to a statute merely because '[they] believe the Legislature intended something else but failed

to express it adequately.'" *Id.* at 106. Here, this Court too should reject adding an exception not expressed by the legislature.

Interestingly, when the legislature created two-way turn lanes, they maintained the 100-feet signal requirement. Under RCW 46.61.290:

> Upon a roadway where a center lane has been provided by distinctive pavement markings for the use of vehicles turning left from either direction, no vehicles may turn left from any other lane. A vehicle shall not be driven in this center lane for the purpose of overtaking or passing another vehicle proceeding in the same direction. No vehicle may travel further than three hundred feet within the lane. A signal, either electric or manual, for indicating a left turn movement, shall be made at least one hundred feet before the actual left turn movement is made.

RCW 46.61.290(3)(c). Thus, even when contemplating a designated lane, in which they limited the overall length of movement to 300 feet, and are specifically built and regulated for turning left, the legislature still specifically provided for signaling the left turn for 100 feet.

Clearly, had the legislature intended entering a turn-only lane to be a manner of signaling an intention to turn, they could have provided for it in RCW 46.61.310 and .315. They chose not to. Instead, the undisputed facts show the defendant made a left turn on a roadway without using any hand or lamp signal, which violated the clear and unambiguous requirements of RCW 46.61.305.

B. Out-of-state cases concur that a signal is required.

Similar but not identical to Washington, in Texas, Section 545.104 of the Texas Transportation Code provides that "[a]n operator intending to turn a vehicle right or left shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn." Like here, in *Wehring v. State*, 276 S.W.3d 666, 670 (Tex. App. 2008), defense attempted to claim that a driver need not signal from designated turn lanes. In Texas, the courts have determined that:

> The plain language of the statute requires the driver to signal for a turn. It does not include exceptions for those situations in which there is only one direction to turn. We cannot say that requiring the use of a turn signal while entering a turn-only lane and making the turn would lead to absurd results. *See Williams v. State*, No. 05–02–00314–CR, 2002 WL 31521373, at *2 (Tex.App.-Dallas Nov.14, 2002, no pet.) (holding Section 545.105 requires driver use turn signal in turn-only lane). It has been held that Section 545.104 provides a "bright-line rule by which drivers of motor vehicle and police officers charged with enforcing the laws may operate. If a turn is made from one street onto another, a signal is required." *Id.* (citing *Krug v. State*, 86 S.W.3d 764, 767 (Tex.App.-El Paso 2002, no pet.)) (Section 545.104 applies anytime turn made and not limited to situations in which driver turns at intersections or turning around near curve or grade.).

Id. (finding "Wehring committed a traffic violation by failing to indicate his intent to turn in a turn-only lane, we agree with the trial court that the traffic stop was valid.").

The same would be true in Oregon. *See State v. Bea*, 318 Or. 220, 864 P.2d 854 (1993) (relying on Oregon's turn statute ORS 811.335 which provides a driver must "give an appropriate signal continuously during not less than the last 100 feet traveled by the vehicle before turning," and finding that a driver faced with an L-shaped intersection, and only one direction to turn, commits a traffic infraction by not signaling the turn).

The federal courts looking at Washington's statute have reached the same conclusion. *See United States v. Holloway*, 392 F. App'x 563, 564 (9th Cir. 2010) (citing RCW 46.61.305, when finding the officer "possessed the requisite reasonable suspicion and lawfully initiated the traffic stop" when "the left turn signal on the vehicle failed to illuminate at any point during the last 100 feet traveled by the vehicle before it made a left turn.").

Thus, like in Washington, throughout other states the fundamental rule of day one of driver's education, that one must signal a turn, holds true.

C. The defendant was lawfully stopped for failing to signal.

Whether a traffic stop is legitimate does not turn on whether a violation in fact occurred. *State v. Nichols*, 161 Wn.2d 1, 13, 162 P.3d 1122 (2007). In Washington, an officer who has reasonable suspicion of a traffic violation may make a warrantless traffic stop. *State v. Arreola*, 176

Wn.2d 284, 292-93, 290 P.3d 983 (2012). As set forth above, when making a left turn, Washington law requires that a driver make the turn with reasonable safety, signal continuously for at least the last 100 feet traveled prior to the turn, and signal the turn with either a signal lamp or hand and arm signals. The Washington Supreme Court has previously stated "[a] driver is required to signal at least 100 feet of travel before turning." *Nichols*, 161 Wn.2d at 13 (citing RCW 46.61.305(2)).

Here, after a brief signal of intent to move left,[4] the defendant moved left from lane two of two into the designated left-turn only lane. There, the defendant drove down the turn lane and stopped at the red traffic light. At no point did he signal with either a signal lamp or hand and arm. He did not signal continuously; he did not signal during the last 100 feet traveled; and he did not signal while stopped at the light. The defendant then made a left turn from the designated turn lane on Clearwater Avenue onto northbound SR 395, a turn he never signaled an intent to make. While the defendant suggests this is a common occurrence, *see* Br. of Appellant at 7, that does not alter the fact that it is an infraction. *See e.g. State v. McGovern*, 187 Wn. App. 1031, 2015 WL 2451780 at *5

[4] Previously, the State has always maintained this signal was not maintained for the required 100 feet, an additional infraction justifying the stop, but it is not the basis for which this matter is currently under discretionary review.

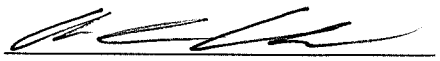
(2015) (unpublished)[5] (upholding a traffic stop for 5 m.p.h. over the limit, stating, "[c]ommon wisdom may be that one is free to exceed the speed limit up to five miles per hour. Nevertheless, driving 75 m.p.h. in a 70 m.p.h. zone remains a traffic infraction."). Therefore, the troopers, having observed the defendant make a left turn without ever signaling the turn, had reasonable suspicion to stop the defendant.

IV. CONCLUSION

Troopers Morris and Acheson had a reasonable suspicion to stop the defendant's vehicle, believing a turn signal violation had occurred before them. Accordingly, the State respectfully requests this Court affirm the Superior Court decision finding the traffic stop was lawful.

RESPECTFULLY SUBMITTED this 2nd day of April, 2018.

ANDY MILLER
Prosecutor



Andrew J. Clark
Deputy Prosecuting Attorney
Bar No. 46667
OFC ID NO. 91004

[5] This unpublished opinion, attached as App. B, is a nonbinding authority that has no precedential value but is cited for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite*, 197 Wn. App. 539.

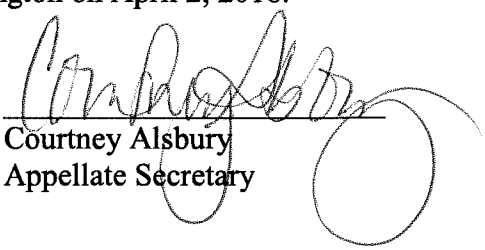
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Randy Jameson
Armstrong, Klym, Waite, Atwood & Jameson, P.S.
660 Swift Blvd, Ste. A
Richland, WA 99352

☒ Legal Messenger

Signed at Kennewick, Washington on April 2, 2018.



Courtney Alsbury
Appellate Secretary

APPENDIX A

State v. Trenary, 183 Wn. App. 1005, 2014 WL 4197558 (2014) (unpublished)

183 Wash.App. 1005

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

STATE of Washington,
Respondent/Cross Appellant,
v.
Louis Monroe TRENARY,
Appellant/Cross Respondent.

No. 70015–4–I.
|
Aug. 25, 2014.

Appeal from Snohomish Superior Court; Honorable Ellen J. Fair.

Attorneys and Law Firms

Lila Jane Silverstein, Whitney Rivera, Washington Appellate Project, Seattle, WA, for Appellant/Cross–Respondent.

Mara J. Rozzano, Snohomish County Prosecuting Attorneys, Everett, WA, for Respondent/Cross–Appellant.

Opinion

UNPUBLISHED

COX, J.

***1** Louis Trenary appeals his conviction for identity theft and forgery. Because the traffic stop of the car driven by Trenary was based on probable cause and not pretextual, the trial court properly denied his motion to suppress the evidence seized from the car. We affirm.

Around 10:30 p.m. on March 16, 2012, Detective William Koonce and Detective Zachariah Olesen were on patrol when they observed a car driven by Trenary make a turn without signaling properly. Both Detective Koonce and Detective Olesen are members of the Lynnwood Police Department's Special Operations unit. It is tasked primarily with intelligence gathering and other crime prevention activities, but also conducts routine patrol activities like traffic stops.

Detective Koonce activated his lights to signal Trenary to stop. After Detective Koonce made the decision to stop the car but before the car came to a complete stop, he learned the car was registered to Crystal Nelson, whom he had investigated on prior occasions for drug activity.

When Detective Koonce approached Trenary and requested identification, Trenary claimed he did not have his identification with him and gave a false name. After being instructed to give his true identity, he gave another false name. The officer arrested Trenary for failing to cooperate. A subsequent search of the car revealed evidence on which the State based charges against Trenary for two counts of identity theft and one count of forgery.

Trenary moved to suppress the evidence pursuant to CrR 3.6, claiming the lack of probable cause to stop the car and that the stop was merely a pretext to investigate suspected criminal activity. In addition to the testimony of Detective Koonce and Detective Olesen, the court reviewed a video recorded by the patrol car's dashboard video system. The video showed Trenary approaching a four-way stop. Trenary's right turn signal flashed for approximately one second, then went off. Approximately five seconds later, the right turn signal again flashed for approximately one second, then went off. Trenary slowed but did not come to a complete stop at the intersection. Approximately seven seconds later, as Trenary completed a right turn, the right turn signal again flashed briefly. The officers activated their emergency lights. As Trenary pulled onto the shoulder, his turn signal flashed continuously, showing it was functioning properly.

The court denied the motion and made the following findings of fact:

1. On 3/16/2012, Detective's [sic] Koonce and Olesen of the Lynnwood PD special ops were driving in their semi marked patrol car.

2. There was no logo on the vehicle, but there is a spotlight.

3. Both detectives were wearing plain clothes and were not in uniform.

4. Around 10:30 p.m., the Detectives were driving behind the defendant's car.

5. The defendant's vehicle signal came on, then went off, came on again, then went off again.

6. After it had been turned off, the defendant made a right turn.

*2 7. The signal may have come on as the turn was being made indicating that the signal was working properly.

8. Though there was testimony that the defendant's vehicle also crossed over the centerline [sic], this is not shown on the dash-cam video.

9. Before the car is pulled over, Detective Olesen became aware that the car was registered to Crystal Nelson.

10. Though Crystal Nelson has prior police contacts for narcotics, she was not being investigated at that time.

11. There was no reason to believe that the vehicle or its occupants were involved in any kind of drug activity prior to the stop.

12. The car was pulled over for a traffic infraction. [1]

The court also made the following conclusions of law:

1. There was probable cause to stop the vehicle for a valid traffic infraction under RCW 46.61.305.

2. The officers were proactively looking to address criminal activity.

3. Given the information, it was a mixed-motive stop under *State v. Arreola.* [2]

4. Here, because the testimony is that Detective Koonce already made up his mind to stop the vehicle prior to finding out it belonged to Crystal Nelson, the decision to stop the vehicle for the traffic infraction was independent from any knowledge that the vehicle belonged to a known narcotics individual.

5. A traffic stop was necessary in order to address the driving that was witnessed by the officers.

6. The stop was not pre-textual. [3]

A jury found Trenary guilty as charged. Trenary appeals.

PROBABLE CAUSE

Trenary challenges the court's denial of his motion to suppress. He argues that "the totality of the circumstances demonstrated his substantial compliance" with RCW 46.61.305 and therefore the officers lacked reasonable suspicion that a traffic violation occurred. We disagree.

As a general rule, warrantless searches and seizures are per se unreasonable. [4] But a warrantless seizure is valid if it falls within the scope of one of the narrowly drawn exceptions to the warrant requirement. [5] The State bears the burden of proving that a warrantless seizure falls within an exception to the warrant requirement. [6]

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. [7] But officers may not use the traffic stop as a pretext to conduct a criminal investigation unrelated to driving for which reasonable suspicion is lacking. [8] Pretextual traffic stops violate article I, section 7, of the Washington constitution "because they are seizures absent the 'authority of law' which a warrant would bring." [9] When determining whether a stop is pretextual, courts 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." [10]

The trial court's findings of fact are reviewed for substantial evidence. [11] Unchallenged findings of fact are verities on appeal. [12] We review de novo conclusions of law, such as whether a stop is pretextual. [13]

*3 RCW 46.61.305 provides:

(1) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided.

(2) A signal of intention to turn or move right or left when required shall be given continuously during not

less than the last one hundred feet traveled by the vehicle before turning.

Trenary contends that his method of signaling did not violate RCW 46.61.305(2). He argues that the statute does not define "continuously" and does not "regulate the interval or frequency during which the light is required to flash, nor does it specifically regulate the interval between illuminations." Without evidence of a traffic violation, Trenary argues that the stop was illegal.

The question is whether the officers had probable cause to make the stop. Trenary admits that when making a turn drivers must use "electric turn signals which shall indicate an intention to turn by flashing lights...." [14] It is clear from the language of the statute that it is the "flashing" that must occur "continuously" to notify other drivers of the intention to turn. A nontechnical term left undefined in a statute is given its plain and ordinary meaning, as defined in a standard dictionary. [15] "Continuous" is defined as "stretching on without break or interruption." [16] When Trenary repeatedly turned his turn signal on and off before initiating a turn, this did not constitute signaling "continuously" within the plain meaning of the word. The officers had probable cause to stop Trenary for violating RCW 46.61.305(2).

PRETEXT

Trenary next contends that the stop was pretextual. But Trenary's claim is not supported by the record. Though Trenary does not articulate why he believes the stop was pretextual, we presume it was because the officers were members of a special unit that proactively investigates crime and who had discovered that Trenary was driving a car belonging to an individual with connections to drug activity. But the officers testified that in addition to their investigative duties they were also responsible for routine law enforcement activities, including traffic stops. Furthermore, the officers made the decision to stop Trenary as soon as they witnessed the traffic violation. The decision to stop Trenary occurred before the officers learned that Trenary was driving Nelson's car.

Even if the detectives were motivated by a desire to investigate suspected drug involvement, the stop was not pretextual. As the court concluded, the stop was a "mixed-motive" stop; in other words, one that is "based on both legitimate and illegitimate grounds." [17] A mixed-motive stop does not violate article I, section 7 "so long as the police officer making the stop exercises discretion appropriately." [18]

> 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. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop, and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion because the officer would have stopped the vehicle regardless. [19]

***4** Here, the officers had reason to believe that Trenary had violated RCW 46.61.305(2) and that a traffic stop was reasonably necessary to address the suspected traffic infraction and to promote traffic safety and the general welfare. The fact that the officers may also have been interested in Trenary's connections to Nelson does not render the stop pretextual in light of the independent legitimate basis for the stop.

Because the stop was lawful, the evidence obtained from the stop was admissible. Therefore, the trial court properly denied Trenary's CrR 3.6 motion to suppress.

We affirm the judgment and sentence.

WE CONCUR: LAU and BECKER, JJ.

All Citations

Not Reported in P.3d, 183 Wash.App. 1005, 2014 WL 4197558

Footnotes

1 Clerk's Papers at 185–86.

2 176 Wn.2d 284, 288, 290 P.3d 983 (2012).

3 Clerk's Papers at 186.

4 *State v. Ladson,* 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

5 *Id.* at 349–50.

6 *Id.* at 350.

7 *Id.* at 349.

8 *Id.*

9 *Id.* at 358.

10 *Id.* at 358–59.

11 *State v. Martinez,* 135 Wn.App. 174, 179, 143 P.3d 855 (2006) (citing *State v. Hill.* 123 Wn.2d 641, 647, 870 P.2d 313 (1994)).

12 *State v. Luther,* 157 Wn.2d 63, 78, 134 P.3d 205 (2006).

13 *Arreola,* 176 Wn.2d at 291.

14 RCW 46.37.200(2).

15 *State v. Sullivan,* 143 Wn.2d 162, 174–75, 19 P.3d 1012 (2001).

16 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 493–94 (1993).

17 *Arreola,* 176 Wn.2d at 297.

18 *Id.* at 298.

19 *Id.* at 298–99.

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APPENDIX B

State v. McGovern, 187 Wn. App. 1031, 2015 WL 2451780 (2015) (unpublished)

187 Wash.App. 1031
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,
v.
Erin E. McGOVERN, Appellant.

No. 32197-5-III.
|
May 19, 2015.

Appeal from Spokane Superior Court; Honorable John O. Cooney, J.

Attorneys and Law Firms

Douglas Dwight Phelps, Phelps & Associates, P.S., Spokane, WA, for Appellant.

Brian Clayton O'Brien, Spokane Co. Pros. Atty., Spokane, WA, for Respondentt.

Opinion

UNPUBLISHED OPINION

FEARING, J.

*1 After a traffic stop of a car, in which Erin McGovern rode as a passenger, McGovern refused law enforcement consent to search her purse. After obtaining a search warrant for the car, an officer searched the purse and discovered unlawful drugs and another's identification. Erin McGovern appeals her convictions for three counts of possession of controlled substances and one count of possessing another's identification. She argues that law enforcement lacked reason to stop the car, the State violated her trial rights when its witness commented that she refused to consent to a search, and insufficient evidence supports her convictions. We disagree and affirm all convictions.

FACTS

On June 19, 2012, Spokane County Sheriff Deputy Nathan Bohanek and Corporal Justin Elliott, in their role on a criminal interdiction team, traveled eastbound on Interstate 90. The duo surveilled the highway for criminal activity, particularly transportation of drugs and weapons, and for persons wanted on warrants. Eventually the officers followed a white 1985 BMW and established the speed of the BMW to be 75 miles per hour. The posted speed limit was 70. The officers stopped the car. When stopping the BMW, the officers noticed the windows to be illegally tinted.

Deputy Nathan Bohanek approached the BMW and asked the driver, Kerry Gracier, who owned the car. Erin McGovern, a passenger in the front seat of the car, answered that the car belonged to Victor Antoine. Antoine was not the registered owner, nor was he in the car. Kerry Gracier had a suspended license, so the officers asked her to exit the vehicle to investigate whether she legally possessed the car. Gracier complied and verbally consented to a search of the BMW.

Deputy Nathan Bohanek and Corporal Justin Elliott pulled Erin McGovern and another passenger from the BMW and frisked them for weapons. McGovern and Deputy Bohanek disagree as to what occurred once McGovern exited the BMW. Bohanek maintains neither Justin Elliot nor he handcuffed any of the three car occupants. McGovern asserts that the officers moved her from the front of the car to the rear of the car and handcuffed her, because the officers claimed she incessantly moved her feet and she told the officers that they could not search her possessions inside the car. According to McGovern, the officers insisted they had not arrested her, although she remained handcuffed.

During a search of the BMW, Bohanek found a credit card of someone not in the vehicle; a bag in the back seat containing two laptop computers, which Erin McGovern claimed as hers; and two purses in the front passenger seat, which McGovern also identified as her purses. Deputy Bohanek asked McGovern's permission to search the bag and purses, and she refused. Bohanek searched the trunk and found a backpack, to which all vehicle occupants denied ownership. Bohanek opened the backpack and found a digital scale with methamphetamine residue on

its surface. He last searched the unlocked glove box and found another digital scale with methamphetamine residue and a wallet with identification and credit cards belonging to Victor Antoine and Tyson Andrew.

***2** After speaking with his superior officer, Deputy Nathan Bohanek orchestrated a tow of the BMW so he could gamer a search warrant for other objects in the car. He did not allow Erin McGovern to retrieve her purses and laptop bag from the car before its towing. Bohanek and Corporal Justin Elliott cited the driver for driving with a suspended license, speeding, and an illegal window tint. The two officers also cited the other passenger for an open container of alcohol in the back seat of the vehicle. Erin McGovern received no citation.

On June 21, 2012, Deputy Nathan Bohanek obtained a warrant to search the BMW and its contents. Upon opening one of the purses claimed by Erin McGovern, Bohanek found a small metal cylinder which contained a white crystalline residue. The white residue tested positive for methamphetamine. Bohanek also found two tins with over 200 legend drugs and narcotic pills in the purse. Finally, Bohanek found in the purse a credit card bearing the name Kristopher White and a Washington State driver's license belonging to Brendan W. Cassida. Bohanek called Cassida and verified that McGovern lacked his permission to possess his driver's license.

PROCEDURE

The State of Washington charged Erin McGovern with three counts of possession of a controlled substance and one count of possession of another's identification. McGovern moved under CrR 3.6 to suppress evidence obtained in the search of the vehicle. She argued, among other contentions, that the traffic stop leading to the search was pretextual.

The trial court entertained the motion to suppress and heard testimony from Erin McGovern. The trial court ruled in favor of the State. The court entered written findings of fact, which included the following finding:

> III. The vehicle was stopped for traveling five miles per hour over the posted speed limit and was not pretextual.

Clerk's Papers (CP) at 89.

During trial, the State questioned Deputy Bohanek regarding the bags, including the purses, found in the BMW:

> Q. Okay. So you asked about the ownership of the bags?
>
> A. I did.
>
> Q. What were you told?
>
> A. Ms. McGovern identified the bag as being hers.
>
> Q. Did she say anything else?
>
> A. She did not want me to search the bag.

Report of Proceedings at 96. After this colloquy, Erin McGovern moved for a mistrial, arguing that the government violated her constitutional rights by telling the jury that she asserted her rights. The trial court denied the motion, but allowed McGovern to present a curative instruction to the jury. That instruction read:

> You have heard testimony that the defendant exercised her rights to require a search warrant under the 4th amendment of the United States constitution and the constitution of the State of Washington article 1 section 7. You are to infer no guilt upon the defendant's exercise of these rights nor are you to consider this testimony during your deliberations.

CP at 124.

At the close of the State's case. Erin McGovern moved to dismiss all charges against her based on insufficient evidence. McGovern argued that the State failed to show that Deputy Nathan Bohanek found drags in a purse over which she claimed ownership. She also asserted that the State presented insufficient evidence for a jury to find she knowingly possessed another's identification. The trial court denied the motion. The trial court reasoned that McGovern's arguments regarding the lack of nexus between her and the purse went to weight and not to its sufficiency. The court also determined that the State provided sufficient evidence for a jury to infer

that McGovern knowingly possessed the identification because it was found in a purse to which she claimed ownership.

*3 A jury found Erin McGovern guilty of all charges. The trial court convicted and sentenced McGovern to thirty days' confinement.

LAW AND ANALYSIS

Traffic Stop

Erin McGovern first contends that the trial court erred in denying her CrR 3.6 motion to suppress evidence obtained in the search of the 1985 BMW. McGovern asks this court to ignore the driver's consent to search the vehicle, because the officers' initial stop of the car for speeding was pretextual. She emphasizes the fact that Deputy Nathan Bohanek and Corporal Justin Elliot served on an interdiction team, thereby following cars on the highway and gazing for drugs, weapons and persons wanted on warrants. According to McGovern, the officers lacked cause to stop the BMW because they observed no drugs or weapons and had no knowledge that the driver lacked a license.

We must first address whether Erin McGovern sufficiently assigned error to the trial court's findings of fact, and, if not, the ramifications of the lack of a proper assignment. In her opening brief, McGovern assigned error to none of the trial court's findings. In her opening brief's argument, she does not criticize any of the trial court's findings. In her reply brief, Erin McGovern wrote:

> Appellant does assign error to the court's factual findings in the CrR 3.6 hearing.

Reply Br. of App. at 3. McGovern's haphazard assignment of error does not suffice.

RAP 10.3(g) provides in relevant part:

> A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

A general assignment of error to the findings of fact is insufficient under the rule. *State v. Roggenkamp,* 115 Wn.App. 927, 943, 64 P.3d 92 (2003). When the assignments of error to the court's findings of fact do not comply with RAP 10.3(g), the trial court's findings become the established facts of the case. *State v. Arreola,* 176 Wn.2d 284, 288, 290 P.3d 983 (2012); *State v. Roggenkamp,* 115 Wn.App. at 943.

In this appeal, we accept the trial court's findings as accurate, but this acceptance does not end our review. The ultimate determination of whether those facts constitute a violation of the constitution is one of law and is reviewed de novo. *State v. Harrington,* 167 Wn.2d 656, 662, 222 P.3d 92 (2009); *State v. Gatewood,* 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The constitutionality of a warrantless stop is a question of law we review de novo. *State v. Gatewood,* 163 Wn.2d at 539.

We review the traffic stop of the 1985 BMW only under Washington law, since state law affords an accused greater protection. As a general rule, warrantless searches and seizures are per se unreasonable, in violation of article I, section 7 of the Washington State Constitution. *State v. Duncan,* 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Washington recognizes at least six narrow exceptions to the warrant requirement: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Garvin,* 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty,* 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

*4 Whether pretextual or not, a traffic stop is a "seizure" for the purpose of constitutional analysis. *State v. Ladson,* 138 Wn .2d 343, 350, 979 P.2d 833 (1999). Warrantless traffic stops are constitutional under article I, section 7 as investigative stops, but only if based on a reasonable articulable suspicion of either criminal activity or a traffic infraction, and only if reasonably limited in scope. *State v. Arreola,* 176 Wn.2d at 292–93 (2012); *State v. Ladson,* 138 Wn.2d at 350. The narrow exception to the warrant requirement for investigative

stops has been extended beyond criminal activity to the investigation of traffic infractions because of the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation. *Arreola,* 176 Wn.2d at 293; *State v. Johnson,* 128 Wn.2d 431, 454, 909 P.2d 293 (1996).

Purely pretextual traffic stops are unconstitutional. *Ladson,* 138 Wn.2d at 358. A pretextual traffic stop occurs when a police 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. *Ladson,* 138 Wn.2d at 358. To determine whether a traffic stop is pretextual, Washington courts evaluate the totality of the circumstances, including 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.

The trial court found that the law enforcement officers' stop of the 1985 BMW was not pretextual, but the result of speeding. Because Erin McGovern failed to object to this finding of fact, we could end our analysis here. We recognize, however, that Deputy Nathan Bohanek and Corporal Justin Elliott may have also been motivated, when halting the BMW, by their principal goal of interdicting drug and weapon traffickers. Assuming we determined the pair to be stimulated by this additional goal, we still would affirm the trial court. The officers would then have had mixed motivations, and mixed motives does not preclude the traffic stop.

Our Supreme Court for the first time addressed a mixed motivation stop in *State v. Arreola,* 176 Wn.2d 284 (2012). The court held:

> A mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately. 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. That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, nor does it interfere with the underlying exercise of police discretion because the officer would have stopped the vehicle regardless. The trial court should consider the presence of an illegitimate reason or motivation when determining whether the officer really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless). But a police officer cannot and should not be expected to simply ignore the fact that an appropriate and reasonably necessary traffic stop might also advance a related and more important police investigation. [*State v.*] *Nichols,* 161 Wn.2d [1,] 11, 162 P.3d 1122 [2007] (" '[E]ven patrol officers whose suspicions have been aroused may still enforce the traffic code ....' " (quoting *State v. Mink Hoang,* 101 Wn.App. 732, 742, 6 P.3d 602 (2000))[)]. In such a case, an officer's motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop so long as discretion is appropriately exercised and the scope of the stop remains reasonably limited based on its lawful justification.

***5** *Arreola,* 176 Wn.2d at 298–99.

State v. Arreola is both controlling and analogous. In *Arreola,* a Mattawa police officer responded to a report of a possible drunk driver. The officer followed the allegedly intoxicated driver, but observed no signs of impaired driving. The officer, nevertheless, stopped the driver because of his car's illegally altered exhaust system. On approaching the car, the officer smelled alcohol and saw open containers in the vehicle. Our Supreme Court affirmed a trial court ruling upholding the traffic stop. Because the trial court's unchallenged finding was that the altered exhaust was the actual reason for the Mattawa police officer's stop, the stop itself was not pretextual.

As part of a crime interdiction team patrolling Interstate 90, Deputy Nathan Bohanek and Corporal Justin Elliot sought suspects engaged in activities other than speeding. Nevertheless, the BMW exceeded the speed limit. Common wisdom may be that one is free to exceed the speed limit up to five miles per hour. Nevertheless, driving 75 m.p.h. in a 70 m.p.h. zone remains a traffic infraction. The law enforcement officers' ulterior motive of stopping individuals transporting drugs or driving with

a suspended license, assuming such motives existed, does not negate the validity of the stop.

Testimony of Denial of Consent

Erin McGovern contends the trial court erred in denying her motion for a mistrial that she forwarded when the State elicited trial testimony from Deputy Nathan Bohanek that indicated McGovern refused consent to search her possessions. McGovern argues that the testimony impermissibly used her refusal as evidence of guilt. McGovern maintains the curative jury instruction did not, and could not, correct the error. The State promotes the admissibility of Deputy Bohanek's testimony as evidence behind the issuance of the warrant to search the BMW and not as substantive evidence of McGovern's guilt. The State further contends that the trial court's curative instruction cured any error and alleviated any harm to McGovern. We do not address whether the testimony of Nathan Bohanek was admissible, because we otherwise find no error in the trial court's denial of the motion for a mistrial.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. *State v. Mak,* 105 Wn.2d 692, 701, 718 P.2d 407 (1986), *overruled on other grounds by State v. Hill,* 123 Wn.2d 641, 870 P.2d 313 (1994). Only errors affecting the outcome of the trial will be deemed prejudicial. *Mak,* 105 Wn.2d at 701. A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *State v. Anderson,* 171 Wn.2d 764, 770, 254 P.3d 815 (2011). This court employs the "overwhelming untainted evidence" test and looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Anderson,* 171 Wn.2d at 770 (internal quotation marks omitted).

***6** Erin McGovern is correct that a criminal defendant's assertion of her constitutional right to refuse a warrantless search cannot be used as evidence of her guilt. *State v. Jones,* 168 Wn.2d 713, 725, 230 P.3d 576 (2010); *State v. Burke,* 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *State v. Gauthier,* 174 Wn.App. 257, 267, 298 P.3d 126 (2013). Use of the evidence for this purpose amounts to manifest constitutional error. *United States v. Prescott,* 581 F .2d 1343, 1351 (9th Cir.1978); *State v. Jones,* 168 Wn.2d at 725; *State v. Burke,* 163 Wn.2d at 217. Nevertheless, a mere reference to such an assertion does not always amount to a constitutional violation requiring reversal. Reversal requires the State to have invited the jury to infer guilt from the invocation of the right. *Burke,* 163 Wn.2d at 217.

Three decisions shed light on how the State invites the jury to infer guilt and what measures the trial court should exercise under such circumstances. In *United States v. Prescott,* 581 F.2d 1343 (9th Cir.1978), the court considered an appeal by Saundra Prescott, convicted as an accessory after the fact to mail fraud committed by her neighbor. Prescott allowed the neighbor to hide in her house while law enforcement officers raided his apartment across the hall. After finding the neighbor's apartment empty, the agents knocked on Prescott's door. Prescott refused to open the door and denied knowing or harboring her neighbor. Prescott asked the agents if they had a warrant to search her apartment, and, when they said they did not, she continued to refuse them entry. The agents battered Prescott's door, entered the apartment, and found the neighbor with his fraudulently obtained parcels.

In *United States v. Prescott,* the district court judge denied Saundra Prescott the opportunity to argue that her refusal to consent to a warrantless search of her apartment could not be considered as evidence of guilt. The trial court also refused a curative instruction to the jury similar to that used in Erin McGovern's case. In reversing and remanding the conviction, the Ninth Circuit held that the trial court erred in allowing the government to use Prescott's refusal to consent to a warrantless search as evidence of the crime charged.

In *State v. Gauthier,* 174 Wn.App. 257 (2013), this court reversed Thomas Gauthier's conviction for second degree rape and held that the trial court erred in allowing the State to present evidence of Gauthier's refusal to submit to a warrantless DNA test as evidence of his guilt. Gauthier's defense counsel mentioned the refusal during his closing argument, and the State responded, in rebuttal, that Gauthier's refusal was consistent with the actions of a guilty person.

In *State v. Burke,* 163 Wn.2d 204 (2008), our Supreme Court reversed Justin Burke's conviction for third degree rape of a child. The court held that the State impermissibly introduced Burke's refusal to speak with police as evidence of his guilt. The State stressed Burke's assertion of the Fifth Amendment privilege in its opening and closing arguments, direct examination of investigating officers, and cross-examination of Burke. Our high court found that the trial court abused its discretion by allowing the State to present such evidence and provide such an argument.

***7** We distinguish our appeal from the trial events in *United States v. Prescott, State v. Gauthier,* and *State v. Burke.* The State of Washington below uttered a short reference to Erin McGovern's refusal to consent to the search of her bags and purportedly offered the evidence for the purpose of explaining the reason officers sought a search warrant. The State did not mention McGovern's refusal to consent in its opening or closing argument. In addition, the trial court submitted a curative instruction, crafted by McGovern, to the jury. The other overwhelming untainted evidence presented by the State, as explained below, was sufficient on its own to support a finding of guilt. For these reasons, we hold the trial court did not abuse its discretion in denying McGovern's motion for a mistrial.

Sufficient Evidence to Convict

Erin McGovern contends that insufficient evidence supports her four convictions. She argues that the State failed to provide sufficient evidence to prove the mens rea element of her charge for possessing another's identification. She maintains that the State presented insufficient evidence that she possessed the drugs found in bags she claimed as her own. We disagree.

When a defendant challenges the sufficiency of the evidence underlying her conviction, she admits the truth of the State's evidence and all inferences that reasonably may be drawn from the evidence. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This court views the evidence in the light most favorable to the State and asks whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The reviewing court considers circumstantial evidence equally reliable as direct evidence. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The trier of fact judges the credibility of witnesses, and issues of credibility cannot be reviewed on appeal. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Possession of controlled substances: RCW 69.50.4013(1) provides:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

The jury found Erin McGovern thrice offended this statute by possessing methamphetamine, Xanax, and Ritalin.

When reviewing the evidence in a glow most favorable to the State, a jury could have reasonably found the essential elements of these crimes beyond a reasonable doubt. Erin McGovern claimed that the bags in which officers found the drugs and her personal identification. *See State v. Edwards,* 5 Wn.App. 852, 855, 490 P.2d 1337 (1971). The jury heard no evidence that McGovern obtained a valid prescription for the medications. A jury could reasonably infer from this evidence that McGovern possessed the drugs in question.

***8** *Possession of another's identification:* RCW 9A.56.330 provides, in relevant part:

> (1) A person is guilty of possession of another's identification if the person knowingly possesses personal identification bearing another person's identity, when the person possessing the personal identification does not have the other person's permission to possess it, and when the possession does not amount to a violation of RCW 9.35.020.
>
> (2) This section does not apply to:
>
> (a) A person who obtains, by means other than theft, another person's personal identification for the sole purpose of misrepresenting his or her age;

(b) A person engaged in a lawful business who obtains another person's personal identification in the ordinary course of business;

(c) A person who finds another person's lost personal identification, does not intend to deprive the other person of the personal identification or to use it to commit a crime, and takes reasonably prompt steps to return it to its owner; and

(d) A law enforcement agency that produces or displays counterfeit credit or debit cards, checks or other payment instruments, or personal identification for investigative or educational purposes.

Again, in the light most favorable to the State, the evidence presented supports the jury's finding of guilt. Officers discovered Brendan Cassida's identification and credit card in one of the bags to which Erin McGovern claimed ownership. The State provided evidence that Cassida had not given McGovern permission to possess his identification, and McGovern presented no evidence that she fell under one of the exceptions listed in section 2 of RCW 9A.56.330.

McGovern argues that the State failed to present sufficient evidence of the "mens rea" element of this charge, the element being knowingly possessing Cassida's identification. *See State v. Thompson,* 68 Wn.2d 536, 540–41, 413 P.2d 951 (1966); *State v. Plank,* 46 Wn.App. 728, 731, 731 P.2d 1170 (1987). While she is correct that the State lacked direct evidence in support of this element, the jury is entitled to reasonably infer McGovern's knowing possession from the circumstances surrounding the discovery of Cassida's identification. *See State v. Tembruell,* 50 Wn.2d 456, 457–58, 312 P.2d 809 (1957). As with the other charges, the trial court did not err in submitting McGovern's charge for possession of another's identification to the jury.

CONCLUSION

We affirm all convictions against Erin McGovern.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: BROWN, A.C.J., and KORSMO, J.

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