

NO. 65951-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL MICHAELS,

Appellant.

2010 DEC 14 PM 3:11  
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF WHATCOM

The Honorable IRA J. UHRIG Presiding at the Trial Court

BRIEF OF APPELLANT

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WSBA 20020

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**A. ASSIGNMENT OF ERROR**

1. There was insufficient evidence to support a finding of probable cause to stop and detain Appellant.

1a. The stop of Appellant was unconstitutionally pretextual

**B. ISSUES PRESENTED**

1. Was there insufficient evidence to support a finding of probable cause to stop and detain Appellant?

1a. Was the stop of Appellant unconstitutionally pretextual?

**C. STATEMENT OF THE CASE**

The matter came on below for a stipulated trial and motion to suppress evidence on the basis of impressible stop and detention of Appellant. See, Report of Proceedings (RP) at . 6. The facts of the event are undisputed and they are generally as follows:

A Bellingham municipal police detective obtain information through a confidential informant that Appellant was involved in a drug transaction. RP at 10. The information was that Appellant was to drive to the Seattle area to pick up drugs and return them to Bellingham. RP at 10. The detective followed Appellant to Everett and observed Appellant and another unknown individual outside a business ‘fist bump’ each other and Appellant receive a duffel bag. RP at 18. Based solely upon this

observation, the detective followed Appellant back to Bellingham jurisdiction and effected a stop of Appellant's vehicle. RP at 30. The singular reason for the stop of Appellant's vehicle was to search for narcotics. RP at 30. Narcotics were found. RP at 28; RP at 37.

The trial court found sufficient probable cause to stop, detain and search Appellant and his vehicle. RP at 53. This appeal results.

#### **D. ARGUMENT**

The Fourth Amendment of the United States Constitution prohibits all unreasonable searches and seizures. State v. Rivera, 76 Wn. App. 519, 523, 888 P.2d 740 (1995). Warrantless searches are considered unreasonable, per se, unless they fall within certain narrowly defined exceptions to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).

A police officers act of stopping a vehicle and detaining its occupants constitutes a seizure under the Fourth Amendment that must be reasonable. Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, L. Ed. 2d 660 (1979); see also State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); State v. Tijerina, 61 Wn. App. 626, 628-29, 811 P.2d 241, review denied, 118 Wn.2d 1007 (1991). If a stop is unreasonable, the seized

evidence is subject to exclusion under the fruit of the poisonous tree doctrine. United States v. McNeely, 6 F.3d 1447, 1450 (10<sup>th</sup>

Cir. 1993); United States v. Roberson, 6 F.3d 1088, 1091 (5<sup>th</sup> Cir. 1993); United States v. Erwin, 875 F.2d 268, 269 n.2 (10<sup>th</sup> Cir. 1989); see also United States v. Arango, 912 F.2d 441, 446; State v. Tijeriana, 61 Wn. App. 626, review denied, 118 Wn.2d 1007 (1991).

Detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred. See, e.g., Delaware v. Prouse, 440 U.S. 648, 659 (1979). In Whren v. United States, \_\_\_ U.S. \_\_\_, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), the United States Supreme Court stated:

The Fourth Amendment guarantees [t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of this provision.

See Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). An automobile stop is thus subject to the constitutional imperative that it not be unreasonable under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. See Prouse, supra, at 659;

Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam) (Id. at 1772; emphasis added.).

In Henry v. United States, 361 U.S. 98 (1959), the court discussed probable cause. Importantly, the court noted that good faith on the part of arresting officers is not enough.

Instantly, there is absolutely no probable cause for the stop of Appellant. The municipal Detective that followed Appellant from Bellingham to Everett and observed completely innocuous conduct; to wit., a ‘fist bump’ and a transfer of a duffel bag. RP at 18. This conduct evidences no criminal activity. This conduct is thoroughly benign. This conduct does not indicate to any reasonable, objective person that criminal activity is afoot. Consequently, the court erred in finding probable cause for the detention of Appellant.

1a. The stop of Appellant was unconstitutionally pre-textual.

Additionally, pre-textual stops or detentions collide with constitutional protections. State v. Ladson, 138 Wn.2d 343 (1999). The framework for analysis is essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Id. Accordingly, the reasonable articulable suspicion that a traffic infraction

has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation. Id. To determine whether a stop is pre-textual, and therefore constitutionally infirm, the Court indicated as follows:

When 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.

Of course, when the stop is determined pre-textual, or when an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Id.

Instantly, very simply, the stop of Appellant is lucidly pretextual and thus constitutionally infirm. Here are the facts associated with the reason for the stop; 1) unidentified informant indicates that Appellant is engaged in drug transactions; 2) Officers' follow Appellant to Everett (not Seattle as was reported by the confidential information) and observe him 'fist bump' and exchange a duffel bag with another individual; 3) Officers follow Appellant back to Bellingham jurisdiction and then initiate a stop to search Appellants vehicle for narcotics. (There are no previous controlled buys with the confidential informant & Appellant nor any other potentially corroborating information linking Appellant to drug transactions.)

There is no reason identified for the stop of the Appellant's vehicle other than to search for controlled substance. None whatsoever. In fact, the detectives acknowledge in testimony this was the sole reason for the contact with Appellant-to search his vehicle for narcotics. Further, even where there an infraction identified, this situation would be a pure Ladson stop, supra, where the subjective intent of the Officers is to investigate for some other suspected criminal activity and not actually conduct a bona fide traffic stop. Certainly, without an infraction, the pre-textual nature is dramatically evident.

**E. CONCLUSION**

For all of above reasons, Appellant requests the relief indicated herein.

DATED this 13<sup>6</sup> day of December, 2010.

  
Gene E. Piculell  
WSBA 20020  
COUNSEL FOR APPELLANT

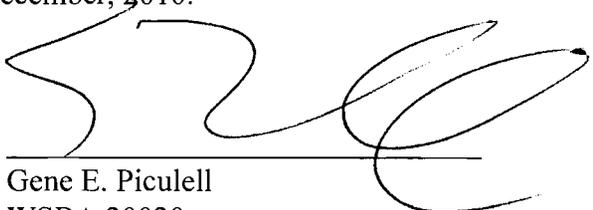
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There is no reason identified for the stop of the Appellant's vehicle other than to search for controlled substance. None whatsoever. In fact, the detectives acknowledge in testimony this was the sole reason for the contact with Appellant-to search his vehicle for narcotics. Further, even where there an infraction identified, this situation would be a pure Ladson stop, supra, where the subjective intent of the Officers is to investigate for some other suspected criminal activity and not actually conduct a bona fide traffic stop. Certainly, without an infraction, the pre-textual nature is dramatically evident.

**E. CONCLUSION**

For all of above reasons, Appellant requests the relief indicated herein.

DATED this 30 day of December, 2010.

  
Gene E. Piculell  
WSBA 20020  
COUNSEL FOR APPELLANT

On this day I mailed in U.S. mail a properly stamped envelope addressed to the attorney for the Plaintiff that contained a copy of this document. I certify under penalty of perjury under the laws of the State of Washington that is true and correct. Signed at Bellevue, WA, this 30 day of December, 2010

