

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

STATE OF WASHINGTON,

Respondent,

v.

ROGER HILLS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Cindy A. Larsen

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. The Anti-Crime Team officers detained the Mercedes and its occupants at the Motel Express in the heart of Everett’s “Stay-Out-of-Drug-Area”. 2

 2. Bench trial and sentencing. 5

D. ARGUMENT 6

 1. THE STOP OF THE CAR WAS PRETEXTUAL IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS. 6

 (i). Terry investigative detentions require reasonable, articulable suspicion, and pretextual stops, which rely on an infraction in order to pursue a hunch of criminal activity, violate the defendant’s constitutional rights. 6

 (ii). Under Chacon-Arreola, a stop is only legal if the traffic infraction was an actual, conscious and independent reason for the stop, as determined by objective and subjective circumstances. 7

 (iii). The traffic stop in this case was pretextual under the totality of the circumstances test, which begins - rather than ending - with the officer’s claim that the infraction was the reason for the stop. 9

 (iv). The focus on the passenger, Mr. Hills, who has nothing to do with the driver’s failure to change the license plate light bulb, attests to the drug focus of the stop. 14

2. THIS COURT SHOULD REMAND WITH AN ORDER TO
SUPPRESS. 15

E. CONCLUSION 16

TABLE OF CONTENTS

WASHINGTON CASES

State v. Boisselle, 194 Wn.2d 1, 448 P.3d 19 (2019). 7

State v. Chacon-Arreola, 176 Wn.2d 284, 290 P.3d 983
(2012) 6,7,8,9,10,11,16

State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173 (1999) 12

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010) 9

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009). 9

City of Spokane v. Hays, 99 Wn. App. 653, 995 P.2d 88
(2000). 15

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) 7,8,11

State v. Martinez, 135 Wn. App. 174, 143 P.3d 855 (2006). 10

State v Meyers, 117 Wn. App 93, 69 P.3d 367 (2003). 8

City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775
(1988) 8

State v. Montes-Malindas, 144 Wn. App. 254, 182 P.3d 999 (2008). 14

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999). 15

State v. Rainey, 107 Wn. App. 129, 28 P.3d 10 (2001) 15

State v. Wolter, 187 Wash. App. 1036 (WL 3422142) (Div. 2, May 27,
2015) (unpublished, cited pursuant to GR 14.1(a) only). 1

UNITED STATES SUPREME COURT CASES

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). 6

United States v. Wong Sun, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441
(1963). 17

CONSTITUTIONAL PROVISIONS

Const. art. I, § 7. 6

U.S. Const. amend. IV 6

A. ASSIGNMENTS OF ERROR

1. The State failed to prove that the detention of Roger Hills was legal under Article 1, section 7, and the Fourth Amendment, where he was subjected to a pretextual traffic stop in which the claimed traffic violation was not an actual, conscious, and independent cause of the stop, therefore requiring suppression of the evidence seized as a result.

2. The court erred in entering finding of fact 3.¹

3. The court erred in entering finding of fact 5.

4. The court erred in entering finding of fact 6.

5. The court erred in entering finding of fact 7.

6. The court erred in entering finding of fact 12.

7. The court erred in entering finding of fact 13.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Roger Hills was a passenger in a car driven by Anthony Maldonado. Everett Police Department Anti-Crime Team Officers Anatoliy and Oleg Kravchun, while driving a surveillance car in the

¹ Findings of fact identical to those identified in assignments of error 2 through 6 were repeated within several of the “Court’s Conclusions.” See CP 223-27. Statements of fact included within conclusions of law are treated as factual findings. State v. Wolter, 187 Wash. App. 1036 (WL 3422142) (Div. 2, May 27, 2015) (unpublished, cited pursuant to GR 14.1(a) only).

Broadway area of Everett, a high drug crime area, stopped the car after it pulled into the Motel Express, a known location of drug activity.

To satisfy the constitution, the traffic infraction must be an actual cause of the stop, a conscious cause of the stop, and an independent cause of the stop. On the record set forth below, applying the combined subjective and objective analysis, was the stop of the Mercedes pretextual?

C. STATEMENT OF THE CASE

1. The Anti-Crime Team officers detained the Mercedes and its occupants at the Motel Express in the heart of Everett's "Stay-Out-of-Drug-Area".

Roger Hills was a passenger in a car Mercedes driving on Broadway, in Everett, at approximately 10 pm on. While driving the opposite direction on Broadway, Everett Police Officers Anatoliy Kravchun and Oleg Kravchun, members of the police department's Anti-Crime Team (ACT), claimed they were able to view the car's rear license plate light, and determined that it was not operating. 7/18/19RP at 9-10, 30-31, 40-41. The officers observed the car turn into the parking lot of the Motel Express, a well-known high-drug sales location in Everett's "SODA," or a "stay-out-of-drug-area," as it has been

designated by the Everett Municipal Court. 7/18/19RP at 10-11, 25-28, 41-42.

Officer Anatoliy Kravchun, who was driving, pulled the car into the parking lot and up to a position directly behind the car.. 7/18/19RP at 9-12, 22. The officers fantastically claimed they were able to notice the defective license plate light even as they drove away from the car, requiring they either noticed it in their rearview mirror or spun their head around to quickly identify this claimed violation even while driving away from it. They then claimed this supposed infraction was the basis their decision to turn and follow the car into the motel parking lot. 7/18/19RP at 11, 41-42.

Officer Anatoliy Kravchun walked up to the car and began speaking with the driver, Anthony Maldonado, who provided his passport. 7/18/19RP 43-44. At the same time, using his flashlight, Officer Kravchun observed a plastic zip-type baggie with a brown residue in it, and a roll of aluminum foil which he said is “often” used to burn heroin, both sitting in the console between the front seats. 7/18/19RP at 11-12, 46.

When Officer Kravchun asked what the bag was, the driver handed it to the officer, who concluded it contained residue of

heroin. 7/18/19RP at 12, 46. Officer Kravchun told the driver, and his passenger Roger Hills, that they were being detained on suspicion of using drug paraphernalia. 7/18/19RP at 46. Officer Kravchun then saw a scale in the console area, and informed Maldonado he was being arrested for possession of drug paraphernalia. 7/18/19RP at 46-47.

Meanwhile, Officer Oleg Kravchun, who had seen the baggie and watched his brother tell the men they were being detained, removed Mr. Hills from the passenger side of the vehicle. Officer Kravchun told Hills that he was being detained for possession of paraphernalia. 7/8/19RP 14-16. Mr. Hills told Officer Kravchun that his name was “Red or Roger,” and Officer Kravchun recognized this as the name of a reputed drug seller in north Everett. 7/18/19RP at 15-16. Officer Oleg Kravchun ran Mr. Hills’ name at the patrol car, and learned that Hills had an active Department of Corrections (DOC) arrest warrant. 7/18/19RP at 16, 19. While several additional officers arrived, numbering at least two from the ACT Team, and a DOC officer, Officer Kravchun arrested Hills, and in a search of his person, located a digital scale, a small amount of cash, and 16 baggies of suspected heroin. 7/18/19RP at 19-20, 23-25.

At a CrR 3.6 hearing, Mr. Hill contended that the ACT officers had followed the car into the Motel Express parking lot to pursue a hunch of a drug crime. 7/18/19RP at 70-87. The court questioned the notion that it was possible that the officers could have spotted the rear license plate, given their testimony of the different directions the two automobiles were headed. 7/18/19RP at 80.

If this Mercedes made a turn into the motel parking lot, there is no way that that officer could see the taillight or the license plate light out on the Mercedes. Impossible.

7/18/19RP at 80. The State responded that the car must have taken a right turn instead of a left, which the court stated was not consistent with the testimony. 7/18/19RP at 81-82. The trial court took the matter under advisement for a period of days. 7/18/19RP at 87. The court subsequently rejected the defense contention of pretext, signing the State's written findings and conclusions deeming the Terry stop to be legal, as based on the supposed traffic infraction. CP 223-27.

2. Bench trial and sentencing.

Mr. Hills proceeded to a stipulated bench trial, following which the court found him guilty of possession of methamphetamine with intent to deliver (committed while on community custody), possession of a controlled substance (committed while on community custody), and

violation of community custody for acts on or around January 14, 2020. 9/16/19RP at 3-9; CP 177-211 at 34-36, 39-40; CP 11-31. .

D. ARGUMENT

1. THE STOP OF THE CAR WAS PRETEXTUAL IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

(i). *Terry* investigative detentions require reasonable, articulable suspicion, and pretextual stops, which rely on an infraction in order to pursue a hunch of criminal activity, violate the defendant’s constitutional rights.

Article I, section 7 of the Washington Constitution protects the “private affairs” of Washington citizens, while the Fourth Amendment protects against searches and seizures that are unreasonable. Const. art. I, § 7; U.S. Const. amend. IV; State v. Chacon-Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Mere reasonableness is not the test; rather, “[u]nder article I, section 7, the right to privacy is broad, and the circumstances under which that right may be disturbed are limited.” Chacon-Arreola, 176 Wn.2d at 291. In Washington, “[w]arrantless disturbances of private affairs are subject to a high degree of scrutiny,” and always require “authority of law,” which generally means a warrant. Chacon-Arreola, at 292.

In this case, the stop of the car was constitutional only if it was based upon a reasonable articulable suspicion of criminal activity or on a traffic infraction. Chacon-Arreola, 176 Wn.2d at 292-93. Absent reasonable suspicion, a stop for purposes of investigating suspected crime violates the state and federal constitutions. State v. Ladson, 138 Wn.2d 343, 350-52, 979 P.2d 833 (1999); Terry v. Ohio, 392 U.S. at 21-22. “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.’ ” Chacon-Arreola, at 294 (quoting Ladson, at 358). At their core, “pretextual” searches violate article I, section 7 of the state constitution. See State v. Boisselle, 194 Wn.2d 1, 4, 448 P.3d 19 (2019). A traffic stop based on an infraction is unconstitutional when the infraction is a pretext for conducting a criminal investigation, unrelated to driving, for which the police lack reasonable suspicion. Chacon-Arreola, at 292-93.

(ii). Under *Chacon-Arreola*, a stop is only legal if the traffic infraction was an actual, conscious and independent reason for the stop, as determined by objective and subjective circumstances.

Under Chacon-Arreola, a traffic stop is only constitutional when the traffic infraction that was the purported reason for the stop was

indeed an “actual, conscious, and independent cause” of the stop. (Emphasis added.) Chacon-Arreola, at 297. To answer this question, Washington courts look to a totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his or her behavior to determine whether a traffic stop was pretextual. Chacon-Arreola, at 296-97; Ladson, at 359; State v Meyers, 117 Wn. App 93, 97, 69 P.3d 367 (2003).

In Chacon-Arreola, the Supreme Court held that an officer engaged in enforcing the drunk driving laws could stop a vehicle where the stop was reasonably necessary to address an unrelated traffic infraction. Chacon-Arreola, at 288. The arresting officer in Chacon-Arreola was responding to a report of a possible DUI. There was an inadequate observed basis for a Terry stop for DUI, but the officer stopped the car he was following because of an illegally altered exhaust pipe. Chacon-Arreola, at 288-89.

Although the Court approved the stop, it recognized that the privacy interest within an automobile remains substantial. Chacon-Arreola, at 293 (citing City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988)). As was said in Ladson, “[v]irtually the

entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter.” Ladson, at 358 n. 10.

For this reason, traffic stops are ripe for being abused as the “legitimate” basis for a pretextual Terry stop - so much so that the Chacon-Arreola Court urged courts to ensure that the police exercise, but not abuse, their discretion in determining whether minor traffic infractions require police attention and enforcement efforts. See Chacon-Arreola, at 294-95. The presence of a crime-based reason for the stop for which no reasonable articulable suspicion exists is material to whether the officers really stopped the vehicle for the claimed traffic code reason, and thus whether it can be said that they would have conducted the traffic stop regardless. Chacon-Arreola, at 299.

(iii). The traffic stop in this case was pretextual under the totality of the circumstances test, which begins - rather than ending - with the officer’s claim that the infraction was the reason for the stop.

This State’s constitution requires the courts to look beyond the formal, asserted justification for the stop to the actual one. Ladson, at 353. And the State bears the heavy burden of proving the legality of a warrantless seizure by clear and convincing evidence. State v. Doughty, 170 Wn.2d 57, 62,239 P.3d 573 (2010); State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). An appellate court reviews the

constitutionality of a warrantless stop *de novo*. Chacon-Arreola, at 291; State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006).

Here, where the Kravchuns, by untenable denials and by manipulations of terminology to evade the constitution, contended that they abandoned the purpose of their ACT patrol of the Everett SODA area to enforce a license plate light law. The objective and subjective analysis shows the stop was pretextual under the totality of the facts and circumstances. The trial court erred at the CrR 3.6 hearing.

Officers Kravchun and Kravchun were both members of the Everett Police Department's Anti-Crime Team (ACT), which focuses on "problem places and problem people" such as the 2300 block of Broadway, which is considered a high crime area. 7/18/19/RP at 26,27, 38-40. But the court erred in finding that the Anti-Crime Team which the officers were assigned to is not like the patrol division of the Everett Police Department "except" that they do not respond to 911 calls. FOF 3, FOF 5. It is clear from the officers' testimony that they were assigned to patrol the city and that section of Broadway for problem persons and problem activities, that their patrol of the "SODA" drug area that night was a drug crime patrol that included surveillance, that other ACT team members were patrolling that same

high drug crime area that night, and that a vehicle turning into the Motel Express would be of particular interest because of its reputation. 7/18/19RP at 7-11, 20-21, 26-30.

The trial court erred in finding that the officers were not involved in a patrol specifically for drug offenses, irrespective of their labels and characterizations of their assignments. FOF 3, FOF 5, FOF 6. The fact that the officers also conducted traffic stops, as any officer might, is of minimal significance - a pretext case will always involve an officer who conducted a putative traffic stop. The fact that part of the Kravchun brothers' authority as officers included the power to enforce the traffic code does not provide any factual or legal insulation against Mr. Hill's argument of pretext. Under RCW 10.93.070, all Washington peace officers may enforce the traffic laws of the State throughout the State. Every police officer is empowered to make traffic infraction stops, RCW 46.61.015(1), and drivers must obey officers when they stop them to do so. RCW 46.61.021(1).

It is this always-present power that causes the problem of pretextual stops to be a constitutional concern in the first place. See Chacon-Arreola, at 294; Ladson, at 358 and n. 10 (both noting that the traffic code is rarely complied with in every detail by drivers and that

police authority to stop persons for traffic code violations, which is plenary, must therefore be exercised with discretion); see State v. DeSantiago, 97 Wn. App. 446, 450-53, 983 P.2d 1173 (1999) (although reasonable suspicion existed for a drug stop, traffic basis asserted was pretextual, and the fact that the officer made traffic stops as part of his regular patrol duties did not shield him from acting pretextually).

Similarly, the testimony that the officers were on proactive patrol in the SODA area in fact supports the fact that the officers were patrolling for drug offenses. FOF 7. The Washington cases involve officers who may have employed traffic stops in order to investigate the serious crimes they were actually seeking to detect. Ladson, 138 Wn.2d at 345 46 (“The officers explained they do not make routine traffic stops while on proactive gang patrol although they use traffic infractions as a means to pull over people in order to initiate contact and questioning . . . for intelligence gathering.”). Findings 5 and 7 were erroneously entered.

The officers here attempted to describe “proactive” patrol as meaning that they basically drove around the city, “commonly” looking for traffic violations or basically anything the same as a routine patrol. 7/18/19RP at 7-9. But the drug surveillance and interdiction purpose of

their work that night, though not labeled the work of a “drug” unit, was embedded, in unguarded moments, in their frank testimony regarding where they were patrolling – the SODA area, along with other ACT units - and why. 7/18/19RP at 7 (“looking for wanted individuals”). Indeed, that is what the citizens of Everett expect and appreciate that their ACT police officers do.² The court erred in entering Findings 6 and 7.

Yet when Officer Oleg Kravchun was asked if he believed the ACT team was formed to enforce the traffic code such as license plate lights, he said, “I don’t know.” 7/18/19RP at 20-21. He asserted that the routine investigations of ACT are for traffic infractions at the same time as demonstrating his intent focus of the SODA area and the high drug locations of the Walgreens and the Motel Express. 7/18/19RP at 10-11. Findings 5, 6 and 7 were erroneously entered. Under the objective analysis, the whole of the testimony and the officers’

² See <https://everettwa.gov/562/Operations> (describing the department’s Anti-Crime Team as a specialty unit and specifically a “project oriented, proactive street team . . . charged with targeting and suppressing selective street level crime problems within the city through the use of specialized enforcement methods [including] non-traditional enforcement techniques such as plain clothes, undercover buy / bust operations, john stings, prostitution stings and stakeouts.”).

incompatible assertions attempting to portray themselves as basically traffic officers weighed in favor of a conclusion that this stop was a pretext.

Further facts required the court to find the State failed to prove the legality of the detention. Beyond just the nature of the officers' patrol that night, the fact that the first thing Officer Anatoliy Kravchun did when he walked up to the car was "use[e] my flashlight to look throughout the car," the rapid convergence of ACT teams and a roving DOC officer onto the location to assist a supposed ticket-writing stop, the complete absence of any citation or enforcement of the license plate light matter, which presented no genuine safety concern from a vehicle pulling safely into a parking space at a motel, render the court's findings unsupported by substantial evidence, its conclusions legally erroneous, and the stop a pretext stop. 7/18/19RP at 29, 35, 43, 49, 53; State v. Montes-Malindas, 144 Wn. App. 254, 182 P.3d 999 (2008).

The court erred in entering Findings 12 and 13.

(iv). The focus on the passenger, Mr. Hills, who has nothing to do with the driver's failure to change the license plate light bulb, attests to the drug focus of the stop.

Because constitutional protections are possessed individually, a reasonable suspicion sufficient to detain the driver of a vehicle does not

necessarily justify detaining a passenger. State v. Parker, 139 Wn.2d 486, 497-98, 987 P.2d 73 (1999). “Individual constitutional rights are not extinguished by mere presence in a lawfully stopped vehicle.” Parker, 139 Wn.2d at 498. Where police interact with passengers for an investigatory purpose, they must have independent reasonable suspicion to do so. City of Spokane v. Hays, 99 Wn. App. 653, 659, 995 P.2d 88 (2000).

In this case, Officer Oleg Kravchun’s focus on the passenger, Mr. Hills, during a stop claimed to be for a rear license plate light, further attests to the pretextual nature of the detention. See State v. Rainey, 107 Wn. App. 129, 138-39, 28 P.3d 10 (2001) (defendant, a passenger in a vehicle, received deficient lawyer performance where facts supported argument that the stop during an “emphasis patrol” in the area of a rock concert was not based on a traffic infraction); State v. Montes-Malindas, 144 Wn. App. at 259 (stop for briefly driving without headlights on was deemed a pretext for a drug investigation in part because officer contacted the passengers first rather than the driver).

Under the totality of the circumstances test, this case permits only the conclusion that the Mercedes was stopped because of an

inarticulate hunch of drug crime. Applying a subjective and objective analysis to the totality of the circumstances, the license plate light was not an actual, conscious, and independent cause of the stop. The absence of any one of those three requirements renders the stop pretextual under Chacon-Arreola.

2. THIS COURT SHOULD REMAND WITH AN ORDER TO SUPPRESS.

The trial court improperly relied on the officer's claims without looking to the objective facts. "Pretext is, by definition, a false reason used to disguise a real motive." Chacon-Arreola, at 359. The required objective review is aimed at rooting out cases where "police officers . . . simply misrepresent their reasons and motives for conducting traffic stops." Chacon-Arreola, at 297. Here, review reveals that this was a stop where the officers "relie[d] 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 requirements." Chacon-Arreola, at 294 (quoting Ladson, 138 Wn.2d at 358). In short, the "police [were] pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." Ladson, at 349. This Court should reverse.

In the event of a pretextual stop, all subsequently obtained evidence from the stop must be suppressed. Ladson, 138 Wn.2d at 357; United States v. Wong Sun, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

E. CONCLUSION

Based on the foregoing, Mr. Hills requests that this Court order suppression and remand the case to the trial court.

Respectfully submitted this 11th day of May, 2020.

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