IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID M. RANDOLPH, Appellant.	No. 39040-0-II UNPUBLISHED OPINION

Hunt, J. – David M. Randolph appeals his bench trial convictions for driving under the influence (DUI) and possession of a controlled substance (psilocybin). He challenges the trial court's denial of his CrR 3.6 suppression motion, arguing that (1) the trial court improperly relied on a radar unit's speed reading to justify the traffic stop that led to his arrest because there was no foundational evidence that the trooper's radar unit was accurate and reliable and there was no evidence corroborating the radar unit's reading; (2) the radar unit's reading was inadmissible without "[a]uthentication," Br. of Appellant at 13; (3) the stop was an invalid "speed trap" stop that did not comply with RCW 46.61.470's requirements; and (4) the trooper lacked probable cause to stop the vehicle to investigate a possible DUI. We affirm.

FACTS

I. Traffic Stop

On April 30, 2008, Washington State Patrol Trooper Joshua J. Merritt was driving eastbound on State Highway 106 on regular patrol when a car driven by David M. Randolph passed in the opposite direction.[1] Merritt's radar unit showed that Randolph's car was traveling at 54 mph; the speed limit in that area was 40 mph. As Merritt turned his patrol car around, Randolph made a "short" left turn onto another road, cutting across the corner and centerline and into the oncoming lane, rather than taking a "qualified right-angle turn" at a slower speed. Report of Proceedings (RP) (Jan. 2, 2009) at 12-13. Merritt stopped Randolph's vehicle.

Randolph smelled strongly of alcohol, his eyes were bloodshot and watery, and his speech was slurred. Randolph told Merritt that he had had several drinks that night, and agreed to allow Merritt to conduct some "voluntary field sobriety tests." Clerk's Papers (CP) at 9. The Horizontal Gaze Nystagmus test and the "Walk and Turn" test indicated that Randolph was impaired.[2] CP at 9. Merritt arrested Randolph for driving under the influence and conducted a "search incident to arrest."[3] CP at 38.

During the search, Merritt found a plastic bag of dried mushrooms containing psilocybin.

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[1] There were no other cars in the immediate area.

[2] Merritt did not conduct any other physical tests because they were too close to traffic to do so safely.

[3] Although not entirely clear, the record suggests that Merritt searched Randolph's person, not the vehicle. Randolph, however, does not challenge this search as unlawful incident to arrest.

Merritt advised Randolph of his *Miranda*[4] rights, which he waived. Randolph told Merritt that he had purchased the mushrooms from a man in a bar and that he (Randolph) had intended to smoke them to get high. Later breath tests showed that Randolph's blood alcohol level was 0.140 g/210 L and 0.131 g/210 L within two hours of having driven his car.

II. Procedure

The State charged Randolph with DUI, RCW 46.61.502(1), and unlawful possession of a controlled substance, RCW 69.50.4013(1).

Randolph moved to suppress all evidence seized following the stop, arguing that the initial stop was unlawful on several grounds: (1) Corroboration of speeding was required to establish probable cause to stop the vehicle because there was no evidence that Merritt's radar unit was tested, calibrated, or accurate; (2) merely crossing the center line was not sufficient corroboration of speeding and did not justify a stop to investigate a possible DUI; and (3) "[t]he stop was the result of an invalid 'speed trap'; without required measurements or timing device. RCW 46.61.470."[5] CP at 57. Randolph also argued that the arrest was not supported by probable cause and that Merritt did not properly administer the breath tests.

At the suppression hearing, Merritt testified that (1) in addition to the radar reading, he had observed Randolph make a "short" turn rather than slow sufficiently to make a legal left hand turn without driving into the oncoming traffic lane, RP (Jan. 2, 2009) at 12; (2) his radar unit had

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] RCW 46.61.470 defines a "speed trap" and establishes under what circumstances evidence of speed from a speed trap situation is admissible.

just been installed in his patrol car; (3) he was trained and certified to operate the radar unit; (4) he had verified the accuracy of the radar unit's ability to measure the patrol car's speed by comparing the radar unit's measurements to the patrol car's calibrated speedometer; and (5) he had verified the radar unit's calibration at the start and end of each shift that day by using tuning forks. There was no testimony from Merritt or any other witness about formal certification of the radar unit or any other formal testing of the radar unit's accuracy.

The State asked Merritt what speed the radar unit had reported when Randolph's car passed. Randolph objected, arguing, "It hasn't been properly authenticated—the proper foundation." RP (Jan. 2, 2009) at 10-11. The State responded that it was not offering the radar unit's reading as evidence of speeding; thus, this foundation was not required. Randolph responded that because there was no foundation, there had to be evidence corroborating the suspected speeding before the trial court could consider the radar unit's reading as evidence of a crime. The trial court considered the radar unit's speed reading in evaluating the legality of the stop, which was the focus of the suppression hearing, and overruled Randolph's objection.

The trial court denied Randolph's motion and stated in both an oral and a written conclusion of law that corroboration of speeding was not required. The trial court concluded that (1) the initial stop was "supported by reasonable and articulable facts," CP at 10, (2) the stop was "properly broadened to investigate the crime of [DUI]" based on Merritt's contact with Randolph after the stop, CP at 10, (3) Merritt had probable cause to arrest Randolph for DUI, (4) the subsequent search was lawful, and (5) the evidence seized during that search was admissible.

Randolph waived his right to a jury trial and agreed to a bench trial based on the police

reports, "other materials in the prosecuting authority's possession," and the evidence presented at the suppression hearing.[6] CP at 47. The trial court found Randolph guilty of DUI and of unlawful possession of a controlled substance. Randolph appeals.

ANALYSIS

Randolph argues that the trial court erred in denying his motion to suppress because (1) it wrongly determined that evidence corroborating the radar unit's reading was not required; (2) it wrongly considered the radar unit's reading, which unit had never been "[a]uthenticat[ed]," Br. of Appellant at 13; (3) the initial stop was an invalid "speed trap" stop that did not comply with RCW 46.61.470's requirements, Br. of Appellant at 14; and (4) Merritt lacked probable cause to stop the vehicle to investigate a possible DUI. We disagree.

I. Standard of Review

We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Where, as here, the defendant does not challenge any of the trial court's findings of fact, we consider them verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review conclusions of law de novo. *Mendez*, 137 Wn.2d at 214.

[6] None of the police reports or "other materials" are included in the record on appeal. CP at 47.

II. Probable Cause to Believe Randolph was Speeding

As he did below, Randolph relies on *Clement v. Dep't of Licensing*, 109 Wn. App. 371, 35 P.3d 1171 (2001). He first argues that the trial court erred when it concluded that the initial traffic stop was valid[7] because the stop was not supported by any facts other than an "inadmissible speed measuring device result." Br. of Appellant at 8. This argument fails.

First, *Clement* does not support Randolph's argument. On the contrary, the *Clement* court rejected the argument that foundational evidence was required to show the radar device's reliability and accuracy because the radar's speed reading was relevant only to whether the initial stop was valid, not to prove that Clement was in fact speeding. *Clement*, 109 Wn. App. at 376.[8] Similarly here, the officer was justified in stopping Randolph's car based on its speed reflected by the radar unit. Here, as in *Clement*, the State did not use the radar reading to prove that Randolph was guilty of speeding, only to show the legality of the initial traffic stop.

Second, even assuming, without deciding, that corroborating evidence of excess speed is

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[7] A traffic stop is constitutionally valid if the officer has probable cause to believe a person has violated the traffic code. *City of Bremerton v. Spears*, 134 Wn.2d 141, 158, 949 P.2d 347 (1998). Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed. *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

[8] Division One of our court held that there was probable cause to stop the vehicle based on information from another trooper that his radar reading showed the vehicle was speeding and on the arresting trooper's visual observation of the front of Clement's car dipping as if the car were rapidly decelerating. More specifically, the court held:

> We decline to require the Department to go beyond proving that there was probable cause to believe the motorist violated the traffic code. Where, as here, the Department can meet its burden without introducing foundational radar evidence, then the Department is not required to introduce such evidence.

Clement, 109 Wn. App. at 376.

required when there is no foundational evidence demonstrating the accuracy of a radar unit,[9] the record here supplies such corroborating evidence. Merritt testified that, in addition to the radar reading, he observed Randolph make a "short" turn into the oncoming traffic lane rather than slow to make a legal left hand turn and staying in his own lane. RP (Jan. 2, 2009) at 12. Randolph's turn demonstrated to Merritt that Randolph was driving too fast and, thus, corroborated the radar unit's reading. In short, Merritt's observation of Randolph's reckless turn justified the traffic stop. We hold, therefore, that the trial court did not err in ruling that the stop was valid.

III. Admissibility of Radar Reading

Randolph next argues that the trial court violated several rules of evidence when it considered the radar unit's speeding reading without a foundation. Again, we disagree.

ER 104 provides that the rules of evidence do not apply to "[p]reliminary questions concerning . . . the admissibility of evidence." Randolph's suppression hearing addressed a preliminary question—the validity of the traffic stop—concerning the admissibility of evidence obtained as a result of stop. Thus, the evidence rules did not apply. We hold that the trial court properly considered the radar unit's reading.

[9] *See Jury v. Dep't of Licensing*, 114 Wn. App. 726, 736, 60 P.3d 615 (2002), *review denied*, 149 Wn.2d 1034 (2003) (probable cause established by "officer's physical observation of the car and his use of the laser speed measuring device," relying on *Clement*, 109 Wn. App. at 375-76).

IV. RCW 46.61.470 Not Applicable

Randolph next appears to argue that the traffic stop was an invalid "speed trap" stop that did not comply with RCW 46.61.470's requirements. Br. of Appellant at 19. Once more, we disagree.

RCW 46.61.470 establishes the requirement for valid "speed trap" stops and defines a "speed trap" as:

> a particular section of or distance on any public highway, the length of which has been or is measured off or otherwise designated or determined, and the limits of which are within the vision of any officer or officers who calculate the speed of a vehicle passing through such speed trap by using the lapsed time during which such vehicle travels between the entrance and exit of such speed trap.

RCW 46.61.470(1). Merritt was driving down the highway running radar on approaching vehicles. There is no indication in the record that Merritt was measuring anyone's speed in a specific, measured area using any form of lapsed time method. *See State v. Ryan*, 48 Wn.2d 304, 306-07, 293 P.2d 399 (1956) (use of radar does not involve lapsed time measurement and therefore does not constitute a "speed trap" within the definition of the statute).[10] Thus, Merritt's running radar on Randolph's car does not meet the statutory definition of a "speed trap," and RCW 46.61.470 does not apply.

V. Probable Cause to Investigate DUI

Finally, Randolph argues that Merritt lacked probable cause to stop his vehicle to investigate a possible DUI. This argument is irrelevant. Merritt's initial stop was based on a

[10] The *Ryan* court addressed an earlier version of the statute, former RCW 46.48.120 (1937). Although the legislature recodified this statute as RCW 46.61.470, the definition of "speed trap" is identical in both the former and the current versions of the statute.

suspected speeding violation; there is no evidence in the record that Merritt was attempting to investigate a possible DUI at the time of that stop. All of the DUI evidence developed after the stop for speeding. And there was clearly probable cause to justify a continued investigation based on Merritt's observations of Randolph's intoxication once the two came in contact.

We affirm.

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

Hunt, J.

We concur:

Armstrong, PJ.

Quinn-Brintnall, J.