

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 28566-9-III**

**Appellant,**

**Division Three**

**v.**

**JAMES MICHAEL PACHPE,**

**UNPUBLISHED OPINION**

**Respondent.**

Sweeney, J. — The trial judge here concluded that a police officer did not have probable cause to stop the defendant driver for failure to yield or negligent driving. The police officer saw the defendant stop at a stop sign but then move three to four feet into the intersection before again stopping to allow the officer to pass by. We conclude that the facts establish probable cause and remand for further proceedings.

**FACTS**

Sergeant Mike Russell stopped a car driven by James Pachpe at 1:45 a.m. in June “[b]ecause he nearly crashed into me.” Report of Proceedings (RP) (Oct. 12, 2009) at 5. Sergeant Russell had been driving east on a street in Wapato, Washington. Mr. Pachpe

had stopped at a northbound stop sign at an intersecting street. But he had then lurched three to four feet into the intersection as Sergeant Russell drove through it. His car had not hit the sergeant's patrol vehicle, and the sergeant had not had to swerve to avoid a collision. Mr. Pachpe had then turned to head west after the patrol vehicle had passed through the intersection. The sergeant stopped Mr. Pachpe. Mr. Pachpe was under the influence and had been driving without a license and without his required "ignition interlock" device.

The State charged him with felony driving while under the influence of intoxicants, first degree driving with a revoked license, and driving without an ignition interlock and with a license restriction. Mr. Pachpe moved to suppress evidence collected and statements made during and following the stop. He argued that Sergeant Russell did not have probable cause to believe he had committed a traffic violation. The trial court agreed "there were no facts for the Sergeant to believe that criminal activity was afoot, i.e.,] probable cause to neither believe that the infraction of failure to stop/yield, nor the infraction of negligent driving had been or was being committed by the defendant." Clerk's Papers (CP) at 3. The court then granted Mr. Pachpe's motion and dismissed all charges. The State appeals the dismissal.

## DISCUSSION

The State contends that the trial judge applied the wrong standard to analyze whether the traffic stop here was lawful. It argues that the test is not whether the State can ultimately prove that Mr. Pachpe drove negligently or failed to yield the right of way. Appellant's Br. at 8. Instead, the test is whether the sergeant had a reasonable and articulable suspicion that Mr. Pachpe committed one of these violations. *Id.* The State relies on *State v. Duncan*, 146 Wn.2d 166, 179, 43 P.3d 513 (2002), and, of course, urges that the facts that unfolded in front of Sergeant Russell supported his suspicion that Mr. Pachpe drove negligently or failed to yield the right of way. Mr. Pachpe responds that the judge got it right because there are no facts from which the officer could form a reasonable and articulable suspicion of criminal activity.

#### Adequate Assignment of Error

Mr. Pachpe first argues that we should dismiss this appeal without entertaining the State's argument because the State failed to assign error to the order of suppression and dismissal. RAP 10.3(g).

We will review claims of error only if the appealing party appropriately assigns error to the court's ruling. RAP 10.3(g). Here is how the State framed its issues with the trial judge's decision:

1. Whether the trial court used the appropriate standard in evaluating whether Sgt. Russell had a basis to detain the defendant.
2. Whether the trial court erred in finding that Sgt. Russell did not have

No. 28566-9-III  
State v. Pachpe

probable cause to stop the defendant for the investigation of a traffic infraction.

Appellant's Br. at 1. Those issues, together with Mr. Pachpe's response, clearly frame the question we have to answer and we will, therefore, address them. RAP 1.2(a); *State v. Olson*, 126 Wn.2d 315, 322-23, 893 P.2d 629 (1995).

#### Standard of Review

The issue here is whether the trial court erred by concluding that Sergeant Russell lacked probable cause to stop Mr. Pachpe for two traffic infractions: failure to yield and negligent driving. There is no dispute over what happened: "[A]s Sergeant Russell's patrol car was passing that intersection, defendant's car suddenly travelled 3-4 feet forward, which the Sergeant observed and braced for." CP at 2. The only question before us, then, is whether what happened was sufficient to support the sergeant's suspicion of criminal activity. That is a question of law that we will review de novo. *Duncan*, 146 Wn.2d at 171.

#### Probable Cause—Traffic Violation

Ultimately, the resolution here turns on the reasonableness of the sergeant's suspicions and that, in turn, depends on "the totality of the circumstances known to the officer at the inception of the stop." *State v. Rowell*, 144 Wn. App. 453, 457, 182 P.3d 1011 (2008), *review denied*, 165 Wn.2d 1021 (2009). Those circumstances include the sergeant's experience and "commonsense

judgments and inferences about human behavior.” *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

“[P]robable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime.” *State v. Seagull*, 95 Wn.2d 898, 906, 632 P.2d 44 (1981). Probable cause is governed by “only the probability of criminal activity and not a prima facie showing of it.” *Id.* at 907. Whether probable cause exists, then, depends on “the content of information possessed by police and its degree of reliability.” *State v. Randall*, 73 Wn. App. 225, 229, 868 P.2d 207 (1994) (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)). The officer is entitled to consider the whole picture. *Id.* And “no single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer.” *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

It is well established that, “[i]n allowing such detentions, *Terry*<sup>1</sup> accepts the risk that officers may stop innocent people.” *Wardlow*, 528 U.S. at 126. However, despite this risk, “[t]he courts have repeatedly encouraged law enforcement officers to investigate suspicious situations.” *State v. Mercer*, 45 Wn. App. 769, 775, 727 P.2d 676 (1986).

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

No. 28566-9-III  
State v. Pachpe

*State v. Lee*, 147 Wn. App. 912, 918, 199 P.3d 445 (2008) (first and third alterations in original), *review denied*, 166 Wn.2d 1016 (2009).

And, so, as the State points out, the test is not beyond a reasonable doubt. Appellant's Br. at 8. A traffic stop is lawful if it is justified at its inception and reasonable in scope. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999); *State v. Chelly*, 94 Wn. App. 254, 258-59, 970 P.2d 376 (1999). A traffic stop is justified at its inception when the police officer has probable cause (i.e., the officer knows sufficient facts) to believe that a traffic violation has occurred. *Chelly*, 94 Wn. App. at 259; *State v. Cole*, 73 Wn. App. 844, 849, 871 P.2d 656 (1994).

The court here concluded that "there were no facts for the Sergeant to believe that criminal activity was afoot, i.e.,] probable cause to neither believe that the infraction of failure to stop/yield, nor the infraction of negligent driving had been or was being committed by the defendant." CP at 3. On reconsideration the court again concluded that Sergeant Russell lacked "probable cause" and "specific and articulable [sic] facts" to believe that a traffic violation occurred. RP (Oct. 21, 2009) at 5.

We turn now to the statutory rules of the road. A driver approaching a stop sign must "yield the right-of-way to any vehicle in the intersection" after stopping at the stop sign. RCW 46.61.190(2). Mr. Pachpe stopped at the stop sign but then "suddenly

traveled 3-4 feet forward.” CP at 2. Mr. Pachpe had to yield that portion of the roadway over which the sergeant had the right-of-way. *Foster v. Bylund*, 7 Wn. App. 745, 752, 503 P.2d 1087 (1972); *Hemrich v. Koch*, 177 Wash. 272, 275-76, 31 P.2d 529 (1934). And, while Mr. Pachpe’s lurch toward the intersection may not have actually obstructed Sergeant Russell’s right-of-way, the factual conclusion that Mr. Pachpe was about to, or almost did, obstruct it was reasonable.

Moreover, a stop for negligent driving required some reasonable suspicion that Mr. Pachpe drove his car in a way that was “both negligent and endangers or is likely to endanger any person or property.” RCW 46.61.525(1)(a). “Negligent” means “the failure to exercise ordinary care, and is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do something that a reasonably careful person would do under the same or similar circumstances.” RCW 46.61.525(2)(a). A driver at a stop sign has a duty to avoid colliding with a driver who has the right-of-way. *Poston v. Mathers*, 77 Wn.2d 329, 333, 462 P.2d 222 (1969). Sergeant Russell’s suspicion that Mr. Pachpe was about not to yield the road as the sergeant passed, then, meets the criteria necessary for probable cause. The stop here was justified.

We, then, reverse the order of the trial court suppressing the evidence and remand

No. 28566-9-III  
State v. Pachpe

for further proceedings.

A majority of the panel has determined that 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.

I CONCUR:

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Sweeney, J.

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Kulik, C.J.