NO. 43522-5-II

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

STATE OF WASHINGTON, Appellant

v.

CHARLES WAYNE MCLEAN, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01628-5

BRIEF OF APPELLANT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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C. STATEMENT OF THE CASE

1. Procedural history

Charles McLean was arrested for driving while under the influence on August 18, 2010. He was subsequently charged with driving while under the influence. Prior to trial, he filed a motion to suppress the evidence used against him as having been the product of an unlawful

seizure. The motion was denied and the case proceeded to trial, after which McLean was convicted. He was sentenced as a third time offender to 120 days in jail. See Judgment and Sentence, attached. The Superior Court for Clark County reversed his conviction for the reasons set forth below. The State filed a timely Notice of Discretionary Review and Motion for Discretionary Review, which this Court granted.

2. Substantive facts

McLean was traveling on State Route 500 in Vancouver, Washington at about 12:30 a.m. on August 18th, 2010. Trial Transcript (TT) at p. 36-37. Trooper Thompson of the Washington State Patrol was on duty at that time and saw McLean's car. TT at 36-38. The reason that Trooper Thompson's attention was drawn to McLean was because McLean was weaving in his lane. TT at 38. As he drew within a couple of car lengths of McLean's car, Trooper Thompson saw that the defendant's car was continuously weaving and that the car actually left its lane and crossed the line onto the shoulder three times. TT at 39. After following the defendant and watching him weave in his lane the entire time like a fish in the water, Trooper Thompson activated his emergency lights in an attempt to stop McLean's car. TT at 41, 71. In spite of the fact that there was an available shoulder on which he could have pulled over on the right hand side of the road, McLean entered the left turn lane and stopped at a

red light. TT at 41. For officer safety reasons Trooper Thompson preferred that the traffic stop occur on the right shoulder and used his PA system to instruct McLean to pull to the right instead. TT 41-42. McLean did not follow this instruction and remained where he was. TT 42-43. When the left turn arrow turned green Thompson then instructed McLean to just proceed through the intersection but McLean still did not comply or move. TT at 43. Then, when the oncoming traffic got their green light to come through the intersection McLean made a left turn and nearly caused a collision. TT at 43. After making the turn McLean pulled to the right hand shoulder of Falk Road. TT at 43.

Upon contacting McLean, Trooper Thompson immediately smelled an odor of alcohol and asked him for his registration, license and proof of insurance. TT at 43. McLean had difficulty producing his driver's license and registration. TT at 44. During this time Thompson asked McLean several questions about where he was going and where he had been coming from, and noticed several things about McLean. TT at 44. He noticed that McLean's speech was very slurred, the odor of alcohol emanating from him was very strong, his responses were delayed and he had poor finger dexterity. TT at 44. At trial, Trooper Thompson testified that these observations were consistent impairment due to alcohol. TT at 44. McLean denied having consumed any alcohol. TT at 45. McLean

agreed to perform field sobriety tests. As he got out of his car, McLean staggered. TT at 45. McLean performed poorly on these tests. TT at 48-57. Regarding the horizontal gaze nystagmus test specifically, McLean had all six of the clues Trooper Thompson is trained to look for when administering the test. TT at 51. As a result, Thompson testified that based on his training and experience, the result of the horizontal gaze nystagmus test was consistent with McLean being under the influence of alcohol. TT at 51. Based on all of his observations and the field sobriety tests, Thompson testified he believed that McLean was under the influence of alcohol and he arrested McLean. TT at 58. Later, McLean refused to take a breath test. TT at 65. No objection was made to any of the aforementioned testimony.

3. *Pre-trial motion to suppress*

McLean brought a motion to suppress the evidence claiming that the stop of his car was unlawful. Trooper Thompson testified that he has made over seven hundred DUI arrests since joining the State Patrol in 2005. Motion Transcript (MT) at page 4. He has received training to learn how both alcohol and drugs affect the human body. MT at 3. He is a certified Drug Recognition Expert. MT at 3. He testified that as he traveled westbound on SR 500 he saw McLean's car in the left lane of

travel and the car was weaving in its lane. MT at 4. He accelerated up to McLean's car and followed behind him in the right lane as McLean continued in the left. MT at 9. McLean continuously weaved in his lane and on at least three occasions he weaved onto the left shoulder of the roadway. MT at 9. The weaving was like watching a fish weave through water, as though a product of delayed steering input. MT at 13. When questioned by defense counsel, Trooper Thompson identified two infractions he believed the defendant committed: Leaving his lane of travel by crossing over the fog line three times, and traveling unlawfully in the left lane while not passing. MT at 23. Trooper Thompson testified that even without the two infractions of driving unlawfully in the left lane and leaving the lane of travel, he still would have stopped McLean's car due to the weaving within the lane. MT at 25.

The district court denied the motion to suppress, orally finding:

> Here, we have the constant travel in the left hand lane for no apparent reason, because there's no other traffic on the road according to the trooper—just him and the defendant. He also then makes 3 incursions outside the lane. Once he describes it by, as by half a tire width and I think-, I understood that at first to be totally outside the lane he clarified that for you to indicate that over half the vehicle width of the tire had crossed outside, but there was still some of the tire on the white line itself. And then the-, there was at least one incursion where the vehicle was totally outside the line.

MT at 36-37.

The district court orally concluded, as a matter of law:

> I don't think *Prado*[1] asks the trooper to sit and follow a vehicle that he feels may be operated by an impaired driver, and that's what Trooper Thompson was clearly looking for was an impaired driver. And he was looking for infractions that would lead him to believe that an infraction-, the infractions were being committed because the driver was impaired. I don't think *Prado* is asking the troopers to, at count 3 or count 1 or count any specific number. If you crossed the line just once and side swiped the Jersey barrier, that may have been enough for PC. Here we've got 3 times where he went outside the line.
>
> In Trooper Thompson's mind, at that point in time, he felt he had a reasonable, articulable suspicion to state that the driver, the defendant, was operating a motor vehicle while he was under the influence. And I don't think *Prado* expects troopers to keep following until some unfortunate incident happens. I think it expects a trooper to use reasonable, articulable suspicion and I believe he has that in this case.
>
> And I'm going to rule that *Prado* does not apply, that there is enough that he has gone past what *Prado* expects. And that there is sufficient information for him to make the stop that he did.

MT at 37.

Following his conviction after trial, McLean filed a direct appeal in the Superior Court. He did not assign error to any of the trial court's factual findings on the suppression hearing. To the extent that his briefing is clear at all, he assigned error to the trial court's conclusion of law that

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[1] *State v. Prado*, 145 Wn.App. 646, 186 P.3d 1186 (2008).

State v. Prado, 145 Wn.App. 646, 186 P.3d 1186 (2008), was distinguishable and did not compel suppression of the evidence in McLean's case. See Brief of Appellant at pages 5-10. He further assigned error to the trial court's conclusion that the officer had probable cause to believe that McLean had committed the infraction of driving unlawfully in the left hand lane as proscribed by RCW 46.61.100. He claimed pretext and cited *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), but did not claim at the motion to suppress that the stop of his car was pretextual. Rather, McLean appears to believe that officers are only permitted to make *Terry* stops of vehicles when they have reasonable suspicion to believe an infraction has been committed, not when they have reasonable suspicion of criminal activity. He appears to believe that a stop based on reasonable suspicion that a crime has been committed, rather than for an infraction, would violate *Ladson*. This is so, he reasons, because a *Terry* stop based on reasonable suspicion of criminal activity focuses on an officer's subjective intent rather than on objective measurements such as whether a particular course of conduct constituted an infraction. To the extent he argues that the stop of his car was pretextual, he was making a claim that the district court had no opportunity to evaluate because he did not make that claim at the trial court level.

The second assignment of error McLean made in his appeal was that he received ineffective assistance of counsel when his attorney did not object to opinion testimony by Trooper Thompson that McLean exhibited signs that were consistent with him being under the influence of alcohol. McLean argued that although *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994), allows an officer to offer an opinion as to impairment, Trooper Thompson's testimony went "far beyond the allowable opinion evidence in *Heatley*." See Brief of Appellant at p. 13. He doesn't say how this is so, beyond complaining that Trooper Thompson testified about his training in learning how to detect alcohol impairment and his testimony that if he determines that someone is not impaired, he doesn't arrest him or her. See Brief of Appellant at 3, TT at 33-34. This, according to McLean, amounted to Trooper Thompson testifying that anyone who gets arrested (based on the officer's opinion that he is impaired) is guilty. See Brief of Appellant at page 13. This is so, he must necessarily reason, because an opinion as to impairment constitutes an improper opinion on an ultimate issue.

The Superior Court, sitting in its capacity as the appellate court in this matter, agreed with McLean on both assignments of error. The Court

issued an order entitled "Opinion and Remand to District Court" which stated:

> The Court, after reviewing the record, considering the briefs submitted by the parties and hearing oral argument, comes to the following conclusions of law:
>
> 1. Pursuant to *State v. Prado*, 145 Wn.App. 646 (2008), 145 Wn.App. 646 (2008), Trooper Thompson's stop of Defendant for DUI was not supported by reasonable suspicion.
>
> 2. Although reasonable suspicion existed for an infraction (violation of RCW 46.61.100(2), "Keep right except when passing, etc."), to the extent that the stop was based on that infraction the stop was pretextual. The Court concludes: "How many cars do we see pulled over because they have been traveling in the left lane? How many times have we all driver down the road behind somebody who is in the left lane and won't pull over? That's you know, that's a stop that doesn't make it at least in my mind, in terms of being anything other than a pretext so under the case law, the stop is not good." *State v. Ladson*, 138 Wn.2d 343 (1999).
>
> 3. Trooper Thompson gave improper opinion testimony on an ultimate issue to be decided by the jury, and the error was not harmless.
>
> 4. As a result of the foregoing Conclusions of Law, insufficient evidence remains to prove the elements of DUI. The case is hereby remanded to District Court for dismissal with prejudice, consistent with this opinion.

See Opinion and Remand to District Court, attached. A timely notice of discretionary review was filed by the State. This Court granted review.

D. ARGUMENT WHY SUPERIOR COURT SHOULD BE REVERSED

I. THE SUPERIOR COURT ERRED WHEN IT HELD THAT THE STOP OF THE DEFENDANT'S CAR WAS PRETEXTUAL AND UNLAWFUL.

The Superior Court misapplied Washington and Federal constitutional law when it held not only that *State v. Prado*, supra, applies to this case but that it compels a finding that the stop was unlawful. *Prado* is wholly inapplicable to this case. In *Prado*, an officer stopped the defendant's car based on a single excursion outside the lane of travel by two tire widths for a period of one second. *Prado* at 647. The stop was solely based on the officer's belief that the defendant committed the infraction of traveling outside the lane of travel, contrary to RCW 46.61.140(1). The stop was not based on any suspicion of criminal activity, reasonable or otherwise. After making the stop, the officer discovered that the driver was intoxicated. Because the stop was not based, either in whole or in part, on suspicion of criminal activity, the validity of the stop depended on whether the infraction occurred. Division I of the Court of Appeals held that the language "a vehicle shall be driven *as nearly as practicable* entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" meant that the legislature did not

intend to punish "brief incursions over the lane lines." *Prado* at 649. "A vehicle crossing over the line for one second by two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully." *Id.*

The differences between this case and *Prado* are both obvious and substantial. In *Prado*, the *sole* basis for the traffic stop was the suspected infraction, not reasonable suspicion of criminal activity. In *Prado*, even if the stop had been based on a suspicion of criminal activity, such suspicion would likely have been deemed unreasonable due to the extreme brevity of the transgression. The State's position in *Prado* essentially demanded perfection of drivers and the Court of Appeals correctly held that the legislature did not intend such rigidity. That is not what occurred here. Here, Trooper Thompson saw McLean weaving in his lane like a fish weaves through water, which, based on his training and experience, suggested to him that the driver could be impaired. Then, he saw McLean actually weave out of the lane of travel three times. At that point he had a reasonable suspicion of criminal activity. To meet the standard of reasonable suspicion, an officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the detention]." *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868 (1968). "When reviewing the merits of an investigatory stop, a court must evaluate the totality of the circumstances presented to

the investigating officer." *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690 (1981). The court should also take the officer's experience into account when determining whether an officer's suspicion is reasonable. *Glover* at 514 ("The court takes into account an officer's training and experience when determining the reasonableness of a *Terry* stop.)

Trooper Thomspon's stop of McLean's car was based on Thompson's suspicion that McLean was engaged in criminal activity and that suspicion was reasonable. That Trooper Thompson also had probable cause to believe that McLean committed the traffic infraction of failing to keep to the right except when passing (see RCW 46.61.100) does not negate his reasonable suspicion of criminal activity. McLean has cited no authority at any point in these proceedings which holds that an officer can have one, and only one, basis for stopping a car. Nor has he cited any authority which holds that if probable cause that an infraction has been committed is found lacking, such deficiency would nullify a concommittant reasonable suspicion of criminal activity. In other words, even if the Superior Court were correct in holding that the suspected infraction of failing to keep right except while passing did not provide grounds for Trooper Thompson to stop McLean's car, Thompson was

nevertheless justified in stopping the car based on his reasonable suspicion of criminal activity.

The Superior Court's holding that the infraction of failing to keep to the right was supported by reasonable suspicion but a pretextual reason for the stop was erroneous and contrary to Washington constitutional law. First, McLean did *not* claim that the stop of his car was pretextual in his CrRLJ 3.6 motion to suppress. Rather, he merely claimed that the infraction had not been committed. See Motion Transcript, pages 28-31, 34-35. The claim of pretext was made for the first time on appeal but McLean failed in his burden (by not recognizing he even bore it) to establish that the issue should be reviewed for the first time on appeal. Under *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011), the following four factors must be present for an issue to have been deemed preserved for appeal:

> (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

Robinson at 305. The issue of pretext is obviously not a new controlling constitutional interpretation material to the defendant's case. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) was decided over a decade

ago. The rule requiring issue preservation is in place to prevent the State from being ambushed on appeal and to allow the trial court to consider and rule upon the issue, thereby minimizing needless appeals. Here, the State was ambushed by this claim, for which no record was developed below, and the Superior Court erred in considering this claim for the first time on appeal where McLean had not met his burden of demonstrating that this issue should be considered for the first time on appeal or had been preserved in any way.

To the extent that the Superior Court judge relied on her own anecdotal experience as a driver ("How many cars do we see pulled over because they have been traveling in the left lane? How many times have we all driven down the road behind somebody who is in the left lane and won't pull over? That's, you know, that's a stop that doesn't make it at least in my mind, in terms of being anything other than a pretext so under the case law, the stop is not good"), such reliance was mind boggling and highly improper. First, how can a passing motorist possibly know the reason why a car has been pulled over? Second, even if this Trooper stops cars for this infraction more than city police officers or sheriff's deputies, so what? Such incongruence would not render a stop on this basis pretextual. Trooper Thompson testified that he regularly stops motorists for that particular infraction. See Motion Transcript at p. 11. If State Patrol

Troopers can no longer enforce the traffic code without being accused of pretext, what are they there for? The oft-misused *Ladson* dealt with undercover narcotics officers who never enforce the traffic code who nevertheless trumped up a traffic code basis to stop a car when their true motivation was to be able to conduct a search for narcotics. See *Ladson* at 345-47. A traffic stop is pretextual when an officer stops a vehicle, under the guise of enforcing the traffic code, to conduct an investigation unrelated to driving. *Ladson*, 138 Wn.2d at 349-51. That case is a far cry from State Patrol Troopers performing their primary function—enforcement of the traffic code.

To the extent the Superior Court's holding was based on the notion that an officer stopping a car must have a reasonable suspicion (or probable cause[2]) to believe that an infraction has been committed, and that a stop of a vehicle cannot be based on reasonable suspicion of criminal activity alone, the Superior Court clearly misapplied both Washington and federal constitutional law. The police may stop a vehicle based on a well-founded suspicion of criminal activity, and may require its occupants to identify themselves and explain their activities, in the same manner as with a pedestrian. *State v. Serrano*, 14 Wn.App. 462, 464-66, 544 P.2d 101 (1975). See also *Hiibel v. District Court*, 542 U.S. 177, 187, 124 S.Ct.

[2] See *State v. Nichols*, 161 Wn.2d 1, 13, 162 P.3d 1122 (2007) ("Rather, an officer must have probable cause that an infraction has occurred.")

2451 (2004). See also *State v. Quezadas-Gomez*, 165 Wn.App. 593, 267 P.3d 1036 (2011), *review denied*, 2012 Wash. LEXIS 314 (April 24, 2012).

The Superior Court erred in holding that the stop of McLean's car was pretextual and that it was "not supported by reasonable suspicion." This Court should reverse the Superior Court.

II. THE SUPERIOR COURT ERRED WHEN IT HELD THAT TROOPER THOMPSON GAVE IMPROPER OPINION TESTIMONY AND THAT SUCH ERROR WAS NOT HARMLESS, PARTICULARLY WHERE THIS WAS NOT A BASIS FOR RELIEF SOUGHT BY MCLEAN.

As an initial matter, McLean claimed in his direct appeal that he received ineffective assistance of counsel because his attorney failed to object to the opinion testimony offered by Trooper Thompson. The Superior Court, in its oral recitation of its ruling as well as its written order remanding this matter to District Court for dismissal, failed to apply the standard of review applicable to ineffective assistance of counsel claims. McLean was not arguing that the opinion testimony offered by Trooper Thompson violated his right to a jury trial and that his claim to that effect should be reviewed for the first time on appeal. Rather, he went through the "back door" and argued that his counsel was ineffective for failing to object to the testimony. The Superior Court granted relief to McLean on

an argument that he didn't make. The Superior Court was required to apply the correct standard of review. Applying the correct standard of review, the Superior Court erred in holding that McLean suffered non-harmless error at his trial. The correct standard is set forth here.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no

effect on the judgment." *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, *review denied*, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). "The decision of when or whether to object is a classic example of trial tactics." *Madison*, 53 Wn. App. at 763. This court presumes that the **failure to object** was the product of legitimate trial

strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, "[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal." *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

The preceding citations demonstrate the clear error of the Superior Court. The decision of whether to object is a tactical one, and the circumstances must be "egregious" before an appellate court can find ineffective assistance of counsel. Moreover, the testimony must be central to the State's case. Putting aside for the moment the fact that *City of Seattle v. Heatley*, supra, specifically allows the type of testimony complained of by McLean in his direct appeal, the testimony was not central to the State's case. Central to the State's case was the testimony about McLean's driving, which was extremely bad (he nearly caused a

collision in an intersection, among other things), his inability to respond to direct commands, his poor performance on each of the field sobriety tests (including the horizontal gaze nystagmus test, which cannot be "beaten" by good balance or a conditioned response to alcohol), his dishonesty to Trooper Thompson (he said he had consumed no alcohol when Troooper Thompson could smell an odor of intoxicants emanating from him), and, most importantly, his refusal to take a breath test despite knowing that his failure to do so would result in his license being suspended for one year. The jury's verdict did not hinge upon the Trooper's testimony that the observations he made about McLean were consistent with impairment. The jury already knew that the Trooper held such an opinion based on his arrest of McLean. The jury was also instructed that a complaint is not an accusation and cannot be deemed evidence of guilt. See Court's Instructions to Jury, Instruction no. 1 (attached).

"To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." *State v. Johnston*, 143 Wn.App. 1, 23, 177 P.3d 1127 (2007), quoting *In re Personal Restraint of Davis*, supra, at 714. The Superior Court in this case erred by not considering first, whether the

decision whether to object was tactical, second, whether the objection, had it been made, would have been granted, and third, whether the result of the trial would have been different had the un-objected to testimony not been admitted. The second factor is dispositive in this case—the objection would not have been sustained.

In *City of Seattle v. Heatley*, supra, a prosecution for driving under the influence, the officer testified that the defendant was "obviously intoxicated" and "could not drive a motor vehicle in a safe manner." *Heatley* at 577. Heatley claimed on appeal that such testimony violated his right to a jury trial because it amounted to an opinion on an ultimate issue to be decided by the jury and because it amounted to an opinion of guilt. *Id.* The Supreme Court rejected the claim, reiterating that "[u]nder modern rules of evidence...an opinion is not improper merely because it involves ultimate factual issues." *Heatley* at 578, citing ER 704. The Court further stated "[t]he fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. 'It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.'" *Heatley* at 579, quoting *State v. Wilber*, 55 Wn.App. 294, 298 n.1, 777 P.2d 36 (1989). Last, the Court reiterated "It has long been the rule in Washington that a lay witness may express an

opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected person." *Heatley* at 580; citing *State v. Forsyth*, 131 Wash. 611, 612, 230 P. 821 (1924); also *State v. Dolan*, 17 Wash. 499, 50 P. 472 (1897). "The effects of alcohol 'are commonly known and all persons can be presumed to draw reasonable inferences therefrom.'" *Heatley* at 580, quoting *State v. Smissaert*, 41 Wn.App. 813, 815, 706 P.2d 647, *review denied*, 104 Wn.2d 1026 (1985). On the question of whether an officer is rendered an expert witness rather than a lay witness based on his experience, the Court held that officer is a lay witness on this question. The Court recognized the absurdity of a rule which would hold that a lay person may express an opinion "regarding the sobriety of another" but an officer who is "specially trained to recognize characteristics of intoxicated persons" may not. *Heatley* at 580.

Here, Mclean's claim of ineffective assistance of counsel necessarily fails because the testimony in question was not objectionable. Any objection lodged would have been overruled. McLean attempted to distinguish *Heatley* in his direct appeal by stating "However, as the record clearly shows, Trooper Thompson testified far beyond the allowable opinion evidence in *Heatley*." The problem is that the record clearly shows just the opposite. The testimony offered in this case was far less provocative than testimony to the effect that a defendant is "obviously

intoxicated" or "could not drive a motor vehicle in a safe manner." *Heatley* controls this case and the testimony offered by Trooper Thompson was proper and admissible. McLean did not receive ineffective assistance of counsel when his attorney chose not to object to admissible testimony.

The Superior Court erred in holding that McLean received ineffective assistance of counsel. This Court should reverse the Superior Court.

E. CONCLUSION

The Superior Court's reversal and dismissal of McLean's conviction should be reversed, and his conviction should be reinstated.

DATED this 24th day of October, 2012.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

9-6-11

DUI, DWS III

364 ... 64 ... 5,000 ... 2,450

96 ... 85 ... 1,000 ... 1,000

~~365~~ 185

180

(150 converted to 30 days jail = 180 days jail)

w/ others

2,550.

43

200

200

1,250

150.

INFRAC 6323155

3,245.50 total

261.2 / fines due 120 days after jail release

9.6.2011

FILED

2012 APR 18 AM 10: 33

SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. CHARLES W. MCLEAN, Defendant.	Superior Court No. 11-1-01628-5 District Court No. 774387 OPINION AND REMAND TO DISTRICT COURT

The Court, after reviewing the record, considering the briefs submitted by the parties and hearing oral argument, comes to the following conclusions of law:

1. Pursuant to *State v. Prado*, 145 Wn.App. 646 (2008), Trooper Thompson's stop of Defendant for DUI was not supported by reasonable suspicion.
2. Although reasonable suspicion existed for an infraction (violation of RCW 46.61.100(2), "Keep right except when passing, etc."), to the extent that the stop was based on that infraction the stop was pretextual. The Court concludes: "How many cars do we see pulled over because they have been traveling in the left lane? How many times have we all driven down the road behind somebody who is in the left lane and won't pull over? That's, you know, that's a stop that doesn't make it at least in

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

my mind, in terms of being anything other than a pretext so under the case law, the stop is not good." *State v. Ladson*, 138 Wn.2d 343 (1999).

3. Trooper Thompson gave improper opinion testimony on an ultimate issue to be decided by the jury, and the error was not harmless.
4. As a result of the foregoing Conclusions of Law, insufficient evidence remains to prove the elements of DUI. The case is hereby remanded to District Court for dismissal with prejudice, consistent with this opinion.

DATED this 17 day of April, 2012.

Diane M. Woolard
Superior Court Judge, Dept. 8

Presented by:

Erin Culver, WSBA #35678
Deputy Prosecuting Attorney

Agreed as to ~~form~~ by:

Jack Peterson, WSBA #38362
Attorney for Defendant

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

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