Supreme Court No: 95636-7
Court of Appeals Div. III No: 35002-9
(Consolidated with No. 35003-7)

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Jena Dale Brooks,

Petitioner.

PETITION FOR REVIEW

Kenneth J. Miller, WSBA #46666
Andrew J. Chase, WSBA #47529
Attorneys for Respondent

PO Box 978
Okanogan, WA 98840
509-861-0815 (P)
509-557-6280 (F)
Ken@MillerChaseLaw.com
Andy@MillerChaseLaw.com

Table of Contents

Table of Authorities

United States Supreme Court Cases

Washington State Supreme Court Cases

Washington State Appellate Cases

Constitutional Provisions

Statutes

Regulations

Court Rules

A. IDENTITY OF PETITIONER

Ms. Jena D. Brooks was the Respondent in Division III of the Court of Appeals in the consolidated cases 35002-9 and 35003-7.

B. COURT OF APPEALS DECISION

The Court of Appeals issued its decision in Ms. Brooks' case on February 1, 2018, reversing the Chelan County Superior Court. *See Appendix A* (Decision).

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in determining that the neutral area is not part of the roadway; and
2. Whether the Court of Appeals erred in failing to reach the issue of whether the rule of lenity applies to the issue of neutral area incursions.

D. STATEMENT OF THE CASE

On September 17, 2015, Trooper Brian Moore effected a traffic stop on Ms. Brooks. The reason for the stop was that Trooper Moore observed Ms. Brooks' vehicle cross the "neutral area" between the merge ramp and through lanes on Highway 2 near Dryden. A neutral area is the triangular piece of pavement that separates a merge lane from the nearby through lanes; neutral areas exist at the bottom of virtually all highway on/off ramps.

The traffic stop was essentially for merging from the ramp to the through lanes too soon, before the merge lane met the through lane.

Following the traffic stop, Ms. Brooks was charged in Chelan County District Court with Driving While License Suspended/Revoked, Second Degree; Obstructing a Law Enforcement Officer; and Refusal to Give Information. Ms. Brooks moved to suppress evidence flowing from the traffic stop, arguing that there was no probable cause to effect a seizure.

At the hearing on Ms. Brooks' suppression motion, testimony established that Trooper Moore did not observe Ms. Brooks create a safety risk to herself or others; that there was no indication that Ms. Brooks did not safely execute the merge; that his observation distance was 100-200 feet behind Ms. Brooks' vehicle; that there were no other vehicles between himself and Ms. Brooks; and finally, that Ms. Brooks did not leave the pavement at any time. *See Clerk's Papers* ("*CP*") at 65-66.

The District Court entered findings and conclusions denying Ms. Brooks' motion to suppress. *Id.* at 85-88. In so concluding, the Court relied upon RCW 46.61.670 (Wheels Off Roadway) and RCW 46.61.050 (Failure to Obey Traffic Control Device) to justify the traffic stop. *Id.* Ms. Brooks timely appealed to the Chelan County Superior Court.

On RALJ Appeal, the Superior Court overturned the District Court. *Id.* at 140-44. The Superior Court held that the Wheels Off Roadway statute

did not apply to the facts of this case, and that because the lane markings at issue imparted no duty to be obeyed or disobeyed, the Failure to Obey Traffic Control Device statute was not violated. *Id.* at 141, 143. The State timely appealed to the Court of Appeals, Division III.

In seeking review from the Appellate Court, the State moved for review on five issues; the Appellate Court Commissioner granted review upon two issues, neither of which were precisely issues presented by the State for review:

> This Court has determined that whether the term "roadway" as used in RCW 46.61.670, is ambiguous, and whether the rule of lenity applies so as to interpret "roadway" in favor of Ms. Brooks in this instance, are issues of public interest that support discretionary review pursuant to RAP 2.3(d).

See Commissioner Wasson's March 7, 2017 Ruling at 3-4. Ms. Brooks argued to the Court of Appeals that the issues had been mis-framed, but also responded to the merits of the State's brief. *See Respondent's [Ms. Brooks'] Brief* at 1. The Court of Appeals held that the neutral area did not meet the definition of "roadway" under RCW 46.04.500, and thus the traffic stop was permissible under the Wheels Off Roadway statute. *State v. Brooks*, 409 P.3d 1072, ¶16 (February 1, 2018). The Court did not reach the issues of whether a neutral area is a shoulder or whether the rule of lenity is applicable in the context of Washington's traffic code. *Id.* at ¶15. The concurring opinion agreed in the result, but reasoned that there had been a

violation of the Failure to Obey Traffic Control Device statute. *Id.* at ¶23-25.

Ms. Brooks now petitions this Court to review this case and reverse the Court of Appeals.

E. ARGUMENT

1. Review is warranted under RAP 13.4(b)(1).

The Court of Appeals decision should be reviewed because it conflicts with this Court's decision in *Simmons v. Cowlitz County*, 12 Wn.2d 84, 120 P.2d 479 (1941).

The Court of Appeals ruled that the neutral area was not part of the roadway. However, in *Simmons*, this Court stated:

> The shoulder or that portion of the highway which collapsed was improved in the same manner as the other portion of the highway. That improved portion of this road which was adjacent to the edge of the road, the shoulder of the road or highway as it is called, was as much a part of this road or highway as any part of the road.
>
> Appellants could lawfully use any portion of Kalama river road and the graveled portion of the shoulder adjacent to the edge of that road as well as the other portion; **in fact, by its improvement in the same manner as the other portion of the road was improved, the county invited its use by the traveling public.**

Id. at 88 (internal citations omitted; emphasis added). The *Simmons* decision involved an issue of the County's liability for a portion of the road that collapsed. *See Id.* However, the *Simmons* Court raises an important point –

that improvement of adjacent areas in the *same manner* as the roadway makes those areas a part of the roadway and invites the use thereof. In the dashcam video, made part of the Appellate record, the neutral area in question can be seen to extend onto the bridge decking, indicating that it is improved in the same manner as both the pavement and the bridge decking.

The Court of Appeals ruled that the neutral area, which is improved in the same manner as the roadway, is not part of the roadway. This conflicts with *Simmons* and invites review under RAP 13.4(b)(1).

2. Review is warranted under RAP 13.4(b)(3).

The Court of Appeals decision should be reviewed because a significant question of law under the Washington Constitution is at issue. Fundamentally, this case involves the question of whether the driver of a motor vehicle is permissibly seized under Article 1, Section 7 of the Washington Constitution where the driver enters the neutral area, absent a safety risk.

Analysis of this issue involves four questions of statutory interpretation. First, whether the neutral area is part of the "roadway" as defined in RCW 46.04.500; Second, and if so, whether the neutral area is also a shoulder that would except it from inclusion as part of the roadway; Third, whether it is permissible to cross the thick, solid, white channelizing lines that demarcate the neutral area; and finally, whether the law applicable

to the above questions is ambiguous, such that the rule of lenity would apply in this context.

The Court of Appeals approached the first issue properly, but erred in its analysis. The statutory definition of roadway is a two-part inquiry first focusing on whether the area in question is "improved, designed, or ordinarily used for vehicular travel." *See* RCW 46.04.500. If so, inquiry shifts to whether the area is excluded from the roadway by being a sidewalk or shoulder. *Id.*

Ordinary use is the easiest of the three disjunctive prongs to address. The neutral area is not *ordinarily* used for vehicular travel. However, the neutral area is both improved and designed for vehicular travel. The fact that the neutral area has other purposes does not detract from this. In support of the holding below, the Court of Appeals noted that the neutral area was designed as a buffer zone to keep vehicles separate to facilitate speed adjustment and safe merging. *See Brooks*, 409 P.3d 1072 at ¶ 10, 11. The Court also noted that the neutral area was an island, quoting language from the Manual on Uniform Traffic Control Devices (MUTCD). *Id.*

Ms. Brooks argues, as she did below, that pavement is a type of improvement that is indicative of design for vehicular travel or use. While the Court of Appeals is correct that pavement allows for drainage and structural integrity, these purposes are *in addition* to the purpose of

vehicular travel. The fact that the neutral area is paved in the same manner as the roadway around it indicates that the neutral area is improved to the same extent as the rest of the roadway – i.e. improved sufficiently to support a vehicle that travels across it.

The same section of the MUTCD that the Court of Appeals relies upon (§ 3I.02) states:

> The neutral area between approach-end markings **that can be readily crossed even at considerable speed** sometimes contains slightly raised (usually less than 1 inch high) section of coarse aggregate or other suitable materials to create rumble sections that provide increased visibility of the marked areas and that produce an audible warning to road users traveling across them. For additional discouragement to driving in the neutral area, bars or buttons projecting 1 to 3 inches above the pavement surface are sometimes placed in the neutral area...

MUTCD, § 3I.02, ¶02, at 430 (emphasis added). This leads directly to the third issue – whether it is permissible to cross the pavement markings that demarcate the neutral area. The above provision seems to indicate that it is permissible to cross the channelizing lines *and* the neutral area.

The Court of Appeals treated this issue as though the neutral area were an island. *Brooks,* 409 P.3d 1072 at ¶11. However, some confusion arises on this issue. The neutral area is designated by channelizing lines. MUTCD § 1A.13(3)(124). Channelizing lines are used to form islands. *Id.* at § 1A.13(3)(29). Islands are defined areas between traffic lanes for control

of vehicular movement, toll collection or pedestrian refuge. *Id.* at §1A.13(3)(98). However, "An island may be designated by curbs, pavement edges, pavement **markings**, channelizing **devices**, or other devices. *Id.* at § 3I.01(2) (emphasis added). Channelizing **devices** are things such as "cones, tubular markers, vertical panels, drums, lane separators, and raised islands, [and] may be used for general traffic control purposes such as adding emphasis to... channelizing lines." *Id.* at § 3H.01(1). Channelizing lines and lane line markings are also types of longitudinal markings. *Id.* at § 1A.13(3)(107). Finally, channelizing lines may also be used to direct lanes, without creating an island. *Id.* at § 3C.01, Fig. 3C-13 (showing channelized lanes in a roundabout, but no island).

The MUTCD treats channelizing lines at entrance and exit ramps as longitudinal pavement markings. *Id.* at § 3B.05. Immediately after noting that it is permissible, but discouraged, to cross a normal or wide solid white line, (§ 3B.04(20)) and that it is impermissible to cross a double white line (§ 3B.04(30)), the MUTCD addresses wide or double solid white channelizing lines. *Id.* at § 3B.05(1). These channelizing lines are used to form channelizing islands. *Id.* at § 3B.05(2). These are the same islands referenced in § 3I.02(1) that are "preceded by diverging longitudinal pavement markings..." and that are referenced in § 3I.02(2) as defining the neutral area "that can be readily crossed even at considerable speed..."

In other words, the MUTCD implies that the rules applicable to lane lines are also applicable to channelizing lines at entrance and exit ramps. Regardless, the MUTCD clearly states that the neutral area may be readily crossed. Finally, the MUTCD appears silent on the issue of what duty, if any, is imparted by channelizing lines

The Court of Appeals did not reach the second issue identified above. However, the issue of whether the neutral area is also a shoulder is easily disposed of by reference to both the MUTCD and the dashcam recording from this case. Where there is a shoulder, it is bound by edge line markings. *Id.* at § 1A.13(3)(58). Edge lines are white or yellow pavement markings delineating the edges of the traveled way. *Id.* The traveled way is that portion for the movement of vehicles, excluding the shoulders. *Id.* at § 1A.13(3)(242). The edge lines visible on the dashcam demarcating the shoulder change to channelizing lines demarcating the neutral area. Thus, edge lines mark shoulders, and channelizing lines mark neutral areas. This change can be seen in the dashcam recording at 0:06-07 and again at 0:29.

Similarly, the Court of Appeals did not reach the fourth issue identified above – whether the rule of lenity applies in this context. Ms. Brooks asserts that if there is any ambiguity in the attendant duties regarding crossing channelizing lines or entering the neutral area, the rule of lenity applies in her favor.

Whether Ms. Brooks and similarly situated drivers may be permissibly seized for crossing channelizing lines or entering the neutral area is a significant question of law under Article I, § 7 of the Washington Constitution that warrants review pursuant to RAP 13.4(b)(3).

3. Review is warranted under RAP 13.4(b)(4).

The Court of Appeals decision should be reviewed because it involves an issue of continuing and substantial public interest that should be determined by the Supreme Court.

a. The State's retroactive justification of seizures based on the prosecutor's suspicions rather than the arresting officer's is a matter of substantial public interest.

The *Brooks* case is the most recent in a constellation of cases that are the progeny of *State v. Prado*, 145 Wn.App. 646, 186 P.3d 1186 (2008). Following *Prado*, Division I of the Court of Appeals also issued opinions in *State v. Huffman*, 185 Wn.App. 98, 340 P.3d 903 (2014); *State v. Jones*, 186 Wn.App. 786, 347 P.3d 463 (2015); and *State v. Kocher*, 199 Wn.App. 336, 400 P.3d 328 (2017).

Prado involved the crossing of a lane line marking, though it is unclear whether the opinion's reference to "an eight-inch white line dividing the exit lane from the adjacent lane" is reference to a lane line marking or a channelizing line. *Prado*, 145 Wn.App. at 647.

Huffman involved the crossing of the centerline; one issue, however, was whether the "as nearly as practicable" language from RCW 46.61.140 applied to RCW 46.61.100. *Huffman*, 185 Wn.App. at 102. The Court held that it did not, in doing so held that crossing the centerline is a strict liability offense. *Id.* at 107.

Jones involved three crossings of the fog line in the absence of other traffic, albeit by approximately an inch, and which were corrected by slow drifts. *Jones*, 186 Wn.App. at 788. The *Jones* holding relied upon the lack of safety issue, referring to language in RCW 46.61.140 stating that a vehicle shall not be moved from its lane "...until the driver has first ascertained that such movement can be made with safety." RCW 46.61.140(1).

Kocher dealt with a single fog line incursion for approximately 200 feet, but in the presence of other traffic. *Kocher*, 199 Wn.App. at 338. The State argued that a stop was permissible under RCW 46.61.670 (Wheels Off Roadway), a statute that was not raised in *Jones*. *Id.* at 339. The Court of Appeals agreed, holding that RCW 46.61.670, and not RCW 46.61.140, controlled the analysis. *Id.* at 345.

An issue of continuing and substantial public interest is at stake here. *Jones* and *Kocher* involve substantially the same driving act (crossing the fog line) but reach opposite conclusions because the State argued an

alternative reason for the traffic stop in one case, but not the other. This is a pattern that is being repeated in District Courts across the State. An example of this can be seen in the unpublished case *State v. Giddens*, 168 Wn.App. 1027, 2012 WL 1977235[1] (2012). In *Giddens,* the defendant crossed a fog line twice within the distance of a block. *Id.* at 1. He challenged the traffic stop under RCW 46.61.140 and *Prado*. *Id.* The District Court agreed and granted his motion to suppress, but the State moved for reconsideration, raising RCW 46.61.670 for the first time. *Id.* at 1, 2 ("The State did not argue defendant's driving was in violation of 46.61.670 prior to the lower court's ruling either. The only argument for the stop was crossing the fog line (46.61.140). The first mention made of 46.61.670 was in the State's Motion to Reconsider days later.")

Since the *Prado* and *Jones* decisions, prosecuting authorities have sought ways to do an end-run around the holdings of these cases. Their purpose in doing so is to preserve an otherwise unlawful traffic stop. For fog line crossings, the Wheels Off Roadway statute is the go-to justification. For other types of lane incursions or travel issues, the State often proffers justifications such as reasonable, articulable suspicion of Embracing

[1] *Giddens* is not cited as authority herein, but rather merely as example.

Another While Driving (RCW 46.61.665) or Failure to Obey Traffic Control Device (RCW 46.61.050).

These late justifications are used to create an injustice by twisting the meaning of "reasonable, articulable suspicion." Warrantless traffic stops are constitutional, but only based upon at least reasonable articulable suspicion of a traffic infraction. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012) (citing *State v. Ladson*, 138 Wash.2d 343, 350, 351–52, 979 P.2d 833 (1999) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); RCW 46.61.021(2); *see also State v. Snapp*, 174 Wash.2d 177, 197–98, 275 P.3d 289 (2012); *State v. Doughty*, 170 Wash.2d 57, 62, 239 P.3d 573 (2010); *State v. Day*, 161 Wash.2d 889, 896, 168 P.3d 1265 (2007); *State v. Duncan*, 146 Wash.2d 166, 173–74, 43 P.3d 513 (2002); *cf. State v. Nichols*, 161 Wash.2d 1, 13, 162 P.3d 1122 (2007) (suggesting probable cause is required).

This requirement is uniform in one respect, however – the **detaining officer** is the one who must have reasonable, articulable suspicion of the infraction. *See e.g., Arreola*, 176 Wn.2d at 297[2]; *State v. Allen*, 138 Wn.App. 463, 470, 157 P.3d 893 (2007)[3]. Once an individual is seized, no

---

[2] "We hold that a traffic stop is not unconstitutionally pretextual so long as investigation of... a traffic infraction... for which the **officer** has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop." (emphasis added).

[3] "A stop based on a traffic infraction is valid only if the **officer** had, **from the beginning**, a reasonable articulable suspicion that the infraction had occurred and the

subsequent events or circumstances can retroactively justify the seizure. *State v. Flores*, 186 Wn.2d 506, 517, 379 P.3d 104 (2016); *City of Spokane v. Hays*, 99 Wn.App. 653, 659, 995 P.2d 88 (2000). An officer activating his emergency lights to stop a vehicle effects a seizure. *State v. DeArman*, 54 Wn.App. 621, 623-24, 774 P.2d 1247 (1989).

The State's actions in proffering alternative justifications to save a traffic stop creates two issues. First, the State is attempting to retroactively justify a seizure by offering new grounds for the seizure long after it has occurred. In some cases, this may occur relatively quickly, as in the context of a response to a motion to suppress the seizure under CrRLJ 3.6 or CrR 3.6. In other cases, as in *Giddens*, *supra*, this may occur even after the Court has already decided the issue on other grounds.

Second, the alternatives advanced by the State well after the seizure are not the suspicions of the *detaining officer*, but rather the *prosecuting attorney*. In effect, the State argues that reasonable articulable suspicion supports a traffic stop even though officer made no such articulation at the time of the seizure. Allowing the State to justify an officer's seizure months later by way of a prosecutor sifting through the traffic code looking for possible infractions works a grave injustice.

---

stop was reasonably related in scope to the circumstances that justified the interference in the first place." (citing *Ladson*, 138 Wn.2d at 359) (emphasis added).

b. The traffic law questions raised in this case are matters of substantial public interest.

This case raises detailed questions about our traffic laws that are matters of substantial public interest. In fact, in the State's Motion for Discretionary Review below, the State argued this same point. Issues concerning the violation of RCW 46.61.670 have been percolating through District Courts for several years. While *Brooks* is not precisely a Wheels Off Roadway case, as *Kocher* and *Jones* were, the Court of Appeals decision in *Brooks* is one of the first cases to address the issue of paved areas adjacent to a roadway, and whether those areas are part of the roadway. Ms. Brooks argued below that this case was too fact-bound to justify review as a matter of public interest, but the Court of Appeals analysis concerning pavement mitigates this fact-bound nature.

There is little question that the shoulder area meets the initial criteria for inclusion in the definition of "roadway" because the shoulder area is improved, designed, *and* ordinarily used for emergency parking of vehicles; access to (e.g.) a collision scene by emergency vehicles; and in some places like mountain passes, it is permissible to drive upon an improved shoulder in accordance with RCW 46.61.428(1). The shoulder, however, is excluded from the roadway. RCW 46.04.500. The neutral area, on the other hand, is

very similarly situated to the shoulder in terms of its improvement and design, though not the issue of ordinary use.

One criteria for considering whether an issue is a matter of public interest is the "need for future guidance provided by an authoritative determination." *Eide v. State Dept. of Licensing*, 101 Wn.App. 218, 223, 3 P.3d 208 (2000). This situation presents with the *Brooks* case. Counsel was able to discover twenty-three cases in Washington citing to provisions of the MUTCD. Of these twenty-three cases, it appears that only *Brooks* provides analysis in the context of a traffic stop related to a criminal prosecution. Interpretation and application of the MUTCD is an issue of substantial public interest because there is a need for future guidance provided by an authoritative determination.

The other traffic law issues in this case also require guidance. For example, there is a question of law as to what duty regarding crossing, if any, is imposed by channelizing lines. Similarly, there is a question of law as to whether it is permissible to enter the neutral area.

The State's continuing use of end-runs around *Prado* and *Jones* demonstrate why these seemingly-minute issues of traffic law are important. Review of these issues is warranted under RAP 13.4(b)(4).

F. CONCLUSION

Based on the foregoing, Ms. Brooks respectfully requests that this Court grant review and reverse the Court of Appeals. The decision below is in conflict with the *Simmons* case, errs in the interpretation of the MUTCD, and permits the continuing injustice resulting from retroactive justification of seizures.

Respectfully submitted this 26th of February, 2018.

Kenneth J. Miller, WSBA #46666
Attorney for Respondent

Andrew J. Chase, WSBA #47529
Attorney for Respondent

FILED
FEBRUARY 1, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 35002-9-III
	)	(consolidated with
Petitioner,	)	No. 35003-7-III)
	)	
v.	)	
	)	PUBLISHED OPINION
JENA DALE BROOKS,	)	
	)	
Respondent.	)	

PENNELL, J. — Washington's traffic code prohibits operating a vehicle on any part of a highway that does not meet the statutory definition of a roadway. Jena Brooks's car was stopped for violating this provision after it crossed a neutral area separating a highway onramp from an adjacent lane of travel. Because the neutral area does not meet the definition of a roadway, the stop was permissible. The superior court's ruling to the contrary is therefore reversed.

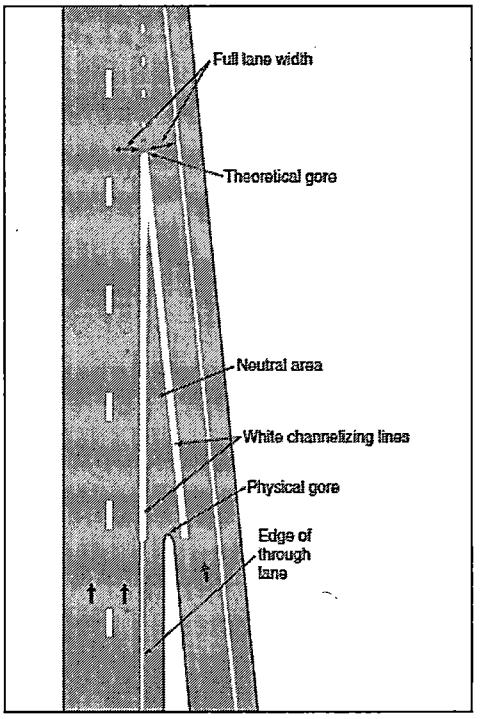
Appendix A

Court of Appeals Decision

BACKGROUND

While merging onto westbound U.S. Route 97 from U.S. Route 2 in Chelan County, Jena Brooks's car crossed over a portion of the highway designated as a "neutral area." A neutral area is a paved triangular space separating an entrance or exit ramp from an adjacent lane of highway. The neutral area between Route 97 and its merger with westbound Route 2 is marked on each side by thick white channelizing lines. Figure 1 is a depiction of a neutral area similar to the one crossed by Ms. Brooks.[1]

Figure 1



A Washington State Patrol trooper observed Ms. Brooks's vehicular activity and performed a traffic stop. Ms. Brooks was ultimately arrested for driving on a suspended license and other misdemeanor offenses.

During proceedings in district court, Ms. Brooks filed a motion to suppress, arguing her vehicle had been stopped without cause. The motion was denied. Pertinent

[1] FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS fig.3B-9, at 360 (2009 ed., rev. May 2012).

to this appeal, the district court ruled Ms. Brooks's merger over the highway's neutral area constituted "driving with wheels off roadway," in violation of RCW 46.61.670. [2] Ms. Brooks was subsequently convicted of several misdemeanor offenses after a jury trial.

Ms. Brooks successfully appealed the suppression ruling to the superior court. It found Washington's definition of a roadway ambiguous in the context of a highway's neutral area. The superior court then invoked the rule of lenity and determined Ms. Brooks should not have been stopped for driving with wheels off the roadway in violation of RCW 46.61.670.

The State sought discretionary review from this court. Review was granted on two specific issues: (1) whether the term roadway is ambiguous in the current context, and (2) if the term is ambiguous, whether the rule of lenity is an available tool of statutory construction that might benefit a defendant such as Ms. Brooks.

ANALYSIS

Discerning the meaning of the term "roadway," as used in RCW 46.61.670, is a

---

[2] "**Driving with wheels off roadway.** It shall be unlawful to operate or drive any vehicle or combination of vehicles over or along any pavement or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway thereof, except as permitted by RCW 46.61.428 or for the purpose of stopping off such roadway, or having stopped thereat, for proceeding back onto the pavement, gravel or crushed rock surface thereof." RCW 46.61.670.

matter of statutory interpretation. As such, our review is de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). We focus our statutory interpretation analysis on the language used by the legislature. *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). Resources such as dictionaries may be used to decipher a statute's plain meaning. *Cornu-Labat v. Hosp. Dist. No. 2*, 177 Wn.2d 221, 231, 298 P.3d 741 (2013). However, we will not resort to aides of construction such as legislative history and (perhaps) the rule of lenity unless we first find the legislature's language truly ambiguous. *Timberline Air Serv. Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994); *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015).

Interpreting the term "roadway" begins with the relevant statutory text. Title 46 RCW defines "roadway" as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles." RCW 46.04.500.

The statutory definition of a roadway involves a two-part inquiry. First, we ask whether a given portion of highway meets the triggering definition of a roadway. In other words, is the area improved, designed, or ordinarily used for vehicular travel? If not, the inquiry ends. The area is not a roadway. But if at least one of the three triggering definitions applies, we go on to ask whether the area is excluded from the scope of a

roadway because the area constitutes a sidewalk or shoulder. If neither exclusion applies, then the area in question falls under the legislature's definition of a roadway.

Of the three triggering definitions, highway design is the least indicative of roadway status in the current context. A highway's neutral area is not a vehicle lane. It is too short to facilitate meaningful travel. And its triangular shape cannot consistently accommodate the size of a vehicle. Rather than being designed for vehicular travel, it is apparent the neutral area is designed as a buffer zone. It keeps vehicles separate so as to facilitate speed adjustment and, in the context of a highway onramp, safe vehicle merging.

National standards set by the Manual on Uniform Traffic Control Devices for Streets and Highways confirm our observations about the apparent design purpose of a highway's neutral area. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS (2009 ed., rev. May 2012) (MUTCD).[3] The MUTCD refers to the neutral area as an "island." MUTCD, § 3I.02, at 430. As such, it is an area intended for vehicle "separation."

---

[3] The MUTCD is the national standard for traffic control signals on public highways and has been adopted by Washington's secretary of transportation. RCW 47.36.020; WAC 468-95-010. Therefore, it is an appropriate guide to interpreting the meaning of traffic control devices, such as pavement markings, used on public highways within our state. The complete MUTCD is available online at https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd2009r1r2edition.pdf.

MUTCD, § 1A.13(03)(98), at 15. Although a neutral area may be designated either by a wide or double solid white channelizing line (MUTCD, §§ 1A.13(03)(29), at 12, 1A.13(03)(124), at 17), the two options carry no substantive significance. Like a double white line, a solid white line can serve as an indicator that crossing is prohibited. MUTCD, § 3A.06(01)(B) at 348.[4] The whole point of a neutral area is to exclude vehicles and promote orderly and efficient traffic flow. MUTCD, §§ 3B.05(06), at 370, 3I.02(02), at 430.

Ms. Brooks claims the neutral area meets the first triggering roadway definition—improvement for vehicular travel—because the area is paved. We disagree. Although the neutral area is an improved piece of land, it is not improved for purposes of vehicular travel. As noted, the purpose of the neutral area is to provide a safe space between vehicles. The MUTCD contemplates using a variety of improvements to alert drivers to the presence of the neutral area. At the very least, the improvements must include pavement and solid white lines. MUTCD, §§ 1A.13(03)(29), at 12, 1A.13(03)(124), at 17. But additional options may also be used, such as internal crosshatching, reflective

[4] A solid white line indicates crossing is discouraged, rather than prohibited, when used as a lane line marking. MUTCD, §§ 3B.04(20), at 362, 3B.05, at 370. However, the lines demarking a neutral area are channelizing lines, not lane lines. MUTCD, § 1A.13(03)(124), at 17. Channelizing lines designate the presence of an island, not a lane of travel. MUTCD, § 1A.13(03)(29), at 12.

marks, or rumble strips. MUTCD, § 3B.05(10), at 371, ch. 3I, at 430-31. These improvements do not exist for the purpose of facilitating travel. Quite the opposite. The purpose of a marked and improved neutral area is to make drivers aware of the buffer zone and keep vehicles out so traffic can merge or exit safely and efficiently.

Pavement is not, in and of itself, a sufficient indicator that an area has been improved for vehicular travel. In the context of highway construction, pavement can serve a variety of purposes. In addition to allowing for heightened visibility of traffic control markings, pavement can help with drainage and structural integrity. While paving constitutes an improvement to the natural landscape, it is not necessarily an improvement for purposes of vehicular travel. Because a highway's paved neutral area does not amount to an improvement for purposes of vehicular travel, the mere existence of pavement does not qualify the area as a roadway.

With respect to the third triggering definition of a roadway—regular use—there is no evidence vehicles regularly violate the intended purposes of neutral areas and use the space for vehicular travel. Unlike a highway shoulder, which can provide a safe passage for small vehicles such as bicycles, the neutral area is not regularly amenable to safe vehicular travel. *See* Clerk's Papers at 59 (noting safety hazards of crossing the neutral area). Some neutral areas may be used for toll collection or pedestrian refuge. MUTCD, § 1A.13(03)(98), at 15. But we find no indication of any regular, acceptable use of

neutral areas by vehicles involved in travel.

Because the neutral area is neither designed, improved, nor regularly used for vehicular travel, it does not meet any of the three triggering definitions of a roadway. Our inquiry, therefore, ends here. We need not address whether the neutral area should be excluded as a shoulder or whether the rule of lenity is applicable in the context of Washington's traffic code.

CONCLUSION

In crossing over the neutral area between Route 97 and Route 2, Ms. Brooks failed to maintain her vehicle wheels on an area of the highway meeting the statutory definition of a roadway. A vehicle stop was therefore permitted under Washington's wheels off roadway statute, RCW 46.61.670.

The superior court's order on appeal from the district court is reversed.

Pennell, J.

I CONCUR:

Siddoway, J.

No. 35002-9-III
(consolidated with
No. 35003-7-III

LAWRENCE-BERREY, A.C.J. (concurring) — I agree with the majority that the trooper had reasonable suspicion to stop Ms. Brooks. But I disagree with the majority that driving in the middle of the roadway amounts to "driving with wheels off roadway." I therefore concur.

A. OUR GRANT OF REVIEW INCLUDES WHETHER CROSSING THE NEUTRAL AREA VIOLATES RCW 46.61.050

The majority asserts that we granted discretionary review of only two issues. I disagree.

The State sought discretionary review of five issues. The first was, "Did the superior court err as a matter of law when it decided that crossing [the neutral area] does not violate RCW 46.61.050 (failure to obey traffic control device)?" Mot. for Discr. Review at 1.

Our commissioner issued a written ruling. The ruling notes that the superior court determined that Ms. Brooks did not violate either RCW 46.61.050 (failure to obey traffic control devices) or RCW 46.61.670 (driving with wheels off roadway). The ruling then discusses the ambiguity of whether the neutral area is a shoulder and, therefore, excluded from the definition of "roadway," and whether the rule of lenity applies to resolve this ambiguity in favor of Ms. Brooks. After concluding that the ambiguity and the

application of the rule of lenity are issues of public importance, the ruling states: "Accordingly, IT IS ORDERED . . . the State's motion for discretionary review is granted." Commissioner's Ruling, *State v. Brooks*, No. 35002-9-III, at 4 (Wash. Ct. App. Mar. 7, 2017). There is no language within the order that limits the scope of review to only two issues.

The State briefed all five issues contained within its motion for discretionary review. Ms. Brooks took the position in her responsive brief that discretionary review was limited to two issues. Nevertheless, she responded to each of the five issues. During oral argument, this panel asked questions concerning RCW 46.61.050, and both parties answered our questions. There is no reason to limit our review to only two issues when our commissioner's order did not. It is therefore appropriate to review whether crossing the neutral area violates RCW 46.61.050.

B. CROSSING THE WIDE SOLID LINES THAT BORDER THE NEUTRAL AREA VIOLATES RCW 46.61.050

The superior court analyzed the 2009 Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD) and concluded that crossing the wide solid lines was discouraged rather than prohibited. I disagree.

RCW 46.61.050(1) requires drivers, bicyclists, and pedestrians to obey traffic control devices. RCW 46.04.611 defines "traffic-control devices" as "all signs, signals, markings and devices . . . placed or erected . . . for the purpose of regulating, warning or

guiding traffic." Here, the white channelizing lines crossed by Ms. Brooks were wide solid lines. Such markings constitute traffic control devices.

The MUTCD sets forth the functions of longitudinal markings. FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS (2009 ed., rev. May 2012). According to section 3A.06.01(B) of the MUTCD, "A solid line discourages or prohibits crossing (depending on the specific application)." Just below that section, section 3A.06.03 clarifies, "The width of the line indicates the degree of emphasis." For this reason, crossing a *wide* solid line is prohibited.

C. DRIVING THROUGH THE NEUTRAL AREA IS NOT DRIVING WITH WHEELS OFF ROADWAY

RCW 46.04.500 defines "roadway" as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles." The majority acknowledges that the paved neutral area is an improved area of the highway, but concludes that the area is not improved *for* vehicular travel. The majority concludes that the neutral area is not improved *for* vehicular travel because the purpose of the neutral area "is to make drivers aware of the buffer zone and keep vehicles out . . . ." Majority at 7.

Drivers are made aware of the buffer zone and to keep vehicles out because the buffer zone is bounded by wide solid lines instead of, for instance, narrow broken lines.

Narrow broken lines would permit vehicles to cross through the neutral area. Because it is the longitudinal markings that tell drivers to keep out of the buffer zone, the statute that controls our analysis is RCW 46.61.050(1) (failure to obey traffic control devices), not RCW 46.61.670 (driving with wheels off roadway).

But because the majority reaches the correct result, I concur.

Lawrence-Berrey, A.C.J.

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

STATE OF WASHINGTON, Appellant, v. JENA BROOKS, Respondent.	COA: 350029 / 350037 CCSC: 16-1-00158-1 16-1-00132-8 DECLARATION OF SERVICE

I hereby certify under penalty of perjury that I, the undersigned, by email and US mail, sent to the office of record of the Chelan County Prosecutor, on the 27th of February, 2019,

Address:

Chelan County Prosecuting Attorney's Office
ATTN: Andrew Van Winkle
401 Washington St.
Wenatchee, WA 98801

Andrew.VanWinkle@co.chelan.wa.us

Documents:

1. Petition for Review

By: _____
Kenneth J. Miller, WSBA #46666
Attorney for Ms. Brooks

MILLER & CHASE, PLLC
PO Box 978
OKANOGAN, WA 98840
509-861-0815 (P)
509-557-6280 (F)