Supreme Court No. 96697-4
Court of Appeals No. 34711-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERICA MAGALLON ALVAREZ,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Erica Magallon Alvarez, Defendant.

II. COURT OF APPEALS DECISION

Ms. Magallon Alvarez seeks review of the Court of Appeals' decision in *State v. Alvarez*, entered on December 4, 2018. It is attached hereto as **Appendix A**.

III. ISSUE PRESENTED FOR REVIEW

Whether the Washington and federal constitutions permit a law enforcement officer to effect a traffic stop of an individual, when the officer observed only a single instance in which the defendant's vehicle briefly traveled over the fog line.

IV. STATEMENT OF THE CASE

The substantive facts of this case are straightforward and undisputed. Ms. Magallon Alvarez was driving on I-82 when Trooper Bivens observed one instance in which her vehicle's tires crossed over the fog line and onto the rumble strips. CP 94 (tr. p. 18, ll. 11-19). Without a warrant, he effected a seizure of Ms. Magallon Alvarez by activating his overhead lights, and ultimately arrested her for DUI. CP 90-91 (tr. p. 14, ll. 22-25; p. 15, ll. 1-5).

Ms. Magallon Alvarez moved to suppress the fruits of the seizure, CP 45, and the district court granted her motion. CP 19. The state appealed to the superior court, CP 1, which affirmed the district court on the RALJ appeal. CP 161. The state sought review by Division III of the Court of Appeals, which granted state's motion. The Court of Appeals reversed the district court. Appendix A.

V. ARGUMENT

A. The decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals, *State v. Jones*

For nearly a decade, Washington's law enforcement officers, its trial courts, and its citizens relied on the Court of Appeals' reasoning in *State v. Prado*, 145 Wn.App. 646 (2008). *Prado* addressed a traffic stop premised on a violation of RCW 46.61.140, which is titled "Driving on Roadways Laned for Traffic" and provides specific rules applicable to drivers who travel on roads laned for traffic. *Id.* at 648. RCW 46.61.140 states in relevant part:

> **Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following**

> **rules <u>in addition to all others consistent herewith *shall apply*</u>:**
>
> (1) 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. (Emphasis added).

In *Prado*, the driver crossed "an eight-inch white line dividing the exit lane from the adjacent lane by approximately two tire widths." *Id.* at 647. Relying on an Arizona case in which a driver crossed the fog line, the *Prado* court concluded that "such minor incursions over a lane line [are] an insufficient basis for a stop." *Id.* at 648. "We believe the legislature's use of the language 'as nearly as practicable' demonstrates a recognition that brief incursions over the lane lines will happen." *Id.* at 649.

The Court of Appeals later directly addressed the statute's applicablity to a driver's incursions over the fog line. *State v. Jones*, 186 Wn.App. 786 (2015) ("Jones contends that the police lacked legal justification to stop him. The State contends that Officer Richter's observation of Jones's vehicle crossing the fog line three times provided this justification.") In *Jones*, the Court of

Appeals held that the *Prado* reasoning applied to a driver's fog line incursions. *Id.* at 788 ("Because the State's evidence at the suppression hearing failed to justify the traffic stop under *State v. Prado*, we reverse and remand without reaching any other issue.")

In other words, *Jones* held that the "roads laned for traffic" statute does apply to fog line incursions such as those involved in the case at bar. In the case at bar, however, the Court of Appeals reached precisely the opposite conclusion of *Jones*: "We find RCW 46.61.140(1) **inapplicable**." *Alvarez*, p. 5 (emphasis added). The Court of Appeals then argued that the statute was "not a nullity" simply because it was "inapplicable" to fog line incursions. *Id.* at p.6 ("The fact that **RCW 46.61.140(1) is inapplicable here** does not render the statute a nullity.") (Emphasis added).

The Court of Appeals' decision at bar cannot be squared with *Jones*. If the "roads laned for traffic" statute was "inapplicable" to fog line incursions, then *Jones* wrongly applied it to fog line incursions. But in *Jones*, the court not only *applied* the statute to fog line incursions; it developed rules specifically explaining

how the statute applied. *Id.* at 792-93 ("we use[] a totality of the circumstances analysis that include[s] factors such as other traffic present and the danger posed to other vehicles. This represents a more sophisticated analysis than a simple tally of the number of times a tire crossed a line.") In other words, according to *Jones*, a driver could violate the "roads laned for traffic" statute by committing a fog line incursion when, under the totality of the circumstances, it was unsafe to do so.

In stark contrast, the *Alvarez* court held that the statute *did not even apply*. If the *Alvarez* court were correct that the statute was "inapplicable" to fog line incursions, it would be quite puzzling indeed for the *Jones* court to devote so much "sophisticated analysis" to an inapplicable statute. Again, *Jones* involved intrusions over the fog line. Clearly, the *Jones* court held that the statute applied to fog line incursions, whereas the *Alvarez* court reached the exact opposite conclusion. The conflict between the cases is unmistakable and inescapable, and the Washington Supreme Court should

accept review of this case in order to resolve this direct conflict in precedent.

In his dissent, Chief Judge Lawrence-Berrey explained the significance of this conflict. If the "roadways laned for traffic" statute *does* apply to the facts of this case, then there would be "tension" between that statute and the "wheels off roadway" statute[1] that formed the basis for the stop in this case. *Alvarez* (C.J. Lawrence-Berrey dissenting), p. 2. The Chief Judge correctly noted that, contrary to the majority's decision, the "roadways laned for traffic" statute is applicable by virtue of its plain language:

> The majority states that RCW 46.61.140(1) does not apply here because it applies only to the "movement *into* another lane of travel." Majority at 6 (emphasis added). To the contrary, **RCW 46.61.140(1) applies to the movement "from" a lane of travel. RCW 46.61.140(1). Here, Ms. Alvarez was driving on a multilane road and moved from a lane of travel across the fog line. RCW 46.61.140(1) thus applies.**

[1] "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.

Alvarez (C.J. Lawrence-Berrey dissenting), p. 2 (emphasis added).

Consequently, if one leaves the roadway by crossing a fog line, then both the "wheels off roadway" statute *and* the "roadways laned for traffic" statute come into play. The "wheels off roadway" statute generally prohibits a vehicle from traveling off of the roadway. RCW 46.61.670. But as the Chief Judge discussed, the "roadways laned for traffic" statute applies "whenever" the roadway is divided into multiple lanes. *Alvarez* (C.J. Lawrence-Berrey dissenting), p. 2. In addition, the "roadways laned for traffic statute" commands that other statutes be understood "consistently herewith." To read the two statutes consistently, the court should have read the "wheels off roadway" statute to permit minor incursions over the fog line. *See, Alvarez* (C.J. Lawrence-Berrey dissenting), p. 3.

Because this case involves conflicting Court of Appeals precedent, which arose out of conflicting statutes left unharmonized by the Court of Appeals, the Washington Supreme Court should review the decision of the Court of Appeals.

B. The petition involves an issue of substantial public interest that should be determined by the Supreme Court

The Court of Appeals' decision affects all drivers who lack the ability to follow a perfect vector within their lane as though their vehicle traveled on rails. It affects everyone who travels in a motor vehicle, including passengers. Its startling rigidity results in a virtual "stop at will" standard for law enforcement. *Alvarez*, p. 1 ("RCW 46.61.670 affords no room for error. Even a minor, momentary violation meets the terms of the statute and can provide a basis for a traffic stop"). As the Chief Judge noted, "The sheer number of potential investigatory stops of sober drivers might be reason alone for our Supreme Court to reinstate the policy expressed in *Prado*, that minor traffic lane violations form an insufficient basis for a traffic stop. The potential for uneven enforcement might be an additional reason." *Alvarez* (C.J. Lawrence-Berrey dissenting), p. 3.

The U.S. Supreme Court has emphasized that "[t]he word 'automobile' is not a talisman in whose

presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971). "[I]f failure to follow a perfect vector down the highway . . . were sufficient reason[] to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy." *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993).

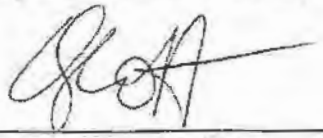
Washington has expressed its desire to require that lanes be maintained only "as nearly as practicable" such that minor fog line incursions are not illegal. The court's decision in *Alvarez* is at odds with this express public policy. The decision is especially concerning in light of the numerous windy mountainous roads in Washington, as well as the countless narrow roads in cities such as Seattle. It is respectfully submitted that the Washington Supreme Court should accept the Chief Judge's suggestion to reinstate the *Prado* policy, which better reflects the policy expressed by the legislature.

VI. CONCLUSION

For the foregoing reasons, this Court should grant the petition for review and reverse the Court of

Appeals decision reversing the superior court's decision affirming the district court on appeal.

Respectfully submitted this 2nd day of January, 2019.



Eric Scott, WSBA # 48913

APPENDIX A

FILED
DECEMBER 4, 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. 34711-7-III
	)	
Petitioner,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
ERICA C. MAGALLON ALVAREZ,	)	
	)	
Respondent.	)	

PENNELL, J. — Under RCW 46.61.670, it is a traffic infraction to operate a vehicle with one or more wheels off a designated roadway. Unlike other traffic statutes, RCW 46.61.670 affords no room for error. Even a minor, momentary violation meets the terms of the statute and can provide a basis for a traffic stop and imposition of an infraction.

Erica Alvarez was stopped by a Washington State Patrol trooper after her car wheels briefly traveled over a fog line and onto an area not designated as a roadway. The district and superior courts in Benton County held that this minor intrusion did not justify a traffic stop. Because we disagree, we reverse.

FACTS

Washington State Patrol Trooper Jarryd Bivens was patrolling Interstate 82 in Benton County, Washington, when he saw a car briefly cross over the right fog line and onto rumble strips. Both right side tires were across the fog line by at least one tire width. Trooper Bivens initiated a traffic stop. At the time, he did not suspect the driver was impaired. Once he contacted the driver, he noticed a number of indicators consistent with impairment. He then arrested the driver, Erica Alvarez, for driving under the influence (DUI).

The State charged Ms. Alvarez with DUI. She filed a motion to suppress, arguing her arrest was unlawful because the trooper lacked reasonable suspicion that she had committed the infraction of wheels off roadway under RCW 46.61.670. Ms. Alvarez claimed the wheels off roadway statute must be harmonized with RCW 46.61.140, which provides that a driver must operate his or her vehicle "as nearly as practicable" within a single lane of travel. She argued that if these two statutes are harmonized, a brief incursion across the fog line would not result in a violation of RCW 46.61.670. The State responded that one drives with wheels off roadway by driving on the shoulder of the roadway and that Ms. Alvarez drove on the shoulder.

The district court agreed with Ms. Alvarez and held that both statutes applied and therefore must be harmonized. Citing *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008), it concluded that Ms. Alvarez's brief incursion across the fog line did not violate the wheels off roadway statute. The district court entered findings of fact and conclusions of law and granted Ms. Alvarez's motion to dismiss.

The State appealed to superior court, which affirmed. We granted the State's request for discretionary review.

ANALYSIS

The sole issue on appeal is whether Trooper Bivens had reasonable suspicion to stop Ms. Alvarez for violating the wheels off roadway statute, RCW 46.61.670. The operative facts are not in dispute. Our review, therefore, is de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

RCW 46.61.670 provides:

> **Driving with wheels off roadway.**
> It shall be unlawful to operate or drive any vehicle or combination of vehicles over or along any payment 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.

We recently addressed RCW 46.61.670 in *State v. Brooks*, 2 Wn. App. 2d 371, 409 P.3d 1072, *review denied*, 190 Wn.2d 1026, 421 P.3d 457 (2018). In *Brooks*, we began our analysis by focusing on the definition of "roadway." *Id.* at 374-75. The legislature has defined "roadway" as "'that portion of the 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.'" *Id.* at 375 (quoting RCW 46.04.500).

Based on the "roadway" definition, *Brooks* announced the following two-step inquiry. *Id.* First, the court determines whether the area driven on meets the triggering definition of a "roadway." *Id.* "[I]s the area improved, designed, or ordinarily used for vehicular travel?" *Id.* If not, the inquiry stops; it is not a "roadway" under the definition. *Id.* If one of the three triggering definitions applies, the court will next determine whether the area is excluded from the "roadway" definition because it constitutes a sidewalk or shoulder. *Id.*

The area to the right of a fog line does not meet the first part of the *Brooks* standard. Although this area is ordinarily an improved space, it is not improved "for the purpose of facilitating travel." *Id.* at 376-77. Pavement itself is not sufficient evidence that an area has been improved for travel. *Id.* at 377. The area to the right of the fog line

is not designed for vehicular travel, nor is the area to the right of the fog line ordinarily used for vehicular travel.[1] Therefore, RCW 46.61.670 prohibits driving with one or more wheels across the fog line. *State v. Kocher*, 199 Wn. App. 336, 344, 400 P.3d 328 (2017) ("[D]riving over the fog line is a traffic infraction unless one of the enumerated exceptions in [the] statute applies.").

Ms. Alvarez argues that we should not end our analysis with RCW 46.61.670 because RCW 46.61.140(1) only requires that a vehicle be driven "as nearly as practicable" within a single lane of travel. As pointed out in *Prado*, this language encompasses "brief, momentary and minor deviations of lane lines." 145 Wn. App. at 648. Because Ms. Alvarez's car crossed over the fog line only once and did not create any safety concerns, Ms. Alvarez argues that RCW 46.61.140(1) protected her from the possibility of a law enforcement stop.

We find RCW 46.61.140(1) inapplicable. Ms. Alvarez may be correct that Trooper Bivens could not have relied on RCW 46.61.140(1) as a basis for his traffic stop. But that does not mean he was barred from considering other statutes. RCW 46.61.670 is separate from RCW 46.61.140(1). The former statute governs the unique situation of a

[1] The area to the right of the fog line may be designated for vehicular traffic when authorized by state or local authorities and accompanied by appropriate signage. *See* RCW 46.61.428.

vehicle's wheels departing a designated roadway, not the more general scenario of movement into another lane of travel. Unlike RCW 46.61.140(1), RCW 46.61.670 does not contain language indicating a vehicle must be driven "as nearly as practicable" with wheels on the roadway. Instead, RCW 46.61.670 affords no exceptions. Even a minor deviation violates the plain terms of the statute. *Kocher*, 199 Wn. App. at 344-45.

The fact that RCW 46.61.140(1) is inapplicable here does not render the statute a nullity. RCW 46.61.140(1) applies in circumstances where a vehicle momentarily crosses from one lane of traffic into a neighboring lane traveling the same direction. *State v. Hoffman*, 185 Wn. App. 98, 104-05, 340 P.3d 903 (2014). Such minor lane deviations are different from the circumstance here where a vehicle's wheels momentarily leave the designated roadway.

Whether the legislature *should* allow some room for minor deviations of a vehicle from the roadway under RCW 46.61.670 is a matter for the legislature, not this court. *Kocher*, 199 Wn. App. at 346. We are not at liberty to add language to RCW 46.61.670 regardless of whether we think a minor intrusion off the roadway presents no greater safety concern than a minor intrusion into an adjacent lane of travel.

CONCLUSION

Ms. Alvarez's vehicle left the designated roadway when its wheels drifted over the fog line. A traffic stop was therefore justified under RCW 46.61.670. We reverse the contrary decisions of the district and superior courts and remand Ms. Alvarez's case for further proceedings.

Pennell, J.

I CONCUR:

Fearing, J.

No. 34711-7-III

LAWRENCE-BERREY, C.J. (dissenting) — The majority concludes that RCW 46.61.670 makes it unlawful to even briefly drive across the fog line and onto the shoulder. We recently held that RCW 46.61.100(1) makes it unlawful to even briefly drive across the center line. *State v. Huffman*, 185 Wn. App. 98, 103-05, 340 P.3d 903 (2014). I write separately to emphasize that law enforcement may now initiate investigatory stops for most minor lane violations. This is contrary to *State v. Prado*, 145 Wn. App. 646, 649, 186 P.3d 1186 (2008).

The *Prado* court construed RCW 46.61.140(1). That statute provides:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (1) 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 ascertained that such movement can be made with safety.

(Emphasis added.)

The *Prado* court wrote:

> The phrase "as nearly as practicable" has not yet been interpreted by a Washington court. Courts in other jurisdictions, however, when construing similar language in the context of whether those observations of potential violations created the basis for a valid investigatory stop, have held such minor incursions over a lane line to be an insufficient basis for a stop.

> Arizona has a similarly worded statute. In *State v. Livingston*, [206 Ariz. 145, 75 P.3d 1103 (2003),] an Arizona appellate court held that the language requiring a driver to remain exclusively in a single lane "as nearly as practicable" indicated an express legislative intent to avoid penalizing brief, momentary, and minor deviations [across the fog line]. We agree.

Id. at 648 (footnotes omitted).

The majority states that RCW 46.61.140(1) does not apply here because it applies only to the "movement *into* another lane of travel." Majority at 6 (emphasis added). To the contrary, RCW 46.61.140(1) applies to the movement "from" a lane of travel. RCW 46.61.140(1). Here, Ms. Alvarez was driving on a multilane road and moved from a lane of travel across the fog line. RCW 46.61.140(1) thus applies.

There is tension between RCW 46.61.670 and RCW 46.61.140(1). As construed by the majority, RCW 46.61.670 does not permit even a brief incursion across the fog line. As construed by the *Prado* court, RCW 46.61.140(1) does.

When the plain meaning of two statutes is in conflict, the specific statute will govern over the general statute. *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 833, 399 P.3d 519 (2017). But "before applying the general-specific rule, we must identify a conflict between the relevant statutes that cannot be resolved or harmonized by reading the plain statutory language in context." *Id.*

I would conclude that RCW 46.61.140(1) and RCW 46.61.670 can be harmonized. The preface of RCW 46.61.140 directs that its subsections "shall apply" to all other rules consistent herewith. As noted in *Prado*, subsection (1) of RCW 46.61.140 makes minor lane violations an insufficient basis for an investigatory stop. Construing RCW 46.61.140(1) and RCW 46.61.670 (wheels off roadway) as consistent with each other, a brief incursion across the fog line is not an infraction. Similarly, RCW 46.61.140(1) and RCW 46.61.100 (drive on right side of road) can be construed together so that a brief incursion across the center line is not an infraction.

It is clear that law enforcement can conduct an investigatory stop for traffic infractions. *State v. Chacon Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012). Routinely, sober drivers briefly cross a fog line or a center line. The sheer number of potential investigatory stops of sober drivers might be reason alone for our Supreme Court to reinstate the policy expressed in *Prado*, that minor traffic lane violations form an insufficient basis for a traffic stop. The potential for uneven enforcement might be an additional reason.

Lawrence-Berrey, C.J.

FAX COVER SHEET

TO	Court Clerk
COMPANY	Washington Court of Appeals Division III
FAX NUMBER	15094564288
FROM	Eric Scott
DATE	2019-01-02 20:56:13 GMT
RE	State v. Alvarez, 34711-7-III

COVER MESSAGE

Dear Clerk, please file the enclosed document regarding the above case. Thank you for your assistance with this request. -Eric Scott cc: Tri-City Legal