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DIVISION II
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STATE OF WASHINGTON
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NO. 39040-0-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON, DEPARTMENT OF LICENSING

Respondent,

v.

DAVID M. RANDOLPH,

Appellant.

BRIEF OF APPELLANT

On Appeal from the Mason County Superior Court
State of Washington
Cause No.: 08-1-00224-1

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pm 9-24-09

ORIGINAL

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I. ASSIGNMENTS OF ERROR.

A. Did the Trial Court err at CONCLUSIONS OF LAW NO. 1 at the CrR 3.6 hearing by holding Trooper Merritt had reasonable articulable suspicion sufficient to stop Randolph's vehicle?

B. Did the Trial Court err at CONCLUSION OF LAW NO. 1 at the CrR 3.6 hearing by holding that no other evidence is required to stop a vehicle other than an inadmissible Speed Measuring Device result?

C. Did the Trial Court err at CONCLUSION OF LAW NO. 2 at the CrR 3.6 hearing by failure to suppress all evidence obtained after the stop of Randolph's vehicle?

D. Did the Trial Court err at CONCLUSION OF Law No. 3 at the CrR 3.6 hearing by finding that Trooper Merritt had probable cause for an arrest for Driving While Under the Influence?

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS.

A. Should all evidence obtained during the illegal seizure of Randolph by Trooper Merritt have been suppressed because Trooper Merritt lacked admissible, articulable facts to stop Randolph for speeding; and for DUI for crossing the centerline only one time?

B. This Court should reverse the CrR 3.6 order because there was no substantial evidence on the record for Trooper Merritt to have a formed reasonable belief of speeding or DUI?

C. Did the Trial Court err in finding that only a unauthenticated SMD was a sufficient fact or circumstance within the arresting officer's knowledge and was reasonably trustworthy information by itself to warrant a person of reasonable caution in a belief that Randolph was speeding?

D. Should the results of SMD have been admitted if the results were not authenticated and were not supported by any other evidence?

E. Without visual facts to support the SMD, was the stop nothing more than an unconstitutional random stop.

III. STATEMENT OF THE CASE

A. Procedural History.

April 30, 2008 - Randolph arrested.

January 2, 2009 - Randolph's Motion to Suppress (CrR 3.6) denied.

January 22, 2009 - Stipulated Bench Trial- Findings of Fact and Conclusions of Law (CrR 6.1(d)).

February 23, 2009 Felony Judgment and Sentence was entered.

March 3, 2009 - Findings of Fact and Conclusions of Law (CrR 3.6 hearing).

May 9, 2009 - Notice of Appeal.

B. Factual History.

On April 30, 2008, Trooper Joshua J. Merritt stopped Defendant David M. Randolph for speeding and for Driving While Under the Influence.

The sole basis for determining that Defendant was speeding was the radar result of 54 MPH in a 40 MPH zone. Pg 3 RP, lines 17-24; Pg 12 RP, lines 6-10; Pg. 81 RP lines 17-20, Police Report.

No other evidence was received at the CrR 3.6 hearing or the Stipulated Bench Trial that Trooper Merritt visually observed the vehicle speeding, nor was there any other articulable facts from which an inference could be drawn that the vehicle was traveling over the speed limit. Entire record.

On April 30, 2008, Trooper Merritt of the Washington State Patrol was traveling westbound on SR 106. Police Narrative, line 2.

Trooper Merritt observed a vehicle traveling toward him in the eastbound lane. Police Narrative, Pg 3, line 20.

The speed limit was 40 mph. Pg 12 RP, lines 11-13; Pg 77 RP, lines 18-19.

Where the Trooper first saw the vehicle Defendant was driving, there was a blind, S-shaped curve. Pg 74 RP, lines 4-21.

The road curved to Randolph's right. Pg 74 RP, lines 4-21.

The front of Trooper Merritt's vehicle went down at the same time that Trooper Merritt and Defendant's vehicle's were in visual sight of each other. Pg 77 RP, line 77; page 78 RP, lines 1-2; Pg 100 RP, lines 11-15.

Trooper Merritt stated in his report, as follows:

> I received a solid tone from the radar and observe a patrol speed reading consistent with my patrol vehicle's calibrated speedometer. The target vehicle speed showed 54 MPH in a clearly posted 40 MPH zone. I watched the vehicle as it passed my location.

Trooper Merritt turned around to follow Defendant's vehicle.

About 800 feet from where Trooper Merritt first saw the Defendant's vehicle, Defendant turned slowly off of SR 106 onto Trails End Drive. Pg 74 RP, lines 4-25, Ex 1-4.

No other cars were present. Pg 4 RP, line 1, Pg 7 RP, lines 7-8.

Defendant was familiar with the road traveled. Pg 73 RP, lines 24-5; Pg 74 RP, lines 1-5.

The time was about 7:30 p.m.

IV. ARGUMENT

A. Standard of Review on Appeal.

> We review a trial court's conclusions of law at a suppression hearing de novo. State v. Carter, 151 Wash.2d 118, 125, 85 P.3d 887 (2004). We review challenged findings of fact for substantial evidence, that is, enough evidence to persuade a fair-minded rational person of the truth of the finding. State v. Vickers, 148 Wash.2d 91, 116, 59 P.3d 58 (2002). We treat unchallenged findings as verities on appeal. State v. Acrey, 148 Wash.2d 738, 745, 64 P.3d 594 (2003). The findings must, in turn, support the conclusions of law. Vickers, 148 Wash.2d at 116, 59 P.3d 58.

State v. Allen, 138 Wash.App. 463, 468, 157 P.3d 893 (2007) (Standard of review to determine if there was sufficient evidence to support of finding of probable cause to question passenger after stop of a vehicle for traffic violation).

This independent standard was set forth previously in State v. Sykes, 27 Wash.App. 111, 114, 615 P.2d 1345, 1347 (Wash.App., 1980) involving seizure of a person:

> The first issue, relating to the stop, involves the fourth amendment to the United States Constitution, which prohibits "unreasonable searches and seizures." Art. 1, s 7 of the Washington State Constitution has been interpreted accordingly. When fundamental constitutional rights are in issue, an appellate court may make its own independent examination and evaluation of the facts. McNear v. Rhay, 65 Wash.2d 530, 398 P.2d 732 (1965). Furthermore, when the facts are undisputed, the judicial determination becomes a conclusion of law reviewable on appeal. State v. Byers, 85 Wash.2d 783, 786, 539 P.2d 833 (1975), rev'd on other grounds, 88 Wash.2d 1, 559 P.2d 1334 (1977); State v. Freeman, 17 Wash.App. 377, 379-80, 563 P.2d 1283 (1977). This determination rests upon a review of the totality of facts and circumstances within the officer's knowledge at the time of the officer's stop. State v. Fricks, 91 Wash.2d 391, 398, 588 P.2d 1328 (1979).

Also State v. Thorp, 71 Wash.App. 175, 181-182, 856 P.2d 1123, 1127 (1993), the court held that random stops without probable cause where not constitutional, even to check for forest permits, and that the

Washington Constitution provided greater protection than the U. S. Constitution. The Court stated:

> The Fourth Amendment to the United States Constitution prohibits an officer who has neither probable cause nor articulable suspicion from randomly stopping a moving vehicle for the purpose of questioning the occupants about whether they have permits or similar papers required by the government. United States v. Brignoni-Ponce, 422 U.S. 873, 884, 95 S.Ct. 2574, 2581, 45 L.Ed.2d 607 (1975); Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979); United States v. Munoz, 701 F.2d at 1298. In Brignoni-Ponce, the United States Supreme Court held that border patrol officers on roving patrol, who had neither probable cause nor articulable suspicion, were constitutionally prohibited from randomly stopping a moving car in order to question its occupants about their citizenship and immigration status. 422 U.S. at 884, 95 S.Ct. at 2581. In Prouse, the United States Supreme Court held that a county patrolman, who had neither probable cause nor articulable suspicion, was prohibited from randomly stopping a moving car in order to question its driver about his driver's license and vehicle registration. 440 U.S. at 663, 99 S.Ct. at 1401. In Munoz, the United States Court of Appeals for the Ninth Circuit held that state game agents on roving patrol in the Mount Hood National Forest, who had neither probable cause nor articulable suspicion were constitutionally prohibited from randomly stopping vehicles "to check for wood-cutting permits, to conduct a brief interview asking what park visitors had seen or done, and to check for possible game violations in the heavy game wintering area." 701 F.2d at 1295.
>
> Washington, of course, cannot require less than the Fourth Amendment. Thus, in State v. Marchand, 104 Wash.2d 434, 706 P.2d 225 (1985), two troopers set up a fixed checkpoint at which they stopped cars selected at random. The defendant's car was one of those stopped, and the troopers found marijuana. The State relied on a statute

> purporting to authorize state troopers to stop vehicles, without cause, so the driver's license and the vehicle's equipment could be checked. Applying Prouse, the Washington Supreme Court invalidated the stop on Fourth Amendment grounds. 104 Wash.2d at 439, 706 P.2d 225.
>
> Additionally, the Washington Constitution provides greater protection than the Fourth Amendment requires. In Seattle v. Mesiani, 110 Wash.2d 454, 755 P.2d 775 (1988), the court held that article I, section 7 of the Washington Constitution prohibited the police from establishing a fixed checkpoint at which every car was stopped, without probable cause or individualized suspicion, so the driver could be checked for sobriety. Two years later, the United States Supreme Court held that such a checkpoint was not prohibited by the Fourth Amendment. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455, 110 S.Ct. 2481, 2488, 110 L.Ed.2d 412 (1990).
>
> In this case, the stop of Thorp's vehicle was a roving stop made without probable cause or articulable suspicion. Thus, it violated both the Fourth Amendment and the Washington Constitution. The State cannot successfully rely on Ordinance 23 because that ordinance is unconstitutional to the extent it purports to authorize a roving stop of the kind made here. The trial court did not err when it granted Thorp's motion to suppress.

B. Introduction.

All evidence after the stop should have been suppressed. The evidence was not lawfully seized. A reasonable suspicion of speeding must be based on something more than an inadmissible speed measuring device result. An articulable fact for reasonable suspicion or for probable cause must be based upon something the Trooper saw, heard, or physically sensed. It cannot be just a hunch or guess. In this case, there

were no such facts. The trial erred by finding that as a matter of law an inadmissible speed measuring device result is all that is needed to support a reasonable suspicion of speeding to justify a legal stop. Such a stop is an unconstitutional random stop. All evidence after such a stop should therefore have been suppressed.

A traffic stop is a seizure for purposes of constitutional analysis under both the fourth amendment of the United States Constitution and article 1, section 7 of the Washington Constitution. See State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

A lawful stop is an absolute prerequisite to a constitutional stop of a vehicle or seizure of defendant.

C. All Evidence Obtained during the Illegal Seizure of the Defendant by Trooper Merritt should have been suppressed because Trooper Merritt lacked and admissible, articulable facts to stop Defendant for speeding; and or DUI for crossing the centerline only one time.

1. This Court should reverse the CrR 3.6 order because there was no substantial evidence on the record for Trooper Merritt to have a formed reasonable belief of speeding or DUI such as would convince a reasonable and cautious person that a crime, i.e. speeding violation had been committed.

a. Traffic stop is constitutional only if the stop is based upon probable cause or reasonable suspicion.

A traffic stop is constitutional if the officer has probable cause to believe a person has violated the traffic code. Clement

v. Dep't of Licensing, 109 Wn.App. 371, 375-75, 35 P.3d 1171 (2001); City of Bremerton v. Spears, 134 Wash.2d 141, 158, 949 P.2d 347 (1998). Failure to comply with a speed restriction is a violation of the traffic code and a traffic infraction. See RCW 46.63.020.

b. Reasonably trustworthy information within officer's knowledge is required for reasonable suspicion or probable cause.

In Washington, "[p]robable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." State v. Terrovona, 105 Wash.2d 632, 643, 716 P.2d 295 (1986), probable cause was based on observation of physical facts). Clement v. Dep't of Licensing, 109 Wn.App. 371, 375, 35 P.2d 1171 (2001) (An uncertified SMD coupled with the officers' observation were sufficient to establish probable cause). The definition of probable cause encompasses the reasonable grounds language. Thus, based solely on the language, the probable cause standard is appropriate. State v. Avery, 103 Wash.App. 527, 539, 13 P.3d 226, 233 (2000).

In all cases, reasonable suspicion was supported by more than just the unauthenticated Speed measuring device result.

In Jury v. State, Dept. of Licensing, 114 Wash.App. 726, 735-736, 60 P.3d 615, 619 (2002), the Court stated as follows:

> The State appeals the trial judge's conclusion that the Kustom Pro Laser II speed gun used by the state patrol officer to clock Mr. Jury's speed was not scientifically validated as a speed measuring device. The State responds that the officer's observation of Mr. Jury's vehicle, coupled with use of the speed measuring device, provides ample support for a reasonable articulable suspicion of a traffic infraction. See Clement v. Dep't of Licensing, 109 Wash.App. 371, 376, 35 P.3d 1171 (2001) (visual observations of motorist's car coupled with information that the radar showed car approaching at a speed in excess of the speed limit justifies traffic stop for speeding), review denied, 146 Wash.2d 1017, 51 P.3d 87 (2002). The officer must have probable cause. Id. at 375, 35 P.3d 1171. Probable cause requires facts and circumstances "sufficient to warrant a person of reasonable caution to believe that an offense has been committed." Id. Here, that probable cause followed the officer's physical observation of the car and his use of the laser speed measuring device. The challenge in this case is to the scientific validity of the speed measuring device. Mr. Jury argues that no Washington appellate case has passed upon whether a laser speed measuring device meets the necessary scientific threshold.

Officer observed the Defendant's vehicle. Challenge was to the scientific validity of the principal.

In Clement v. Dep't of Licensing, 109 Wn.App. 371, 375-75, 35 P.3d 1171 (2001), review denied, 146 Wash.2d 1017, 51 P.3d 87 (2002) reasonable suspicion was supported by more than just the unauthenticated

SMD result. First, the factual background shows observations of facts that inferred speeding. The facts were set out as follows:

> Washington State Patrol Trooper Rodriguez was operating a radar unit on I-5 and reported to Trooper Coglizer, who was working with him, that a car was approaching at 82 miles per hour. As the car passed the troopers, Trooper Coglizer saw the front end of the car dip, as if the driver had suddenly hit the brakes. Trooper Rodriguez then reported that his radar reading showed that the car was traveling at 77 miles per hour. Trooper Coglizer pursued the car and pulled it over, believing that the driver, who was later identified as Clement, was speeding. The trooper smelled a strong odor of alcohol in the car and saw that Clement's eyes were watery and bloodshot. Based upon these observations, Trooper Coglizer arrested Clement for DUI. Clement refused to submit to a breath test and, after a hearing, the Department revoked his driver's license.

The Trooper saw the front of Clement's car dip as the driver saw the Trooper. This is a clear indication of speeding – the same as someone running from a crime.

Clement argued that authentication of the SMD was required to use the SMD result as evidence of probable cause or reasonable suspicion.

The Court held that was not the case, but the Clement's Court went on to emphasize that authentication of the SMD was not required because the finding of reasonable suspicion was not based just on the SMD result. In fact, the conditional phrasing of the Clement's court requires that something more than just the inadmissible SMD result is required.

> We hold that Trooper Coglizer's visual observations of Clement's car coupled, under the fellow officer rule, with Trooper Rodriguez's information that the radar showed Clement's car approaching at a speed in excess of the speed limit, were sufficient to warrant a person of reasonable

> caution to believe that Clement was speeding. Accordingly, this evidence was sufficient to establish probable cause to justify Trooper Coglizer's initial stop of Clement's vehicle.
>
> We reject Clement's argument that to establish the validity of the traffic stop, the Department was required to go beyond this and produce foundational evidence to support the radar reading. The Department's burden with respect to the traffic stop was to prove that the stop was valid. Here, the Department met this burden with the evidence discussed above, evidence that did not include foundational radar evidence. Once the Department met this burden, it then became Clement's burden to produce evidence showing that the stop was not valid by, for example, subpoenaing Troopers Coglizer and Rodriguez. We decline to require the Department to go beyond proving that there was probable cause to believe the motorist violated the traffic code. Where, as here, the Department can meet its burden without introducing foundational radar evidence, then the Department is not required to introduce such evidence. *Emphasis added.*

Clement v. Dep't of Licensing, 109 Wash.App. 371, 376, 35 P.3d 1171, 1174 (Wash.App. Div. 1, 2001)

Conversely, if the evidence is not sufficient (or in Mr. Randolph's Case where other evidence does not exist), the unauthenticated SMD result is not enough to establish probable cause or reasonable suspicion.

Here, there is nothing but the SMD results to support the stop. Where the results of the SMD are the only basis for the stop, there is nothing but the officer's hunch or feelings upon which to guess the driver was speeding. The Trooper saw a car and then looked at the SMD to see if there was speeding. Police report, line 22; RP pg 3; lines 12-18,

pg 11 RP. Trooper Merritt never testified that based upon his observation of the vehicle, the Trooper formed an independent opinion the vehicle was travelling over the speed limit. There was also not any articulated basis for the conclusion. It is only bootlegging the results of the SMD which was not or should not have been admissible without authentication or collaboration.

c. Speed measuring device results were not admissible without supporting evidence. The results of SMD were not authenticated and unsupported, and therefore should not be admitted.

The results of the speed measuring device were inadmissible. Authentication of the SMD is still required by ER 609 and by Seattle v. Peterson, 39 Wn.App. 524, 527, 693 P.2d 757 (1985) (Court erred in taking judicial notice of results of speed gun without authenticating the reliability of or ability of the particular machine to use the scientific principal, i. e. Doppler effect). The authentication of radar devices is now done by a certificate under IRLJ 6.6 or by expert testimony.

Seattle v. Peterson has been distinguished, but not overturned. Bellevue v. Mociulski, 51 Wn.App 855, 860-61, 756 P.2d 1320 (1988) (Under ER 901 (b)(9), expert testimony is required to confirm that the particular speed measuring device is reliable).

Neither the certificate under IRLJ 6.6 or expert testimony was presented. The SMD result should therefore not have admitted into evidence.

In prosecution for exceeding posted speed limit, the accuracy of particular model of radar gun employing the Doppler effect was not a proper subject of judicial notice where city made no effort to supply court with the type of information necessary to treat the issue of the reliability or accuracy of the radar unit as a matter of common knowledge in the state. ER 201(b, d), 901; City of Seattle v. Peterson, 39 Wash.App. 524, 693 P.2d 757 (1985) (Court erred in taking judicial notice of results of speed gun without authenticating the reliability of the or ability of the particular machine to use the scientific principal, i. e. Doppler effect). The authentication of radar devices is now done by a certificate under IRLJ 6.6 or by expert testimony.

d. By analogy, without visual facts to support the SMD, the stop is nothing more than an unconstitutional random stop.

A stop must be legally supported by something more than an inadmissible SMD result. Otherwise, result is not any different than an unconstitutional and invalid "speed trap". RCW 46.61.470. The burden of proof to support a speeding ticket is finding by a preponderance of the evidence. Where a "speed trap" is involved RCW 46.61.470 requires

significant articulable facts under the statute. The officer must measure the distance, time the vehicle over the distance, and use a certified stopwatch. Without these basics, the "speed trap" is nothing more than a random stop. State v. Thorp, 71 Wash.App. 175, 181-182, 856 P.2d 1123, 1127 (1993).

Trooper Merritt did not testify as to distance and time and even if he had, the distance was not measured or known as required by RCW 46.61.470 for speed traps. He did not state that he visually observed the vehicle speeding. This is not any different from a random stop.

e. In addition, there were other reasons to doubt the accuracy of the SMD result.

The SMD result was taken on a blind, sharp curve where Trooper Merritt braked immediately as soon as Randolph's vehicle came into view. It was at night.

There was not any supporting evidence of the SMD result as pacing, pulling away quickly from other cars, or even an attempt by Randolph to stop suddenly.

2. Crossing a line on time does not support probable cause to stop for Driving While Under the Influence.

Also, crossing a line one time was also not a valid basis for a stop for further investigation for DUI. Crossing a line did not justify the Trooper's stop of Mr. Randolph's vehicle. State v. Prado, 186 P.3d 1186

(2008) (Brief crossing over lane marker by two tire widths did not constitute traffic violation for failure to maintain lane, as justification for traffic stop, and was an insufficient basis for a valid investigatory stop).

In regards to whether a swerve within a lane is sufficient probable cause to pull over a traveling motorist, courts have noted:

> The Fourth Amendment's prohibition against unreasonable searches and seizure applies to investigatory traffic stops.

United States v. Colin, 314 F.3d 439, 744 (9th Cir. 2002). In Colin, the defendants were observed operating a motor vehicle on a two-lane highway as follows:

> ...[T]he car drift onto the solid white fog line on the far side of the right lane and watched the car's wheels travel along the fog line for approximately ten seconds. The Honda then drifted to the left side of the right lane, signaled a lane change, and moved into the left lane. Carmichael next observed the car drift to the left side of the left lane where its left wheels traveled along the solid yellow line for approximately ten seconds. The car then returned to the center of the left lane, signaled a lane change, and moved into the right lane. Carmichael pulled the car over for possible violations of California Vehicle Code § 21658(a) (lane straddling) and California Vehicle Code § 23152(a) (driving under the influence).

Colin, 314 F.2d 439 at 441. The court, in assessing the facts, articulated the following standard of review:

> To justify an investigative stop, a police officer must have reasonable suspicion that a suspect is involved in criminal activity. Lopez-Soto, 205 F.3d at 1104-05. Reasonable

> suspicion is formed by "specific articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." Id. at 1105 (internal quotation marks and citations omitted); see also Mariscal, 285 F.3d at 1130; United States v. Twilley, 222 F.2d at 1092, 1095 (9th Cir. 2000). An officer's inferences must "be grounded in objective facts and be capable of rational explanation." Lopez-Soto, 205 F.3d at 1105 (internal quotation marks and citations omitted); see also Mariscal, 285 F.3d at 1130; Twilley, 222 F.2d at 1095. In reviewing the district court's determination of reasonable suspicion, we must look at the "totality of the circumstances" to see whether the officer had a "particularized and objective basis" for suspecting criminal activity. Arvizu, 534 U.S. at 273, 122 S.Ct. 744 (internal quotation marks and citations omitted); see also United States v. Diaz-Juarez, 299 F.3d 1138, 1141-42 (9th Cir. 2002).

Colin, 314 F.3d at 442. In Colin, the court was asked to review a violation of California Vehicle Code § 21658(a) (lane straddling), which provides as follows:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic in one direction, the following rules apply: (a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety.
>
> Id. at 443.

The court held that there was no reasonable, articulable suspicion for the CHP officer to pull over the defendants, stating:

> Although we recognize that in some cases evidence of weaving might be indicative of driving under the influence,

> we disagree that the evidence in this case was sufficient for Carmichael to harbor a reasonable suspicion that Estrada-Nava was driving under the influence, thus justifying the stop...
>
> Id. at 445.

The court went on to note that:

> ...Carmichael testified that he observed Estrada-Nava and Colin's vehicle for 35-45 seconds before pulling it over, and during that time, Estrada-Nava drove within the speed limit and properly activated his turn signals before making lane changes. Carmichael thought Estrada-Nava was "possibly" driving under the influence because the car's wheels touched the fog line on the right side of the right lane for 10 seconds and then, about 5-10 seconds later, touched the yellow line on the far left of the left lane for another 10 seconds.
>
> Id. at 445.

The court further augmented its findings by stating:

> Even if we assume, as the district court did, that "if the wheels were **on** the line, then that part of the vehicle that extends beyond the wheels was **over** the line and the car was traveling in two lanes," we still conclude that there was not reasonable suspicion to stop Estrada-Nava and Colin for a violation of section 21658(a). Touching a dividing line, even if a small portion of the body of the car veers into a neighboring lane, satisfies the statute's requirement that the driver drive as "**nearly as practical** entirely within a single lane."
>
> Id. at 444 (emphasis in original).

Crossing the centerline one time was not a valid basis for the stop.

3. Trooper Merritt lacked probable cause or reasonable suspicion for the stop because there was not any admissible evidence or testimony that the Trooper believed Randolph was speeding.

In this case, no observable facts were presented by the Trooper that supports the bare conclusion that Mr. Randolph was speeding. In fact, the testimony and circumstances to be presented by Defendant demonstrate otherwise.

The Trooper did not report as to distance and time and even if he had, the distance was not measured or known before stopping the driver as required by RCW 46.61.470 for "speed traps". There was not any evidence of pacing, pulling away quickly from other cars, or even an attempt by Defendant to stop suddenly.

Here, there is nothing but the inadmissible SMD results to support the stop. Where the results are the only basis for the stop, there is nothing but the officer's hunch or feelings upon which to guess the driver was speeding. This is not an articulated basis for the conclusion. It is only bootlegging the results of the SMD, which was not admissible.

The report does not include any statement that the Trooper actually saw the vehicle traveling over the speed limit. The finding that Defendant was speeding is simply not supported by the evidence.

V. CONCLUSION.

The only reference to speeding is the speed measuring device results, which should not have been admitted. No other visible facts are included. The report does not include any statement that the Trooper actually saw the vehicle traveling over the speed limit. Therefore, the findings of reasonable suspicion was simply not sufficiently supported by the evidence. Probable cause must be based upon knowledge. The knowledge must be based on something that is seen or heard, i.e. an actual fact to which the Trooper testified.

As the stop was not based on any visible facts, the Trooper lacked probable cause for the stop based only upon speeding.

No case has ever held that all the Trooper needs to support a traffic stop is an inadmissible SMD result. The backbone of reasonable suspicion has always been articulable facts, but at least something tangible from which to draw conclusions.

The Trial Court is in error as a matter of law that the SMD result does not need to be supported by something. As there was nothing else, the Trial Court erred by denying Defendant's Motion to Suppress all evidence obtained after the stop.

The case should be remanded with instructions to suppress the SMD results, and to suppress all evidence obtained after the stop.

RESPECTFULLY SUBMITTED this 24th day of September, 2009.

HOULE & GOODELL ATTORNEYS PLLC

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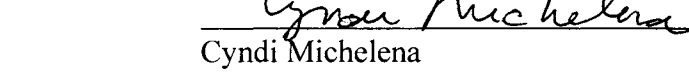
Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned, declares under penalty of perjury that on this day she deposited into the mail, or otherwise caused to be delivered, one copy of the foregoing document to the following:

Mr. Monty Dale Cobb
Mason County Prosecutor's Office
521 North 4th Avenue, Suite A
P.O. Box 639
Shelton, WA 98584-0639

DATED this 24th day of September, 2009, at Belfair, Washington.



Cyndi Michelena