

Nº. 47346-1-II

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

STATE OF WASHINGTON
Respondent,

v.

DAVID JAMES KARLSON,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 14-1-04402-1
The Honorable Philip Sorensen, Reviewing Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying Mr. Karlson's Motion to Suppress where the facts known to Trooper Worley were insufficient to support a stop of Mr. Karlson's vehicle.
2. The trial court's ruling on Mr. Karlson's motion to suppress is given at pages 28-30 of the report of proceedings. The court does not clearly and separately articulate its findings of fact, but it does clearly indicate its conclusion of law that "there [were] observable facts sufficient to justify the stop." RP 30.

The trial court found that Trooper Worley observed Mr. Karlson for only forty seconds before pulling him over (RP 28), that Mr. Karlson's driving was not unusual with the exception of touching the white border and crossing onto the shoulder (RP 28-29), and that Mr. Karlson didn't swerve in his own lane. RP 29.

Mr. Karlson does not assign error to any of the trial court's findings of fact. Mr. Karlson does assign error to the trial court's conclusion of law that the court's findings of fact support the conclusion that the stop of Mr. Karlson was lawful.

B. ISSUES PRESENTED

1. Did the facts known to Trooper Worley support an objectively reasonable belief that the stop of Mr. Karlson's vehicle was appropriate? (Assignments of Error Nos. 1 & 2)
2. Did the trial court abuse its discretion in denying Mr. Karlson's Motion to Suppress where the facts known to Trooper Worley were, as a matter of law, insufficient to support a stop of Mr. Karlson's vehicle? (Assignments of Error Nos. 1 & 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On February 14, 2013, Washington State Patrol Trooper Worley was working when he purportedly observed a vehicle later determined to be driven by Mr. Karlson weaving in its lane. RP 73-76.¹ Trooper Worley saw the right tires of the vehicle go on top of the fog line, but not all the way over the line. RP 116. Trooper Worley pulled his patrol vehicle behind Mr. Karlson's vehicle and observed the right tires of Mr. Karlson's vehicle go off the shoulder of the roadway. RP 77. Trooper Worley then pulled Mr. Karlson over. RP 77. Trooper Worley observed Mr. Karlson's vehicle for less than one minute before pulling it over. RP 117.

Trooper Worley contacted Mr. Karlson and noticed an "extreme" odor of intoxicants emanating from the interior of Mr. Karlson's vehicle. RP 79. Trooper Worley noted that Mr. Karlson's movements were sluggish and uncoordinated. RP 79. Mr. Karlson told Trooper Worley that he had had three drinks that night. RP 79-80. Trooper Worley had Mr. Karlson exit his vehicle and perform the standardized field sobriety tests. RP 81, 85-86. Mr. Karlson exhibited all clues indicating

¹ The page numbers in the copy of Report of Proceedings submitted to the Superior Court were missing. However, the page numbers are present in the copy of the Report of Proceedings attached to Mr. Karlson's Motion for Discretionary Review. Reference to the RPs will be to the paginated version attached to the Motion or Discretionary Review.

intoxication on both the hand-gaze-nystagmus test and the walk and turn test. RP 94-95, 104. Mr. Karlson indicated that he did not want to perform any more sobriety tests after the walk-and-turn test. RP 105.

Trooper Worley believed Mr. Karlson was under the influence of alcohol and was a danger to himself and to anyone else on the road. RP 105. Trooper Worley arrested Mr. Karlson for driving under the influence and transported him to the Washington State Patrol headquarters. RP 105-106, 114.

At the State Patrol headquarters, Mr. Karlson was unable to provide a breath sample due to illness and shortness of breath. RP 131, 134.

On March 12, 2103, Mr. Karlson was charged with one count of driving under the influence of alcohol in violation of RCW 46.61.502(1)(a)(c)(d) while having an alcohol concentration of at least 0.15. CP 4.

On October 1, 2014, Mr. Karlson filed a motion to suppress all evidence discovered after Mr. Karlson was stopped on the basis that Trooper Worley lacked knowledge of facts sufficient to support a stop of Mr. Karlson's vehicle. CP 246-257.

On October 20, 2014, a hearing was held regarding Mr. Karlson's Motion to Suppress. RP 5-29. Trooper Worley testified that he observed

Mr. Karlson's vehicle weaving back and forth on the highway, that he observed the tires on Mr. Karlson's vehicle touch the fog line, and that he observed the tires on Mr. Karlson's vehicle drift over the fog line and onto the shoulder of the road. RP 9-10, 19. Video from the dash mounted video camera in Trooper Worley's vehicle was admitted for purposes of the suppression hearing. RP 18. The State argued that Mr. Karlson's weaving in his own lane and the two incidents of his tires contacting the fog line were a sufficient basis for Trooper Worley to stop Mr. Karlson for a DUI investigation. RP 22. The trial court viewed the video, noted that it did not see Mr. Karlson's vehicle weave in its lane and that Mr. Karlson's driving wasn't unusual, but ultimately found that the observable facts were sufficient to justify the stop and denied the motion to suppress. RP 27-29.

Mr. Karlson's trial began on October 20, 2014. RP 73.

On October 21, 2014, the jury returned a verdict finding Mr. Karlson guilty of the crime of driving under the influence.

Mr. Karlson filed a notice of appeal on November 5, 2014. CP 11.

On appeal to the Superior Court, Mr. Karlson renewed his challenge to the lawfulness of the stop of his vehicle. CP 19-28. However, the Superior Court affirmed Mr. Karlson's convictions and held that there were sufficient observable facts to support the stop of Mr. Karlson's vehicle. CP 288-289.

Mr. Karlson sought discretionary review in this court. CP 290-293.

D. ARGUMENT

When reviewing the decision of a Superior Court on an appeal from a court of limited jurisdiction, the Court of Appeals' inquiry is whether the court of limited jurisdiction committed an error of law and whether substantial evidence supports the factual findings. *City of Seattle v. May*, 151 Wn.App. 694, 697, 213 P.3d 945 (2009); RALJ 9.1. Any unchallenged findings are verities on appeal and review for errors of law is de novo. *May*, 151 Wn.App. at 697, 213 P.3d 945.

1. The trial court erred in denying Mr. Karlson's motion to suppress all evidence discovered pursuant to the stop of his vehicle.

a. Standard of review.

When reviewing a trial court's ruling on a motion to suppress evidence, appellate courts independently determine whether (1) substantial evidence supports the trial court's factual findings, and (2) the factual findings support the trial court's conclusions of law.² "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the

² *State v. Carney*, 142 Wn.App. 197, 201, 174 P.3d 142 (2007), review denied 164 Wn.2d 1009, 195 P.3d 87 (2008) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Dempsey*, 88 Wn.App. 918, 921, 947 P.2d 265 (1997)).

finding.”³ Unchallenged findings of fact are considered verities on appeal.⁴

Appellate courts review the trial court’s conclusions of law **de novo**.⁵ Thus, the fact that the trial court denied Mr. Karlson’s Motion to Suppress has no bearing on this court’s determination of whether or not the facts known to Trooper Worley were sufficient to support an investigative stop of Mr. Karlson.

b. Findings of fact and conclusions of law to which error is assigned.

Courts of limited jurisdiction are not required to enter written findings of fact when ruling on a motion to suppress.⁶ Instead, CrRLJ 3.6 mandates only that the trial court state its findings of fact and conclusions of law.

The trial court’s ruling on Mr. Karlson’s motion to suppress is given at pages 28-30 of the report of proceedings. The court does not clearly and separately articulate its findings of fact, but it does clearly indicate its conclusion of law that “there [were] observable facts sufficient to justify the stop.” RP 30.

³ *Hill*, 123 Wn.2d at 644 (citing *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)).

⁴ *Hill*, 123 Wn.2d 644.

⁵ *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citation omitted), *overruled on other grounds by Brendlin v. California*, --- U.S. ----, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (emphasis added).

⁶ CrRLJ 3.6.

The trial court found that Trooper Worley observed Mr. Karlson for only forty seconds before pulling him over (RP 28), that Mr. Karlson's driving was not unusual with the exception of touching the white border and crossing onto the shoulder (RP 28-29), and that Mr. Karlson didn't swerve in his own lane. RP 29.

Mr. Karlson does not assign error to any of the trial court's findings of fact. Mr. Karlson does assign error to the trial court's conclusion of law that the court's findings of fact support the conclusion that the stop of Mr. Karlson was lawful. Because conclusions of law are reviewed de novo, this court must accept the factual findings made by the trial court as verities and determine whether those factual findings support the conclusion that the stop was lawful.

c. The trial court abused its discretion by applying the wrong legal standard to determine whether the stop of Mr. Karlson was lawful.

When police officers have a "well-founded suspicion not amounting to probable cause" to arrest, they may nonetheless stop a suspected person, identify themselves, and ask that person for identification and an explanation of his or her activities.⁷ A police officer may stop and detain a person for questioning if he reasonably suspects that

⁷ *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991).

the person is engaged in criminal activity.⁸

An investigatory detention is a seizure.⁹ To support an investigative detention, the circumstances must show there is a **substantial possibility** that criminal conduct has occurred or is about to occur.¹⁰ In Washington, the officer must have a “well founded suspicion, based on objective facts, that the person is connected to potential or actual criminal activity.”¹¹ Such facts are “judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a [person] of reasonable caution in the belief’ that the action taken was appropriate?”¹²

The level of articulable suspicion required for a car stop is no greater than required for a pedestrian stop.¹³ The circumstances must be more consistent with criminal conduct than with innocent behavior.¹⁴

A reviewing court decides whether reasonable suspicion existed

⁸ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

⁹ *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

¹⁰ *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999), *abrogated on other grounds* *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

¹¹ *State v. Kennedy*, 107 Wn.2d 1, 7, 726 P.2d 445 (1986).

¹² *State v. Almanza-Guzman*, 94 Wn.App. 563, 566, 972 P.2d 468 (1999) (quoting *State v. Barber*, 118 Wn.2d 335, 343, 823 P.2d 1068 (1992)).

¹³ *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (citing *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)).

¹⁴ *State v. Pressley*, 64 Wn.App. 591, 596, 825 P.2d 749 (1992).

based on an objective view of the known facts.¹⁵ The reviewing court does not base its determination of reasonable suspicion upon the officer's subjective belief.¹⁶

A trial judge's ruling on the admissibility of evidence is reviewed for abuse of discretion.¹⁷ A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds."¹⁸ A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.¹⁹

Here, the trial court improperly based its determination of whether or not there was a reasonable suspicion to stop Mr. Karlson on Trooper Worley's subjective belief. After hearing Trooper Worley's testimony and observing the video of Mr. Karlson's driving prior to the stop, the trial court stated that the issue before the court was whether or not "two crosses [of the lane line by the tires of Mr. Karlson's vehicle] in forty seconds [was] sufficient to...make a stop?" RP 29. The court noted that it was a

¹⁵ *State v. Mitchell*, 80 Wn.App. 143, 147, 906 P.2d 1013 (1995), *review denied* 129 Wn.2d 1019, 919 P.2d 600 (1996).

¹⁶ *Mitchell*, 80 Wn.App. at 147, 906 P.2d 1013.

¹⁷ *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

¹⁸ *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002).

¹⁹ *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

“very close call” and that it would have preferred to have another forty seconds of video to see what else happened (RP 29) but then stated, “I wasn’t there at two o’clock in the morning though. And I don’t have the trooper’s experience.” RP 29.

The trial court clearly based its determination of whether or not the facts known to Trooper Worley were sufficient to support an objectively reasonable suspicion that Mr. Karlson was engaged in criminal activity on Trooper Worley’s own subjective belief. The trial court’s statements that “it wasn’t there” and that it “didn’t have the trooper’s experience” make clear that the trial court was not conducting an objective view of the facts and was, instead, relying on the subjective determination of the officer that the stop was lawful. This was an abuse of discretion because the proper standard for the trial court to apply was whether the facts known to Trooper Worley supported an **objectively reasonable** belief that Mr. Karlson was engaged in criminal activity. The trial court applied the wrong legal test in determining the lawfulness of the stop of Mr. Karlson’s vehicle.

d. The trial court’s findings of fact do not support its conclusion of law.

Under RCW 46.61.140,

Whenever any roadway has been divided into two or more clearly marked lanes for traffic...[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.

“[T]he Legislature's use of the language ‘as nearly as practicable’ [in RCW 46.61.140(1)] demonstrates a recognition that brief incursions over the lane lines will happen...A vehicle crossing over the line for one second by two tire widths...does not justify a belief that the vehicle was operated unlawfully. [A stop of a vehicle on this basis is] unlawful.”²⁰

In *Prado*, Prado’s car was stopped by a police officer after the officer observed Prado's car cross an eight-inch white line dividing the exit lane from the adjacent lane by approximately two tire widths for one second.²¹ Prado was subsequently arrested for driving under the influence of intoxicants.²² Prado’s motion to suppress was denied by the trial court on the grounds that he had done more than merely touch the white line but had actually crossed it. Prado was subsequently convicted.

On RALJ appeal, the superior court reversed, holding that the language “as nearly as practicable” required an analysis of the totality of the circumstances and that here there was nothing more than a brief incursion across the white lane line with no erratic driving or safety problems. The State appealed and the Court of Appeals granted discretionary review.

²⁰ *State v. Prado*, 145 Wn.App. 646, 649, 186 P.3d 1186 (2008).

²¹ *Prado*, 145 Wn.App. at 647, 186 P.3d 1186.

²² *Prado*, 145 Wn.App. at 647, 186 P.3d 1186.

The Court of Appeals affirmed the Superior Court noting that there was nothing other than Prado's "brief incursion over the lane line" to justify the stop of his vehicle.²³

Similarly, in *State v. Jones*, the court held that observation of a vehicle drifting one inch over the fog line three times within a mile, but with no other evidence of impaired driving, was insufficient to establish a reasonable suspicion of DUI such that an investigatory stop was permissible.²⁴

The facts of this case are almost exactly like the facts of *Prado* and *Jones*. Here, the trial court found that Mr. Karlson's driving was not unusual and that he was not weaving in his own lane. As in *Prado*, the only basis for the stop found by the trial court was that Mr. Karlson's tires touched the fog line once and crossed the fog line completely once. Under *Prado* and *Jones*, such facts do not support the conclusion that a traffic infraction occurred. Therefore, the stop of Mr. Karlson's vehicle was unlawful. The trial court's findings of fact do not support its conclusion of law that Trooper Worley was aware of facts sufficient to support a stop of Mr. Karlson's vehicle.

2. This court should vacate Mr. Karlson's conviction and remand for a new trial.

²³ *Prado*, 145 Wn.App. at 649, 186 P.3d 1186.

²⁴ *State v. Jones*, 186 Wn.App. 786, 793-794, 347 P.3d 483 (2015).

If the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree.²⁵ Under article I, section 7, suppression is constitutionally required.²⁶

The remedy for an error in an evidentiary ruling is to remand the case for new trial where the inadmissible evidence is suppressed.²⁷

The trial court erred in finding that the initial stop of Mr. Karlson was lawful and that the evidence discovered pursuant to the stop was admissible. This court should vacate Mr. Karlson's conviction and remand his case to the trial court for retrial where all evidence discovered pursuant to the stop of his vehicle is suppressed.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Karlson's conviction and remand his case for a new trial at which all evidence discovered pursuant to the stop of his vehicle is inadmissible.

DATED this 21st day of October, 2015.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

²⁵ *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986), citing *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441 83 S.Ct. 407 (1963).

²⁶ *State v. Boland*, 115 Wn.2d 571, 582-83, 800 P.2d 1112 (1990)

²⁷ See *State v. Florek*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

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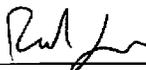
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 21st day of October, 2015, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

David Karlson
415 1st Ave. N., #9153
Seattle, WA 98109

And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached to:

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 21st day of October, 2015.



Reed Speir, WSBA No. 36270

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