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**Court of Appeals, Div. II,  
of the State of Washington**

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State of Washington,

Respondent,

v.

Artur Tysyachuk,

Appellant.

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**Brief of Appellant**

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## **1. Introduction**

Artur Tsyachuk did not plan on driving the night of DATE. He had been drinking. But when circumstances changed, his judgment clouded, he got behind the wheel. State Patrol Trooper Nicholas Smith observed Tsyachuk encroach onto the lane line. A nearby car decided to change lanes to move away—better safe than sorry. Trooper Smith immediately initiated a traffic stop for DUI. Tsyachuk was charged, convicted, and has served his time. He is now on community custody.

Due to errors before and during the trial, Tsyachuk's conviction should be reversed. The trial court granted an improper continuance, in violation of Tsyachuk's speedy trial rights. The trial court failed to suppress evidence obtained from the traffic stop when Trooper Smith lacked reasonable suspicion to stop Tsyachuk for DUI. The trial court refused to bifurcate the issues of guilt and of prior convictions. The trial court failed to exclude inadmissible evidence at trial.

Tsyachuk knows that he did wrong and has willingly served his time. But in the interests of justice, the trial court's errors must be corrected. This Court should reverse the convictions and dismiss the charges.

## **2. Assignments of Error**

### **Assignments of Error**

1. The trial court erred in denying Tysyachuk's motion to suppress evidence obtained from an improper traffic stop.
2. The trial court erred in entering "Undisputed Fact" #2, in particular that portion finding that the dashcam footage "strongly corroborated the testimony of Trooper Smith."
3. The trial court erred in entering "Undisputed Fact" #4, in particular that portion finding, "There was enough room for the defendant to pull over to the right at the place where Trooper Smith activated his emergency lights, but the defendant did not initially stop."
4. The trial court erred in entering "Undisputed Fact" #19, in particular that portion finding, "No reasonable person in the defendant's circumstances would believe he or she was in police custody to a degree associated with formal arrest before Trooper Smith actually told him he was under arrest."
5. The trial court erred in entering "Finding as to Disputed Fact" #1, in particular that portion finding, "the defendant's vehicle was swerving inside and outside of its lane, and when the defendant's vehicle left its lane it nearly caused a collision with a vehicle traveling in the neighboring lane."
6. The trial court erred in entering "Finding as to Disputed Fact" #2, in particular that portion finding, "the defendant had room to pull over to the right when Trooper Smith activated his emergency lights but the defendant failed to do so."
7. The trial court erred in entering "Reasons for Admissibility or Inadmissibility of the Evidence" #1,

which reads, “The defendant’s driving behaviors (weaving in and out of his lane, causing other vehicles to take evasive action to avoid him) provided a reasonable articulable suspicion that criminal activity and/or traffic infractions had occurred, and thus Trooper Smith was justified in initiating a traffic stop of the defendant’s vehicle. It was appropriate and reasonable for Trooper Smith to conduct a traffic detention to investigate why the defendant’s driving was substandard.”

8. The trial court erred in entering “Reasons for Admissibility or Inadmissibility of the Evidence” #7, which reads, “The defendant’s motions to suppress evidence based on the lawfulness of the traffic stop and/or the investigative detention of the defendant (or its duration or content) are DENIED.”
9. The trial court erred in entering “Reasons for Admissibility or Inadmissibility of the Evidence” #8, which reads, “The defendant’s motions to suppress evidence based on the lawfulness of his arrest are DENIED.”
10. The trial court abused its discretion in denying Tsyachuk’s motion to bifurcate trial of the issue of guilt from the issue of prior DUI convictions.
11. The trial court abused its discretion in admitting evidence of the results of the blood alcohol tests when there was insufficient evidence that the blood draw was properly conducted.

#### **Issues Pertaining to Assignments of Error**

1. A traffic stop is only justified when the officer has reasonable, articulable suspicion that the person is engaged in criminal activity. Drifting twice onto the lane/fog lines does not create reasonable suspicion of criminal activity. Did the trial court err in denying

Tysyachuk's motion to suppress the evidence obtained from the unlawful traffic stop? (assignments of error 1-9)

2. Where the state must prove prior convictions as an element of a crime, the trial court has discretion to craft a bifurcated procedure to reduce unnecessary prejudice. In denying Tysyachuk's motion to bifurcate, the trial court expressed its belief that bifurcation would be improper under current case law. Did the trial court abuse its discretion by applying the incorrect legal standard? (assignment of error 10)
3. Blood test results are inadmissible in a DUI trial unless the state lays a foundation sufficient to demonstrate that the blood sample was not adulterated. Here, the state failed to present testimony regarding the procedures used during the blood draw. Did the trial court abuse its discretion in admitting the blood test results over Tysyachuk's objection? (assignment of error 11)

### **3. Statement of the Case**

#### **3.1 Trooper Smith initiated the traffic stop after observing Tysyachuk encroach onto the lane line one time.**

State Trooper Nicholas Smith observed Artur Tysyachuk driving a white Cadillac northbound on I-5 near the Tacoma Dome in the far left lane. RP, Jun. 4, 2018, at 7-8.<sup>1</sup> According to Smith's testimony at the suppression hearing, the Cadillac's

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<sup>1</sup> The Verbatim Reports of Proceedings in this case are not all numbered by volume, and page numbers are not sequential from beginning to end. This brief will refer to the reports of the trial and the sentencing hearing by volume and page number. It will refer to pre-trial hearings by date and page number, as here.

right tires crossed the lane divider into the center lane. RP, Jun. 4, 2018, at 13-14. As it did so, another car slowed down and merged away from the Cadillac “because of the unsafe lane travel.” RP, Jun. 4, 2018, at 8. Smith testified that the Cadillac drifted back onto the left fog line, “and at that point I activated my emergency lights.” RP, Jun. 4, 2018, at 8, 14.

Smith testified that his reason for initiating the stop was to investigate why the Cadillac was not driving safely. RP, Jun. 4, 2018, at 8. Smith believed that the Cadillac had committed one or more traffic infractions for unsafe lane travel. RP, Jun. 4, 2018, at 8-9. He believed that the Cadillac’s driver might have been driving under the influence. RP, Jun. 4, 2018, at 9, 39.

Dashcam footage from Smith’s patrol car was admitted at the suppression hearing and at trial. RP, Jun. 4, 2018, at 12-13; 2 RP 60-61. The video footage shows the Cadillac driving steadily in the left lane as Smith approaches, then slowly drifting right until its right tires touched or crossed the lane line. Ex. 1A. A vehicle traveling some distance behind the Cadillac and in the center lane noticed the drift, signaled, and then moved over to the right lane. Ex. 1A. The Cadillac moved back to the middle of the left lane, then to the left side of the lane. Ex. 1A. The Cadillac’s left tires may have momentarily touched the fog line, but the driver immediately corrected to

stay within the lane. Ex. 1A. After the correction, Smith activated his emergency lights and siren. Ex. 1A.

**3.2 After Trooper Smith initiated the stop, he observed various behaviors that caused him to suspect Tsyachuk was impaired, and he arrested Tsyachuk for DUI.**

After Smith activated his lights and siren, the Cadillac signaled right, slowed, and pulled over to the right lane. Ex. 1A. After moving right and while looking for a suitable location to pull over, the Cadillac was unable to maintain a straight path of travel within a lane. Ex. 1A; RP, Jun. 4, 2018, at 14; 2 RP 64. Smith felt the driver had slow reactions and was unable to decide where to put the car. RP, Jun. 4, 2018, at 15; 2 RP 64-65.

After taking the Port of Tacoma exit, the Cadillac attempted to stop on the left side of the road. Ex. 1A; 2 RP 65. Smith had to give verbal commands to direct the driver to continue until there was a shoulder on the right side of the road. Ex. 1A; RP, Jun. 4, 2018, at 15; 2 RP 65. The Cadillac complied with Smith's instructions. Ex. 1A.

When Smith contacted Tsyachuk, Smith observed a partially consumed bottle of Fireball whiskey on the passenger side of the center console. RP, Jun. 4, 2018, at 18; 2 RP 66. There were some beer bottles on the floor on the passenger side. RP, Jun. 4, 2018, at 18; 2 RP 67. Both Tsyachuk and his passenger had "VIP" wristbands that Smith recognized are given out at

establishments that serve alcohol. RP, Jun. 4, 2018, at 18; 2 RP 71. There was a strong odor of intoxicants coming out of the car. RP, Jun. 4, 2018, at 19; 2 RP 66.

Smith described Tsyachuk's face as "flaccid" or "droopy." RP, Jun. 4, 2018, at 19; 2 RP 66. Tsyachuk's eyes were "bloodshot, red, and watery." RP, Jun. 4, 2018, at 19; 2 RP 66. When Smith asked for his license, Tsyachuk was initially confused about where it was, reacted slowly, and fumbled to pull the license out from the sleeve on his phone. RP, Jun. 4, 2018, at 19; 2 RP 69.

When Smith asked him out of the car, Tsyachuk stumbled forward, then leaned against the car. RP, Jun. 4, 2018, at 19-20; 2 RP 70. The odor of intoxicants was coming off of Tsyachuk. RP, Jun. 4, 2018, at 19. His speech was slurred. RP, Jun. 4, 2018, at 20. Smith asked Tsyachuk to perform field sobriety tests, but Tsyachuk declined. RP, Jun. 4, 2018, at 20. Smith concluded that Tsyachuk was impaired by alcohol and placed him under arrest for DUI. RP, Jun. 4, 2018, at 23.

Tsyachuk was charged with felony DUI, driving while license suspended in the first degree, and failure to have an ignition interlock device. CP 1-2. He was found guilty of all three charges. CP 206-08.

### **3.3 The trial court denied Tsyachuk's motion to suppress evidence obtained from the stop.**

In a motion to suppress, Tsyachuk argued that Smith did not have reasonable suspicion to justify a traffic stop for DUI. CP 35-37. He argued that even if the initial stop could be justified by traffic infractions, Smith lacked probable cause to extend the stop to investigate DUI. CP 34-35, 37-42.

The trial court denied the motion and entered findings of fact and conclusions of law.<sup>2</sup> CP 120-27. The trial court found that Tsyachuk made “jerky, unsafe lane maneuvers,” such as “swerving inside and outside of its lane.” CP 123. The trial court found, “when defendant’s vehicle left its lane it nearly caused a collision with a vehicle traveling in the neighboring lane.” CP 123-24. Based on these findings, the trial court concluded, “The defendant’s driving behaviors (weaving in and out of his lane, causing other vehicles to take evasive action to avoid him) provided a reasonable articulable suspicion that criminal activity and/or traffic infractions had occurred, and thus Trooper Smith was justified in initiating a traffic stop of the defendant’s vehicle.” CP 125. The trial court denied the motion to suppress. CP 126.

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<sup>2</sup> The trial court labeled its findings as “The Undisputed Facts,” “The Disputed Facts,” and “Findings as to Disputed Facts.” The trial court labeled its conclusions of law as “Reasons for Admissibility or Inadmissibility of the Evidence.”

**3.4 The trial court denied Tsyachuk's motion to bifurcate the trial to avoid prejudice where the jury could use his prior DUI convictions as propensity evidence to find him guilty.**

Tsyachuk was charged with felony DUI with three or more prior convictions. CP 1. The State had the burden of proving, as an essential element of the crime, that Tsyachuk had three or more prior DUI convictions within ten years. *See* CP 196.

Prior to trial, Tsyachuk moved for bifurcation of the trial. CP 157-70. He requested the trial court divide the trial into two phases: first, to try him on the issue of whether he committed DUI; and second, to determine whether he had the requisite prior offenses to elevate the crime to a felony. CP 170. He argued that without bifurcation, the jury would be likely to improperly use the evidence of his prior convictions as propensity evidence on the issue of whether he was impaired on the night in question, in violation of his right to due process. CP 158-68.

The trial court denied the motion to bifurcate, reasoning, "I don't believe it's appropriate to bifurcate, given the case law." 1 RP 20. Tsyachuk suggested as an alternative that he could stipulate to the prior convictions but have that stipulation held from the jury until after the jury made a determination of guilt. 1 RP 21. The trial court denied the alternative proposal,

reasoning, “I don't think you can do that under the case law. The State has to prove each and every element of the crime charged, and that's one of the elements of the crime.” 1 RP 21.

Tsyachuk was left with the choice of either submitting a stipulation to the jury as part of the state's case in chief that he had “three prior convictions as defined by RCW 46.61.5055” or requiring the state prove the prior convictions with evidence. *See* 1 RP 35-36; CP 242.

Tsyachuk intended to exercise his right to require the state to prove the prior offenses. 1 RP 38. Upon hearing this, the trial court attempted to engage Tsyachuk in a colloquy to determine whether his choice to exercise his constitutional right was knowing and voluntary. 1 RP 38-39. Defense counsel intervened and suggested that the issue could be discussed the next morning. 1 RP 39-40.

By the next morning, defense counsel had convinced Tsyachuk to stipulate to the prior offenses. 2 RP 46-47. The trial court conducted a colloquy and determined that Tsyachuk's waiver and stipulation were knowing and voluntary. 2 RP 47-50.

### **3.5 The trial court admitted blood test results over Tsyachuk's objection.**

At trial, the state offered testimony and a written report of results of a blood alcohol test. Tsyachuk objected for lack of foundation. The trial court admitted the evidence.

After arresting Tsyachuk, Trooper Smith obtained a warrant for a blood draw. 2 RP 75. Smith took Tsyachuk to Allenmore Hospital in Tacoma. 2 RP 75. William Davis, a licensed phlebotomist, performed the blood draw. 2 RP 75; ??. Smith provided Davis with grey-topped vials issued by the State Patrol for the blood samples. 2 RP 76. Smith observed Davis draw the blood from Tsyachuk's arm. 2 RP 77.

Davis did not testify at trial. Instead, Kyle Congo, the manager of the hospital's laboratory, testified. 2 RP 109. Congo testified that he supervised Davis and that Davis was licensed to draw blood. 2 RP 110-11. Congo was not himself licensed to draw blood. 2 RP 109. Congo was not present to observe Davis draw the blood from Tsyachuk's arm. 2 RP 115. Congo did not know whether Davis followed required procedures in drawing the blood. 2 RP 115-16.

Rebecca Flaherty, the forensic scientist who tested the blood, testified at trial. 3 RP 132, 153. When the state offered Flaherty's report as an exhibit to prove the results, Tsyachuk objected. 3 RP 157. "Your Honor, I do not believe they've shown

the proper foundation to get the blood results in. There are a lot of issues with the blood draw itself. We don't know if it was properly done. We don't have any information on how it was done." 3 RP 157-58. The trial court overruled the objection and admitted the report and the test results. 3 RP 158-60.

#### **4. Summary of Argument**

The trial court made significant errors that require reversal of the convictions. First, the trial court erred in concluding that Trooper Smith's stop of Tsyachuk was justified. The trial court's findings of fact were not supported by substantial evidence. Drifting twice onto the lane/fog lines does not create reasonable suspicion of criminal activity. Second, the trial court abused its discretion in denying Tsyachuk's motion to bifurcate the trial. The trial court applied the wrong legal standard. Third, the trial court abused its discretion in admitting the report and results of the blood alcohol test. The state failed to lay a sufficient foundation that the blood draw was properly conducted.

Because the traffic stop was unjustified, this Court should reverse the convictions and dismiss the charges. But even if this Court finds the traffic stop to be proper, this Court should reverse the convictions and remand for a new trial as a result of the trial court's other errors.

## **5. Argument**

### **5.1 The trial court erred in denying Tsyachuk's motion to suppress evidence obtained from an improper traffic stop.**

#### **5.1.1 The trial court's findings of fact are reviewed for substantial evidence, and its legal conclusions are reviewed de novo.**

In reviewing denial of a motion to suppress, the Court should review the trial court's conclusions of law de novo and its findings of fact for substantial evidence. *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015). "Evidence is substantial if it is sufficient to persuade a fair-minded, rational person that the finding is true." *State v. Jones*, 186 Wn. App. 786, 789, 347 P.3d 483 (2015).

#### **5.1.2 The Washington and United States Constitutions prohibit investigative traffic stops that are not based on reasonable, articulable suspicion of criminal activity.**

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit unreasonable seizures. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). A traffic stop is a warrantless seizure. *Kennedy*, 107 Wn.2d at 4. Warrantless seizures are per se unreasonable, unless an exception to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 343,

349, 979 P.2d 833 (1999). The State bears the burden of establishing that an exception to the warrant requirement has been met. *Ladson*, 138 Wn.2d at 350.

One such exception is an investigative stop, including a traffic stop, but only if it is based on an objectively reasonable suspicion that a person is committing a crime or traffic infraction, and only if the stop is reasonable in scope. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012); see *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The State bears the burden of proving by clear and convincing evidence that the stop was justified. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

When reviewing the lawfulness of an investigative stop, a court must evaluate the reasonableness of the officer's suspicion under the "totality of the circumstances" known to the officer at the time of the stop. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). A reasonable suspicion exists when specific, articulable facts and rational inferences from those facts establish a substantial possibility that criminal activity or a traffic infraction has occurred or is about to occur. *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012).

"The use of traffic stops must remain limited and must not encroach upon the right to privacy except as is reasonably necessary to promote traffic safety and to protect the general

welfare.” *Arreola*, 176 Wn.2d at 293. To that end, each investigative stop must be justified at its inception and must be reasonably limited in scope. *Id.* at 294.

The analysis focuses on “the reasonableness of the officer’s activities with respect to the privacy rights thereby invaded.” *Kennedy*, 107 Wn.2d at 5. Traffic stops are only permitted when reasonably necessary to investigate and detect crime. *Arreola*, 176 Wn.2d at 295. This includes consideration of whether it would be desirable for officers to investigate every time a given set of facts arises, or whether privacy interests should win out. *See Id.* at 294-95. “The misuse of traffic stops ... represents an enormous threat to privacy if left unchecked.” *Id.* at 296.

When a traffic stop is based on a hunch, rather than on a reasonable, articulable suspicion, the stop disturbs private affairs without valid justification and is unconstitutional. *Arreola*, 176 Wn.2d at 295-96. In analyzing a stop that may be pretextual or based on a mere hunch, the Washington Supreme Court has instructed lower courts to consider the totality of the circumstances, “including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” *Id.* at 296.

When a traffic stop is not justified, all evidence uncovered from the stop must be suppressed. *Fuentes*, 183 Wn.2d at 158.

**5.1.3 Trooper Smith’s stop of Tysyachuk was not based on reasonable, articulable suspicion of criminal activity.**

Part of the analysis of the totality of the circumstances requires examining each fact identified by the officer as contributing to the officer’s suspicion of criminal activity.

*Fuentes*, 183 Wn.2d at 159. Where the facts do not suggest criminal behavior, the officer is left with only a hunch, and the stop is unconstitutional. *See Fuentes*, 183 Wn.2d at 159-61.

In *Fuentes*, the Washington Supreme Court held that an officer merely acted on a hunch when he stopped the defendant, Sandoz. *Fuentes*, 183 Wn.2d at 161. Sandoz had been “walking with his head down, and he registered surprise when he looked up to see the officer standing by the Jeep he was about to enter.” *Id.* at 159. The court held that startled reactions to seeing the police do not suggest criminal behavior. *Id.* The stories told by Sandoz and the driver of the jeep did not conflict. *Id.* Sandoz was not loitering. *Id.* at 160. Simply going into an apartment does not suggest criminal activity. *Id.* Having eliminated all of the officer’s stated causes for suspicion, the court concluded that the officer merely acted on a hunch, and the stop was not justified. *Id.* at 161.

Here, the trial court entered findings that Tysyachuk was driving erratically, endangering other vehicles. But the trial

court's findings are not supported by substantial evidence in the record. Trooper Smith's testimony and the dashcam video demonstrate that as Trooper Smith approached from behind, Tsyachuk was driving steadily, then drifted to the right, briefly crossing the lane line, then to the left, correcting course before crossing the fog line. Ex. 1A; RP, Jun. 4, 2018, at 8, 13-14. These facts do not reasonably suggest criminal activity that should be investigated. This Court should reverse, suppress the evidence from the stop, and dismiss the charges.

**5.1.3.1 The trial court's findings of fact were not supported by substantial evidence in the record.**

The trial court justified the traffic stop on the basis of Finding as to Undisputed Facts #1. *See* CP 123-24. This finding is not supported by substantial evidence in the record. The finding reads,

The Court finds Trooper Smith's testimony about the defendant jerky, unsafe lane maneuvers to be credible. The Court finds the defendant's vehicle was swerving inside and outside of its lane, and when the defendant's vehicle left its lane it nearly caused a collision with a vehicle traveling in the neighboring lane. One vehicle in the neighboring lane slowed and merged to the right to avoid the defendant's unsafe driving.

CP 123-24.

Although the trial court claimed to find Trooper Smith's testimony credible, it proceeded to enter a finding that goes so far beyond Trooper Smith's testimony as to be without any basis in fact.

Trooper Smith did not testify that Tsyachuk's vehicle was "swerving inside and outside of its lane." Although Smith initially summarized Tsyachuk's driving as "coming in and out of its lane," RP, Jun. 4, 2018, at 8, he later clarified what he meant: "The DeVille went across the broken white line with reflectors on it, that's what's called the lane divider line or the skip line. I observed the right two tires of that DeVille go over that lane divider into the center lane... The DeVille then did some braking and then went to the left side of the lane into the solid line, which is called the fog line." RP, Jun. 4, 2018, at 13-14. In other words, the car drifted right, then left, briefly crossing or touching the lane/fog lines twice. After the vehicle touched the fog line, Trooper Smith initiated the stop. RP, Jun. 4, 2018, at 8.

Trooper Smith's testimony is further clarified by the dashcam footage. The video footage shows the Cadillac driving steadily in the left lane as Smith approaches, then slowly drifting right until its right tires touched or crossed the lane line. Ex. 1A. The Cadillac moved back to the middle of the left lane, then to the left side of the lane. Ex. 1A. The Cadillac's left

tires may have momentarily touched the fog line, but Tsyachuk immediately corrected to stay within the lane. Ex. 1A.

Trooper Smith also did not testify that Tsyachuk “nearly caused a collision with a vehicle traveling in the neighboring lane.” Rather, he testified that as Tsyachuk drifted right, “I observed another car slow down and merge away from the DeVille because of the unsafe lane travel.” RP, Jun. 4, 2018, at 8. The dashcam footage confirms that this other car was travelling a few car lengths behind Tsyachuk and was not in danger of a collision, but chose to slow and move right as a precaution. Ex. 1A. There was a third vehicle a safe distance ahead of Tsyachuk. Ex. 1A. Tsyachuk did not nearly cause a collision.

The trial court’s findings of fact were not supported by substantial evidence in the record. What the record does support is a finding that Tsyachuk drifted from right to left, touching or crossing the lane/fog lines a total of two times before Trooper Smith initiated the stop. There was other traffic present, but no other vehicles were endangered by the drifting. These facts do not create reasonable suspicion of criminal activity. The traffic stop was unjustified. All evidence obtained from the stop should be suppressed and the charges dismissed.

**5.1.3.2 Drifting twice onto the lane/fog lines does not create reasonable suspicion to justify a traffic stop.**

In Washington, slight drifting onto the lane/fog lines does **not** create reasonable suspicion to justify a traffic stop for driving under the influence—or even for unsafe lane travel.

In *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008), this Court held, “A vehicle crossing over a lane once for one second by two tire widths does not, without more, constitute a traffic violation justifying a stop by a police officer.” *Prado*, 145 Wn. App. at 647. The court explained, “the Legislature’s use of the language ‘as nearly as practicable [within a single lane]’ 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 on an exit lane does not justify a belief that the vehicle was operated unlawfully.” *Id.* at 649.

In *State v. Jones*, 186 Wn. App. 786, 347 P.3d 483 (2015), this Court followed *Prado* and held that crossing over the fog line **three times**, without anything else, did not justify a traffic stop. *Jones*, 186 Wn. App. at 788, 794. If crossing a lane/fog line three times is not justification for a stop, surely crossing only twice cannot justify a stop, either.

In both *Prado* and *Jones*, the court observed that the driver did not pose a danger to others at the time. The same is

true here. Although there was other traffic on the road at the time, Tysyachuk's drifting did not threaten a collision with any other vehicle. The stop was not justified.

Many other courts have reached similar conclusions. In *United States v. Lyons*, 7 F.3d 973 (10<sup>th</sup> Cir. 1993), a pickup truck was weaving within its own lane for about two miles before the officer initiated a traffic stop. *Lyons*, 7 F.3d at 974. The appellate court held that "the universality of drivers' 'weaving' in their lanes ... significantly undercut[s] the rationality" of using this factor as an objective reason for the legitimacy of a traffic stop. *Lyons*, 7 F.3d at 976. "Indeed, if failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons 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." *Id.*

Similarly, the Supreme Court of Wisconsin rejected a bright-line rule that weaving within a single lane could give rise to reasonable suspicion, in *State v. Post*, 733 N.W.2d 634 (Wis. 2007). The court reasoned, "Repeated weaving within a single lane' is a malleable enough standard that it can be interpreted to cover much innocent conduct." *Post*, 733 N.W.2d at 639. Allowing weaving within a single lane to justify a traffic stop "fails to strike the appropriate balance between the State's

interest in detecting, preventing, and investigating crime with the individual's interest in being free from unreasonable intrusions." *Id.* "Because the standard proffered by the State can be interpreted to cover conduct that many innocent drivers commit, it may subject a substantial portion of the public to invasions of their privacy. **It is in effect no standard at all.** Adopting it here would allow essentially unfettered discretion and permit the arbitrary invasions of privacy by government officials" prohibited by state and federal constitutions. *Id.* at 640 (emphasis added).

In *Navarette v. California*, 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014), the United States Supreme Court distinguished between common indicia of drunk driving—such as “weaving all over the roadway,” “driving in the median,” or “crossing over the center line ... and almost causing several head-on collisions,” and minor traffic infractions that do not create reasonable suspicion. The Court reasoned that while extreme driving behavior generally suggests driving under the influence, isolated traffic infractions “are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect.” *Navarette*, 572 U.S. at 402.

In dissent, Justice Scalia made an observation that suggests additional observation is sometimes necessary before a stop is made: “I take it as a fundamental premise of our

intoxicated-driving laws that a driver soused enough to swerve once can be expected to swerve again—and soon. If he does not ... the Fourth Amendment requires that he be left alone.” *Navarette*, 572 U.S. at 413 (Scalia, J., dissenting).

Tysyachuk’s driving was well within the bounds of *Prado* and *Jones*. Drifting twice over the lane/fog lines could be caused by any of a multitude of innocent reasons. To justify a traffic stop under such circumstances would unreasonably subject substantial portions of the public to burdensome and embarrassing invasions of privacy without any public safety benefit. Drifting twice onto the lane/fog lines does not create reasonable suspicion of driving under the influence. This Court should reverse, suppress the evidence, and dismiss the charges.

**5.1.3.3 It is unreasonable to interfere in a person’s private affairs on the basis of drifting twice onto the lane/fog lines.**

Washington courts have jealously guarded the constitutional protection of privacy. *E.g.*, *Arreola*, 176 Wn.2d at 291-92. Other courts have as well. Justice Scalia observed in *Navarette*, “Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference.” *Navarette*, 572 U.S. at 413 (Scalia, J., dissenting).

A key part of the constitutional analysis is “the reasonableness of the officer’s activities with respect to the

privacy rights thereby invaded.” *Kennedy*, 107 Wn.2d at 5. This includes consideration of whether it is desirable for officers to conduct investigative stops whenever a given set of facts arises, or whether privacy interests should win out. *See Arreola*, 176 Wn.2d at 294-95. “The misuse of traffic stops ... represents an enormous threat to privacy if left unchecked.” *Id.* at 296.

Is it desirable for officers to conduct an investigative stop every time a driver is found drifting twice onto the lane/fog lines? Would such frequent stops be reasonable? As this Court observed in *Prado*, “brief incursions over the lane lines will happen.” *Prado*, 145 Wn. App. at 649. Such incursions are so common, and so likely to be innocent in their cause, that the intrusion into the driver’s privacy is not justified by the state’s interest in public safety.

Along these lines, the Supreme Court of Tennessee reasoned that finding reasonable suspicion on the basis of weaving within one’s lane and driving over the speed limit would create a “stop at will” standard for police, “since it is the rare motorist indeed who can travel for several miles without occasionally varying speed unnecessarily, moving laterally from time to time in the motorist’s own lane, nearing the center line or shoulder, or exhibiting some small imperfection in his or her driving.” *State v. Binette*, 33 S.W.3d 215, 219-20 (Tenn. 2000). The Supreme Court of Wisconsin agreed that such a standard

would be “in effect no standard at all,” permitting arbitrary and burdensome intrusions of privacy by government officials. *State v. Post*, 733 N.W.2d 634, 640 (Wis. 2007).

In a concurring opinion in *West v. State*, 143 A.3d 712 (Del. 2016), Delaware Supreme Court Justice Valihura bemoaned the possibility that weaving might be used to justify a traffic stop: “Are we now at risk of being stopped and investigated for driving under the influence if we weave within our lane while trying to find the defroster and jerk the wheel, or if we spill coffee on ourselves and swerve within our lane? Are we then subject to being pulled over and having to recite the alphabet from ‘E’ to ‘P,’ count backwards from 69, walk in a straight line while touching the heel of one foot to the toe of the other, and balance on one foot while keeping our hands at our sides?” *West*, 143 A.3d at 726 (Valihura, J., concurring in the judgment).

The invasion of privacy from a traffic stop based only on drifting twice onto the lane/fog lines is simply too great to justify such a stop under the Washington or United States Constitutions.

Trooper Smith’s stop of Tysyachuk was premature, and therefore not constitutionally justified. Under *Prado* and *Jones*, the trial court erred in failing to suppress the evidence obtained from the stop. Without that evidence—which included the blood

alcohol test and all of Trooper Smith's observations of physical signs of impairment—the state could not have proven the charges beyond a reasonable doubt. The proper remedy is to reverse, suppress the evidence, and dismiss the charges.

**5.2 The trial court abused its discretion when it applied the wrong legal standard to conclude that bifurcation of the trial would be improper.**

Prior to trial, Tysyachuk requested the trial court divide the trial into two phases: first, to try him on the issue of whether he committed DUI; and second, to determine whether he had the requisite prior offenses to elevate the crime to a felony. CP 170. He argued that without bifurcation, the jury would be likely to improperly use the evidence of his prior convictions as propensity evidence on the issue of whether he was impaired on the night in question, in violation of his right to due process. CP 158-68. The trial court denied the motion.

**5.2.1 A decision on bifurcation is reviewed for abuse of discretion.**

A trial court's decision on bifurcation is generally reviewed for an abuse of discretion. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds or if it applies the incorrect legal standard. *Kreidler v.*

*Cascade Nat. Ins. Co.*, 179 Wn. App. 851, 866, 321 P.3d 281 (2014).

**5.2.2 The trial court abused its discretion by applying the incorrect legal standard for bifurcating the question of guilt from proof of prior convictions.**

The Washington Supreme Court has acknowledged the potential prejudice that arises when prior convictions are an element of a crime: “If an element of the crime is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime. We and other courts have recognized how highly prejudicial such evidence may be.” *Roswell*, 165 Wn.2d at 198. Because of this grave risk of prejudice, trial courts have discretion to structure their trials to reduce unnecessary prejudice where practical. *Id.*

The court has indicated approval of some possible adaptations. For example, in *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002), the trial court did not abuse its discretion when it bifurcated the “to convict” instruction and used a special verdict form to present the question of prior convictions only if the jury first found the defendant guilty of the other elements of the charge. *Oster*, 147 Wn.2d at 145, 147. The court reasoned, “Instructional bifurcation with respect to criminal history has an important benefit to the accused: it constrains the prejudicial

effect of prior convictions upon the jury while clearly maintaining the State's burden to prove each element beyond a reasonable doubt." *Oster*, 147 Wn.2d at 147.

However, a defendant does not have a **right** to a bifurcated procedure. *Roswell*, 165 Wn.2d at 197. The trial court in *Roswell* did not abuse its discretion in denying the motion to bifurcate. *Id.* at 198. Thus, the state of the law is this: a defendant does not have a right to a bifurcated trial or jury instructions, but a trial court has the discretion to craft a bifurcated procedure in order to avoid undue prejudice while maintaining the state's burden to prove each element of the crime.

The trial court failed to understand that it did, in fact, have this discretion. In denying the motion, the trial court stated, "I don't believe it's appropriate to bifurcate, given the case law." 1 RP 20. When Tsyachuk offered an alternative bifurcated procedure, the trial court again stated, "I don't think you can do that under the case law." 1 RP 21.

The trial court misunderstood its own discretion under the current case law. Rather than exercise its discretion, the court denied the motion because it believed it did not have discretion to grant the motion. The trial court was wrong. It **did** have discretion to consider and craft a creative procedure that

would protect Tysyachuk from unnecessary prejudice. It should have exercised that discretion.

The trial court applied an incorrect legal standard. This Court should remand for a new trial, instructing the trial court to exercise its discretion to determine whether there is a practical bifurcated procedure that would protect Tysyachuk from unnecessary prejudice.

### **5.3 The trial court abused its discretion when it admitted the report and results of the blood alcohol test.**

It is well established that a blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to the requirements of the relevant statutes and regulations. *State v. Hultenschmidt*, 125 Wn. App. 259, 265, 102 P.3d 192 (2004). The state must lay a foundation for the blood evidence that demonstrates that the sample is free from any adulteration that could conceivably introduce error to the test results. *State v. Bosio*, 107 Wn. App. 462, 466, 27 P.3d 636 (2001).

The state failed to present testimony regarding the procedures used to draw the blood samples from Tysyachuk. The phlebotomist who drew the blood did not testify at trial. Instead, the state presented the testimony of a supervisor who testified to the phlebotomist's certification but was not present for the

blood draw and could not testify about the procedures. 2 RP 110-11, 115-16. The supervisor's lack of knowledge was made clear on cross-examination:

Q. Since you weren't there, you do not know if the phlebotomist properly sanitized his hands first, do you?

A. No.

Q. Since you weren't present, you don't know if the site of the blood collection was properly cleaned and air dried, do you?

A. No.

Q. And, again, since you weren't there, you don't know if the cleaning agent was alcohol free, do you?

A. No.

Q. And since you weren't there, you don't know if the cleaning agent was antimicrobial, do you?

A. No.

Q. And since you weren't there, you don't know what test tubes were used, do you?

A. No.

Q. And since you weren't there, you don't know what color the stopper was that was used in the test tube, do you?

A. No.

Q. And since you weren't there, you do not know, with certainty, that the expiration date on the test tube -- what it was, do you?

A. No.

Q. And you don't know if the proper sized needle was used, do you?

A. No. I don't understand the question. "Proper sized needle"?

Q. You don't know what size needle was used, do you?

A. No.

Q. You don't know if he used a clean needle, do you?

A. No.

Q. And you don't know how many vials of blood were filled, do you?

A. No.

Q. And that's again because you were not present for any of the contact with Artur, were you?

A. Correct.

2 RP 115-16.

Because the state failed to lay a foundation that the blood draw was performed according to proper procedures and in a manner that would keep the sample free from any adulteration, the results of the blood alcohol test were inadmissible. The trial court abused its discretion when it admitted the report and results without this essential foundation. Without this foundation, the test results were irrelevant to the question of whether Tysyachuk was impaired by alcohol.

The trial court's error was not harmless. Tysyachuk presented a defense that all of Trooper Smith's observations

could have been explained by exhaustion rather than alcohol consumption. Without the blood alcohol results, a reasonable jury could have found that there was reasonable doubt that Tsyachuk was impaired by alcohol. This Court should reverse and remand for a new trial.

## **6. Conclusion**

The trial court erred in concluding that Trooper Smith's stop of Tsyachuk was justified. The trial court's findings of fact were not supported by substantial evidence. Drifting twice onto the lane/fog lines does not create reasonable suspicion of criminal activity. This Court should reverse, suppress the evidence obtained from the unlawful traffic stop, and dismiss the charges.

Alternatively, the trial court abused its discretion in denying Tsyachuk's motion to bifurcate the trial, by applying the wrong legal standard. The trial court also abused its discretion in admitting the report and results of the blood alcohol test without a proper foundation that the blood draw was properly conducted. This Court should reverse the convictions and remand for a new trial.

Respectfully submitted this 18<sup>th</sup> day of March, 2019.

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## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on March 18, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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I further certify that on March 18, 2018, I served the Brief of Appellant and a copy of RAP 10.10 on the Appellant, Artur Tsyachuk, by depositing a copy in the U.S. mail, postage paid, to the following address:

Artur Tsyachuk  
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SIGNED at Lacey, Washington, this 18<sup>th</sup> day of March, 2019.

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