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

State of Washington,

Respondent,

v.

Artur Tysyachuk,

Appellant.

Reply Brief of Appellant

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Regulations

WAC 448-14-01011
WAC 448-14-02011

1. Reply Argument

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

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

Tsyachuk's opening brief set forth the general constitutional standard: a warrantless investigative stop can be justified 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. Br. of App. at 13-15; *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).

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). Courts should consider whether it would be desirable for officers to investigate every

time a given set of facts arises, or whether privacy concerns should win out. *See Arreola*, 176 Wn.2d at 294-95. When a traffic stop is not justified, all evidence uncovered from the stop must be suppressed. *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152, 158 (2015).

The State appears to generally agree with this standard but disagrees with how it should apply in this case.

1.1.2 Trooper Smith’s stop of Tsyachuk was not based on reasonable, articulable suspicion of criminal activity.

Tsyachuk’s brief explained why the traffic stop by Trooper Smith was not based on reasonable, articulable suspicion of criminal activity. First, the trial court’s findings of fact were not supported by substantial evidence in the record. Br. of App. at 17-19. Second, under a correct understanding of the facts, Washington precedent holds that slight drifting onto the lane/fog lines does not create reasonable suspicion to justify a traffic stop, and other jurisdictions agree. Br. of App. at 20-23. Third, it is unreasonable to interfere in a person’s private affairs on the basis of drifting twice onto the lane/fog lines—conduct which often is entirely innocent in its origin. Br. of App. at 23-26.

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

The trial court's written findings regarding Tysyachuk's driving do not find support in either Trooper Smith's testimony or in the dashcam footage in Ex. 1A. The true facts of the case are easily discerned from the dashcam footage. Tysyachuk drifted from right to left, touching or briefly 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.

The State does not seem to disagree with Tysyachuk's description of his driving, except to state its opinion that the record supports a finding that another vehicle "had to merge to the right to avoid the defendant's unsafe driving." Review of the video reveals that the State is wrong. The other vehicle was a safe distance behind Tysyachuk, in the center lane. It did not merge to the right to avoid a collision. Rather, upon seeing Tysyachuk drift onto the lane line, the other vehicle carefully signaled and then moved into the right lane as a precaution. This does not support a finding that other traffic was endangered by Tysyachuk's drifting.

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

Tsyachuk's brief demonstrated that case law in Washington and other jurisdictions holds that slight drifting on the lane/fog lines does not create reasonable suspicion to justify a traffic stop. Br. of App. at 20-23 (citing, *e.g.*, *State v. Jones*, 186 Wn. App. 786, 347 P.3d 483 (2015), and *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008)). The State's response relies on a single case, *State v. McLean*, 178 Wn. App. 236, 313 P.3d 1181 (2013), which is distinguishable.

In *McLean*, the officer initially observed the vehicle weaving from side to side within its lane. *McLean*, 178 Wn. App. at 241. There was no other traffic present. *Id.* at 240. The officer then followed the vehicle for some distance as continued weaving caused the vehicle to cross the fog line three times. *Id.*

The key difference is in the amount of observation. The officer in *McLean* saw the vehicle weave back and forth multiple times and continued to watch to see if it would be a continued pattern, which it was. The vehicle continued to weave, crossing the fog line three times before the officer initiated a stop. This volume of observations combined with the officer's training and experience to give rise to a reasonable suspicion of driving under the influence.

Trooper Smith did not observe Tysyachuk weaving back and forth. As Trooper Smith approached, Tysyachuk was driving steadily in the left lane. He slowly drifted right onto the lane line, then corrected, moving left until he touched the fog line, then immediately corrected to stay within the lane. The drifting occurred over a span of 6-10 seconds. Ex. 1A (at about 01:00 the vehicle crosses the lane line; at about 1:06 it touches the fog line; Trooper Smith initiates the stop at about 1:08).

Unlike the officer in *McLean*, Trooper Smith did not observe Tysyachuk's driving for long enough to determine whether the drift was an isolated incident, innocent in its origin, or whether it would prove to be a pattern of impaired driving. His training and experience could do little to discern the difference without additional observations.

The ten seconds of driving that Trooper Smith saw before initiating the stop 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 and does not even rise to the level of a traffic infraction. 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 in an isolated six-second interval does not create reasonable suspicion of driving under the

influence. More observation was required before even a highly trained officer could reasonably conclude that there was a substantial probability that Tysyachuk was driving under the influence. This Court should reverse, suppress the evidence, and dismiss the charges.

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

Tysyachuk additionally argued that in making the constitutional analysis here, this Court must consider the reasonableness of the stop with respect to the driver's privacy rights. Br. of App. at 23-25 (citing, *e.g.*, *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986)). This kind of drifting could be caused by a driver adjusting the radio or air conditioning, checking their GPS map, sneezing, or getting a sip of coffee. It could happen when a child or other passenger momentarily steals the driver's attention.

Is it desirable for officers to conduct an investigative stop every time a driver is found drifting momentarily onto the lane/fog lines? Would such frequent traffic stops be reasonable when weighed against the privacy being invaded? The State does not try to answer these questions.

Jurists in other jurisdictions have answered. The Supreme Court of Wisconsin reasoned that 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.” *State v. Post*, 733 N.W.2d 634, 639 (Wis. 2007).

Justice Antonin Scalia wrote, “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 v. California*, 572 U.S. 393, 413, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (Scalia, J., dissenting).

Before an officer’s suspicion can reach the level of being constitutionally reasonable enough to justify a traffic stop, the officer must observe the driver long enough to discern between innocent drifting and a pattern of impairment. Drifting to the lane/fog line twice in six seconds is not enough to justify invasion of the driver’s privacy.

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

Tysyachuk’s brief explained the current state of the law in regards to bifurcating or otherwise creatively structuring a trial in order to reduce the prejudice inherent when prior convictions are an element of a crime: although a defendant does not have

an absolute right to a bifurcated trial or jury instructions, trial courts have the discretion to craft a bifurcated procedure that avoids undue prejudice while maintaining the state's burden to prove each element of the crime. Br. of App. at 27-29 (citing *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008); *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002)).

The State's argument that *Roswell* prohibits a bifurcated trial is incorrect. In *Roswell*, the defendant sought to take the question of prior convictions away from the jury entirely by waiving his right to a jury trial on that element, allowing it to be decided by the judge. *Roswell*, 165 Wn.2d at 189, 190. The trial court denied the request. *Id.* at 191. While the Washington Supreme Court rejected Roswell's argument that he had a right to his proposed procedure, *Id.* at 197-98, nothing in the court's opinion prohibited a trial court from bifurcating a trial into two phases: one phase to determine guilt of the base crime, followed by a second phase to determine the prior convictions.

What the *Roswell* court emphasized was the requirement that the State must prove every element of the crime to the jury. *E.g., Roswell*, 165 Wn.2d at 196-97. The court approved of the procedure in *Oster* because it "allowed the jury to make the ultimate determination on all of the elements charged." *Roswell*, 165 Wn.2d at 196. So long as that requirement is met, the trial court may craft any procedure it deems appropriate to ensure a

fair trial. *See Id.* at 198 (“Within the parameters we have laid out, trial courts may exercise their sound discretion to reduce unnecessary prejudice where practical”).

A bifurcated trial along the lines proposed by Tysyachuk would still meet this requirement. A single jury could hear both phases of the case. Taken together, the State would still be required to prove to the jury every element of the crime beyond a reasonable doubt. Between the two phases, the jury would be fully instructed and the defendant’s rights protected, just as in *Oster*. There is no reason to believe, as the trial court did here, that such a trial is prohibited by *Roswell*.

A recent example of this sort of trial is *State v. Wu*, 6 Wn. App. 2d 679, 431 P.3d 1070 (2018). Wu’s felony DUI charge was based on having four prior offenses under RCW 46.61.502(6). *Id.* at 681. The trial court granted Wu’s motion to bifurcate the trial. *Id.* The first phase of trial determined whether Wu was guilty of DUI for the August 1, 2016, arrest. *Id.* at 681-82. The second phase of trial determined whether Wu had four prior offenses within 10 years which would elevate the DUI to a felony DUI. *Id.* at 682. This example is within the discretion granted to trial courts under *Roswell*.

The trial court was mistaken when it believed that it did not have discretion to allow the bifurcated procedure suggested by Tysyachuk. The trial court abused its discretion by applying

an incorrect legal standard to the question. Had the trial court correctly understood the breadth of its discretion, it may have decided differently.

The procedure adopted by the trial court here was still prejudicial. Even though the nature of the prior convictions was masked with citations to the RCW, rational jurors can see right through it. Ordinary laypersons know that some crimes are enhanced when there are prior convictions. When it comes to DUI in particular, it is common knowledge that the penalty escalates with each subsequent conviction.

It is a simple thing for the jury to conclude, when it is presented with prior convictions in a DUI case, that those prior convictions are almost certainly prior **DUI convictions**. The prior convictions still serve as unduly prejudicial propensity evidence if the jury sees that evidence before making its determination of guilt for the base crime. “He’s a habitual drunk driver. He did it before; you can bet he did it again.” The prejudice is too great. This Court should reverse the trial court decision and remand for the trial court to exercise its discretion under a correct understanding of the breadth of options available.

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

Tsyachuk's brief argued that before blood alcohol test results can be admitted into evidence, 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. Br. of App. at 29-32 (citing, *e.g.*, *State v. Bosio*, 107 Wn. App. 462, 466, 27 P.3d 636 (2001)).

The State responds that a foundation is sufficient if it demonstrates that the sample meets the requirements in WAC 448-14-020(3). But that is not all that the regulations require. For example, "on living subjects, the method should be free from interferences native to the sample, such a therapeutics and preservatives." WAC 448-14-010(2)(a).

This is why defense counsel asked the supervisor—who was not present for collection of the blood sample—whether the phlebotomist sanitized his hands; whether the site of the blood draw was cleaned and air dried; whether the cleaning agent was alcohol free or antimicrobial; or whether different test tubes were used to collect the sample. Any of these things could have introduced "interferences native to the sample" that could invalidate the test results. The State did not have a witness who could lay this foundation of an unadulterated sample.

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. This Court should reverse and remand for a new trial.

2. Conclusion

The trial court erred in concluding that Trooper Smith's stop of Tysyachuk 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 Tysyachuk'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 28th day of June, 2019.

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I certify, under penalty of perjury under the laws of the State of Washington, that on June 28, 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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