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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30648-8-III

STATE OF WASHINGTON, Respondent,

v.

TERALD D. DAVE, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....5

A. The initial stop was unjustified because crossing the fog line does not, in itself, justify a stop of a vehicle under Washington law.....6

B. By investigating Dave's identity and warrant status after confirming that the driver of the vehicle was not under the influence, the deputy unlawfully exceeded the scope of the initial detention.....12

C. Dave's counsel rendered ineffective assistance in failing to move to suppress the evidence obtained as a result of the stop and the unlawful detention.....17

VI. CONCLUSION.....20

CERTIFICATE OF SERVICE.....21

AUTHORITIES CITED

Federal Cases

Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).....8

Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).....6-7

Roe v. Flores–Ortega, 527 U.S. 470, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).....18

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....17

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....12

United States v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000).....8

United States v. Mariscal, 285 F.3d 1127 (9th Cir. 2002).....8

U.S. v. Colin, 314 F.3d 439 (9th Cir. 2002).....10

U.S. v. Freeman, 209 F.3d 464 (6th Cir. 2000).....10

U.S. v. Gastellum, 927 F. Supp. 1386 (D. Colo. 1996).....10

U.S. v. Gregory, 79 F.3d 973 (10th Cir. 1996).....9, 10, 11

U.S. v. Ochoa, 4 F. Supp. 2d 1007 (D. Kan. 1998).....10

U.S. v. Sugar, 322 F. Supp. 2d 85 (D. Mass. 2004).....10

Washington State Cases

City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988).....8

State v. Allen, 138 Wn. App. 463, 157 P.3d 893 (2007).....16

State v. Barwick, 66 Wn. App. 706, 833 P.2d 421 (1992).....14

State v. Fredrick, 45 Wn.App. 916, 729 P.2d 56 (1986).....17

State v. Gibson, 104 Wn. App. 792, 17 P.3d 635 (2001).....12

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).....18

State v. Henry, 80 Wn. App. 544, 910 P.2d 1290 (1995).....13, 14, 15

State v. Hobart, 94 Wn.2d 437, 617 P.2d 429 (1980).....7

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

State v. King, 89 Wn. App. 612, 949 P.2d 856 (1998).....7

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009).....18

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999).....7, 8, 11, 12

State v. O'Cain, 108 Wn. App. 542, 31 P.3d 733 (2001).....12

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004).....17, 18

State v. Santacruz, 132 Wn. App. 615, 133 P.3d 434 (2006).....12

State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991).....15

State v. Veltri, 136 Wn. App. 818, 150 P.3d 1178 (2007).....14

State v. White, 97 Wn.2d 95, 640 P.2d 1061 (1982).....7

State v. White, 80 Wn. App. 406, 907 P.2d 310 (1995).....17

Other State Cases

State v. Bello, 871 P.2d 584 (C.A. Utah 1994).....9

Statutes

RCW 46.61.021.....13, 16

RCW 46.61.140(1).....9, 11

RCW 46.64.015.....8, 11, 13

I. INTRODUCTION

Terald Dave was a passenger in a vehicle stopped for drifting across the fog line. Although the officer admitted that upon contact, the driver did not display any signs of intoxication, he detained the occupants while he ran the driver's identification. However, upon finding a link in the database between the driver's name and Dave's name, which he interpreted to mean that Dave was the driver's brother, the officer exceeded the scope of the detention by seeking out additional information about Dave, including locating a photograph to identify Dave as the passenger and obtaining information about outstanding warrants for Dave's arrest. He then continued to detain Dave to confirm his identification and the warrants before placing him under arrest. Dave was charged with possession of methamphetamine when the officer found a baggie containing white powder near the back of his car, after the arresting officer had handcuffed Dave, searched him, and placed him in the rear passenger seat of the patrol vehicle.

The initial stop of the vehicle was not justified under existing case law. Further, the continued detention of Dave and the vehicle's driver while the officer investigated Dave's identity and his warrant status exceeded the scope of the initial detention and the limits for traffic stops set forth in RCW 46.61.021. The officer lacked reasonable suspicion to

detain the vehicle occupants while he investigated the driver's relationship to Dave, Dave's identification, and Dave's warrant status.

Because the evidence used to prosecute and convict Dave resulted from the unlawful stop, followed by the fishing expedition engaged in by the arresting officer, it should have been suppressed. Trial counsel's failure to move for suppression amounts to ineffective assistance of counsel, in light of the likelihood of success on the merits and the lack of any strategic reason to fail to raise the issue. Accordingly, the judgment should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Trial counsel was ineffective in failing to move to suppress evidence resulting from Dave's unlawful detention.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Was the initial stop of the vehicle for drifting across the fog line lawful? NO.

ISSUE 2: Was Dave, a passenger in the vehicle, unlawfully detained when the arresting officer searched for identifying information and outstanding warrants for Dave, despite the lack of any reasonable suspicion that Dave had committed any crime? YES.

ISSUE 3: Did the search for Dave's photograph and warrant information exceed the lawful scope of the stop? YES.

ISSUE 4: Did trial counsel's failure to move to suppress the evidence constitute ineffective assistance of counsel? YES.

IV. STATEMENT OF THE CASE

Around midnight on January 11, 2011, Deputy Dan Korten was on patrol in Kennewick when he observed a vehicle drifting across the fog line. RP 2-4. Suspicious that the driver might be under the influence, Korten stopped the vehicle and contacted the driver, who identified himself as Brenton. RP 4, 6. Brenton provided his identification and Korton observed that Brenton was not displaying signs of intoxication such as blood shot eyes, or an odor of alcohol. RP 7-8.

Korton returned to his vehicle to check Brenton's information. RP 8. When Brenton's name was identified in the system, it also produced the name "Terald Dave" as "also known as," "may have used," or "not the same as." RP 9. Korton assumed that Terald Dave was Brenton's brother because they shared a last name. RP 9.

Upon further investigation, Korton was able to locate a photograph of Terald Dave and determined that the photograph matched the passenger

in Brenton's car. RP 10. Korton also determined that there were two active warrants for Dave's arrest. RP 10. Korton called for back up and continued to check Brenton's information. RP 11.

When the back up deputy arrived, Korton approached the driver's side and informed Brenton that he would not be cited for the infraction. RP 12. He told Brenton that he was free to leave, but Korton needed to speak to the passenger for a few minutes. RP 12. Dave was cooperative and provided his name and date of birth, and Korton placed him under arrest for the outstanding warrants. RP 13.

Korton placed Dave in handcuffs and then searched him thoroughly, reaching into his pockets, feeling around his belt lining and his socks, checking his armpits, and placing all items he found on the trunk of the car. RP 14. Korton then escorted Dave back to the patrol vehicle and placed him inside. RP 16. Korton walked back to Brenton to tell him the bail amount. RP 17. As he was returning to his patrol vehicle, he saw a flash by his rear passenger door and saw a baggie of white powder near the rear passenger door. RP 17-18. Korton asked Dave what the baggie was, and Dave responded, "That's not my meth." RP 19.

Dave was charged with one count of unlawful possession of methamphetamine. CP 1. The matter proceeded to jury trial, and Dave

was convicted as charged. CP 29. Having no criminal history, Dave was sentenced to 20 days' imprisonment. CP 333. He timely appeals. CP 39.

V. ARGUMENT

Dave was arrested and charged with a crime only after (1) the vehicle he was riding in was stopped on the grounds that it was drifting across the fog line. Explaining that he was concerned that the driver might be under the influence, the officer nevertheless continued to detain and investigate both the driver *and* Dave after contacting the driver and determining there were no signs of alcohol consumption or impairment. The officer then exceeded the scope of the investigative stop when he went beyond verifying the driver's information and searched for information about another individual associated with the driver, including photographic evidence and information about the associated individual's warrant status. Only after this increasingly attenuated investigation was Dave taken into custody and subsequently charged for possessing the methamphetamine found near the patrol vehicle.

Because the series of events leading to Dave's arrest was unlawful, the evidence obtained as a result of his arrest should never have been introduced at trial. First, the initial stop was not justified at its inception because crossing the fog lane, in itself, does not violate Washington's lane

travel statute and does not provide reasonable suspicion to believe any criminal activity is afoot. Second, after initially stopping the vehicle for the stated purpose of investigating whether the driver was under the influence, the arresting officer then exceeded the permissible scope of the stop when, upon noticing an entry in the database that connected the driver with Dave as "also known as," "may have used," or "not the same as," the officer then investigated Dave's identification and warrant status, despite the lack of any reasonable suspicion of criminal activity by Dave. Both the initial stop and the continued detention violated Dave's Fourth Amendment rights and should have resulted in suppression of the inculpatory evidence obtained as a result of his arrest.

By failing to move for suppression of the evidence, Dave's trial counsel rendered ineffective assistance. Counsel's failure was prejudicial in that suppression should have been granted, and the State lacked any untainted evidence of Dave's guilt.

A. <u>The initial stop was unjustified because crossing the fog line does not, in itself, justify a stop of a vehicle under Washington law.</u>

Under the Fourth Amendment to the U.S. Constitution, law enforcement officers may not seize an individual unless there is probable cause to believe the person has committed a crime. *Dunaway v. New*

York, 442 U.S. 200, 207-08, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). However, under the U.S. Supreme Court's decision in *Terry v. Ohio*, an officer may briefly detain a person whom he reasonably suspects of criminal activity for limited questioning. *State v. White*, 97 Wn.2d 95, 105, 640 P.2d 1061 (1982) ("[T]o justify the initial stop the officer must be able to point to specific and articulable facts that give rise to a reasonable suspicion that there is criminal activity afoot."); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998) ("[I]t is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot.").

While an officer may conduct a Terry stop based on a traffic infraction, the stop is proper only if it was justified at its inception. *State v. Ladson*, 138 Wn.2d 343, 351, 979 P.2d 833 (1999). To be valid, the officer must show "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A random stop to check a driver's license and vehicle registration or to investigate criminal activity, without any reasonable suspicion that the law is being violated, is contrary to both the Fourth Amendment to the U.S. Constitution and article 1, section 7 of the

Washington State Constitution. *See generally Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988).

When an officer makes a traffic stop on objective facts that fail to constitute a violation, then there is a lack of reasonable suspicion to justify a stop. *United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002). "If an officer simply does not know the law, and makes a stop based on objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the driver." *Id., citing United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000).

In Washington, law enforcement officers may detain an individual to issue a citation when the individual commits a traffic infraction in the officer's presence. RCW 46.64.015. While an officer may conduct a *Terry* stop based on a traffic infraction, the stop is proper only if it was justified at its inception. *Ladson*, 138 Wn.2d at 351. In this case, the initial stop was not justified because crossing the fog line does not violate Washington's lane travel statute and does not, in itself, provide any reasonable suspicion that criminal activity is afoot.

When a roadway is divided into lanes to control traffic, Washington law provides that "[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." RCW 46.61.140(1). On its face, the statute does not prohibit a driver from crossing out of the marked lane; it merely requires that movement out of the lane must be done in a safe manner.

Interpreting statutes with identical language, multiple courts have held that crossing the fog line does not authorize law enforcement officers to stop the driver. In *U.S. v. Gregory*, the Tenth Circuit court reversed the conviction of a U-Haul driver who crossed the fog line, traveling two feet onto the right shoulder. 79 F.3d 973, 975-76 (10th Cir. 1996). The Utah statute at issue in Gregory required drivers to travel "as nearly as practical entirely within a single lane" – the same language that appears in the Washington statute. *See Gregory*, 79 F.3d at 978; *State v. Bello*, 871 P.2d 584, 587 (C.A. Utah 1994). The court observed that there could have been many innocent explanations for the vehicle's lane travel and because there were no vehicles in the shoulder, the movement did not create any danger. *Gregory*, 79 F.3d at 978. Moreover, the record contained no evidence justifying the stop on the grounds that the driver was sleepy or intoxicated, or otherwise posed a threat to public safety. *Gregory*, 79 F.3d at 978-79.

The *Gregory* court concluded that "[t]he totality of the circumstances suggests that the stop did not meet the reasonableness test of the Fourth Amendment which protects the security of one's privacy against arbitrary intrusion by the police." 79 F.3d at 979 (internal quotations omitted).

Multiple courts have followed this analysis in construing lane travel statutes. *See, e.g., U.S. v. Colin*, 314 F.3d 439, 444 (9th Cir. 2002) (Lane straddling, even if part of the vehicle crosses a lane marker, does not violate the California requirement that a driver remain "as nearly as practical entirely within a single lane"); *U.S. v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000) (The driver of a large motor home that partially weaves into an emergency lane for a few feet is not failing to keep the vehicle in a single lane "as nearly as practicable" under Tennessee law); *U.S. v. Sugar*, 322 F. Supp. 2d 85, 91-92 (D. Mass. 2004) (Minor swerving, including crossing the fog lane three times, does not violate a Missouri statute that requires travel within a single lane "as nearly as practicable"); *U.S. v. Ochoa*, 4 F. Supp. 2d 1007, 1011-12 (D. Kan. 1998) (A single crossing into the emergency lane is not a violation of Kansas law); *U.S. v. Gastellum*, 927 F. Supp. 1386, 1391-92 (D. Colo. 1996) (Colorado statute, which is nearly identical to Utah statute at issue in Gregory, does not prohibit crossing into the shoulder).

Here, Korten's sole basis for stopping the vehicle was the fact that the vehicle drifted over the fog line. But crossing the fog line fails to demonstrate that the vehicle did not stay within its lane of travel as nearly as practicable. As the *Gregory* court observed, road conditions, weather, and other factors can cause a driver to briefly leave the roadway. 79 F.3d at 978. Furthermore, Korten did not contend that it did so unsafely. But under the overwhelming authority cited above, crossing the fog line even a few times is not inherently unsafe and is not prohibited by RCW 46.61.140(1).

Because Korten did not observe the driver of the vehicle violate the rules of the road in his presence, he lacked both statutory and constitutional authority to stop the vehicle and detain the occupants. RCW 46.64.015; *Ladson*, 138 Wn.2d at 350 (under *Terry v. Ohio*, a stop must be justified at its inception to warrant continued detention). Any evidence obtained as a result of the stop is therefore unlawfully obtained and, as "fruit of the poisoned tree," should be suppressed. *Ladson*, 138 Wn.2d at 359.

B. By investigating Dave's identity and warrant status after confirming that the driver of the vehicle was not under the influence, the deputy unlawfully exceeded the scope of the initial detention.

The Fourth Amendment to the U.S. Constitution and Article I, section 7 of the Washington Constitution prohibit warrantless seizures, subject to specific exceptions. *State v. Gibson*, 104 Wn. App. 792, 796, 17 P.3d 635 (2001). *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), permits police to briefly detain a driver reasonably suspected of a traffic infraction so long as (1) the stop is justified at its inception, and (2) the detention is reasonably related in scope to the circumstances that initially justified the interference. *See Ladson*, 138 Wn.2d at 350.

Although the scope of a traffic stop may be enlarged to investigate unrelated suspicions that arise during the initial inquiry, "the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity." *State v. Santacruz*, 132 Wn. App. 615, 619, 133 P.3d 434 (2006). An inarticulable hunch is insufficient. *State v. O'Cain*, 108 Wn. App. 542, 549, 31 P.3d 733 (2001).

In establishing the permissible scope of at traffic stop, RCW 46.61.021 provides that when a person is stopped for a traffic infraction, the law enforcement officer may detain the person for a reasonable period of time in order to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and vehicle registration, and fill out the notice of traffic infraction. However, the detention may not be extended unless the law enforcement officer has probable cause to believe the detained person has committed a crime. RCW 46.64.015.

State v. Henry, 80 Wn. App. 544, 910 P.2d 1290 (1995), is instructive. In *Henry*, the officer stopped the defendant's vehicle for failing to stop and signal a turn. 80 Wn. App. at 546. After Mr. Henry provided his license, registration and proof of insurance, the officer then asked whether his vehicle had been used in recent burglaries or drug transactions in the area. *Henry*, 80 Wn. App. at 546. Although Mr. Henry denied involvement, the officer requested permission to search his vehicle, which Mr. Henry granted. *Henry*, 80 Wn. App. at 546. However, the officer believed that Mr. Henry was unusually nervous; he requested permission to search Mr. Henry's person, which Mr. Henry also granted. *Henry*, 80 Wn. App. at 546-48. The search revealed two knives, a pipe, a

lighter, and two baggies of orange powder determined to be methamphetamine. *Henry*, 80 Wn. App. at 548-49.

On appeal, the court of appeals reversed Mr. Henry's conviction for possession of methamphetamine. *Henry*, 80 Wn. App. at 545-46. Observing that the officer immediately turned his attention from investigating the traffic infractions to investigating other matters, the stop escalated beyond the legitimate scope of a traffic stop. *Henry*, 80 Wn. App. at 551. Moreover, the court held that Mr. Henry's nervousness did not provide an objectively reasonable basis to escalate the traffic stop to a Terry detention, as "'most persons stopped by law enforcement officers display some signs of nervousness.'" *Henry*, 80 Wn. App. at 552 (*quoting State v. Barwick*, 66 Wn. App. 706, 710, 833 P.2d 421 (1992)).

Similarly, in *State v. Veltri*, the Court of Appeals held that evidence obtained after the officer's initial suspicions were dispelled was inadmissible. 136 Wn. App. 818, 150 P.3d 1178 (2007). In *Veltri*, the officer stopped a truck to investigate whether it was stolen because it had mismatched plates. Although he was able to determine that the truck was not stolen and did not issue any citations, the officer continued to detain Ms. Veltri and obtained her consent to search the truck for contraband or weapons. The officer discovered a controlled substance inside a suitcase

in the bed of the truck and arrested Ms. Veltri. The Court of Appeals affirmed the trial court's order granting her motion to suppress the evidence, noting that "'police officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches.'" *Veltri,* 136 Wn. App. at 822 (*quoting Henry*, 80 Wn. App. at 553).

In *State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241 (1991), an officer stopped a vehicle for crossing over the fog line, checked the driver's license and registration, and decided not to issue a citation. However, the officer saw some small bars of motel soap in the glove box and decided to detain the vehicle's occupants, who were Hispanic, to investigate whether they were involved with reports of drug sales at local motels. The driver consented to a search of the vehicle, the officer discovered controlled substances in the trunk, and the driver was arrested. The court held that the detention was excessive because the possession of soap was innocuous and did not give rise to a reasonable suspicion of criminal activity, and the fact that some Hispanics may be engaged in drug trade at motels does not show that the Hispanic driver was involved. "The purpose of the stop was satisfied when the sergeant decided not to issue a citation and his subsequent conduct was based on unjustified suspicion." *Tijerina*, 61 Wn. App. at 630. Consequently, the court suppressed the evidence.

And in *State v. Allen*, 138 Wn. App. 463, 157 P.3d 893 (2007), the Court of Appeals held that it exceeded the scope of the initial detention for a broken license plate light for the officer to question the driver about the identity of the passenger. The *Allen* court observed that the officer's actions went "well beyond a routine investigation of a traffic violation. This is essentially the fishing expedition that the exclusionary rule seeks to prohibit." 138 Wn. App. at 471.

Here, Korten's suspicions that Brenton was driving under the influence were immediately dispelled upon his first contact with the driver. RP 8. Under RCW 46.61.021, Korten could permissibly continue the detention to verify Brenton's identification and license status, check for outstanding warrants, verify his insurance and vehicle registration, and fill out the notice of traffic infraction.

But instead, Korten immediately turned his investigation from whether Brenton was driving under the influence to the nature of his relationship with Dave, Dave's identity, and whether Dave had any warrants for his arrest. This is a classic fishing expedition that had nothing to do with the initial stop and exceeded the limits set forth in RCW 46.61.021. By his own admission, Korten suspected that Dave might have been the driver's brother; he did not suspect that the driver

himself was Dave. RP 9. Thus, the investigation of whether the driver's brother was the passenger, and whether the passenger had any warrants, was unrelated to the initial stop. As in *Veltri* and *Allen*, Korten had no lawful basis to extend the investigation once his suspicions that Brenton was driving under the influence were dispelled. The search for identifying information and warrants on Dave exceeded the scope of the detention and the evidence obtained against Dave should have been suppressed.

C. Dave's counsel rendered ineffective assistance in failing to move to suppress the evidence obtained as a result of the stop and the unlawful detention.

Ineffective assistance of counsel claims are reviewed *de novo*. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To establish ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that this deficient performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A defendant must meet both prongs; failure to show either prong will end our inquiry. *State v. Fredrick*, 45 Wn.App. 916, 923, 729 P.2d 56 (1986).

The threshold for deficient performance is high; a defendant must overcome "'a strong presumption that counsel's performance was reasonable.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (*quoting State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). If counsel's conduct can be construed as a legitimate trial strategy or tactic, performance is not deficient; however, the presumption of reasonable performance can be rebutted by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33–34; *Kyllo*, 166 Wn.2d at 863; *Reichenbach*, 153 Wn.2d at 130; *Roe v. Flores–Ortega*, 527 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).

Here, there is no conceivable reason why trial counsel should not have moved to suppress the evidence. Counsel's trial strategy, which centered around attempting to persuade the jury that Dave could not have been in possession of the baggie because he had been handcuffed and thoroughly searched before the baggie materialized, would have been unnecessary in its entirety if a motion to suppress had resulted in the baggie's exclusion. RP 42-43. Absent the baggie, there was no case against Dave. There cannot, therefore, be a reasonable justification for failing to vigorously challenge the admissibility of the baggie into evidence.

Likewise, because the baggie was the only evidence of Dave's guilt, there can be no question but that the failure to move for suppression prejudiced Dave's case. For the reasons set forth above, a motion to suppress should have been granted because both the initial stop and Korten's expansion of the detention beyond its permissible scope established grounds to conclude that the baggie was "fruit of the poisonous tree" that should be suppressed. Without the baggie, Dave could not have been convicted. There can be no greater prejudice than improper admission of evidence that comprises the entire case for conviction.

Because failing to move for suppression cannot be supported on any strategic grounds and resulted in admitting the only evidence in the State's possession against Dave, the failure to vigorously dispute the admissibility of the evidence obtained as a result of Dave's unlawful arrest amounts to ineffective assistance of counsel. The conviction should be reversed and the cause remanded for a trial consistent with Dave's Fourth and Sixth Amendment rights.

VI. CONCLUSION

The evidence used to convict Dave was obtained when the arresting officer illegally stopped the vehicle in which he was riding, and illegally expanded the detention to investigation of unrelated matters. Because the stop was not based on the commission of a traffic offense in the officer's presence, or reasonable suspicion that a crime was being committed, the stop should have been challenged. Moreover, when Korten extended the scope of the stop after his investigation dispelled his suspicions that the driver was under the influence, by investigating the identity and status of the driver's brother, the detention exceeded the limits established by *Terry*, *Ladson*, and the line of cases establishing that the investigation must be reasonably related to the initial basis for the detention.

By failing to move to suppress the evidence obtained against Dave, trial counsel fell short of his constitutionally mandated responsibility to vigorously defend Dave's constitutional rights and advocate for his defense. Simply put, the evidence should not have been admitted, and there is no conceivable excuse for failing to challenge it. Absent the evidence resulting from Dave's arrest, there were no grounds to prosecute

him. Trial counsel's performance was unconstitutionally deficient, and the conviction should be reversed.

RESPECTFULLY SUBMITTED this 10th day of August, 2012.

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Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16th day of August, 2012 in Walla Walla, Washington.

Andrea Burkhart