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OCT 17, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 306488-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

TERALD D. DAVE, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 11-1-01121-0

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BRIEF OF RESPONDENT

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## I. STATEMENT OF THE CASE

At approximately 1:00 a.m., on January 11, 2011, Benton County Sheriff Deputy, Dan Korten, was on patrol in Benton County, when he observed a vehicle commit some lane violations and drift across the fog line. (RP 3-4). Deputy Korten thought based on his observation and the time of day, that the driver of the vehicle might be intoxicated. (RP 4). Deputy Korten initiated a traffic stop of the vehicle, and contacted the driver. (RP 4). Deputy Korten spoke with the driver, who identified himself as "Brenton Dave," and requested to see his driver's license. (CP 3; RP 6-7). Deputy Korten observed the defendant sitting in the front passenger seat during the initial contact. (RP 8). Deputy Korten returned to his patrol vehicle and ran the driver's information through some databases to check his driver's status and warrants. (RP 8).

While checking the driver's information, the system returned another name that was associated

with the driver's name. (RP 9). Deputy Korten observed that the other name was "Terald Dave," and was listed as "also known as," "may have used," and assumed that the name was possibly a brother, based on his experience with others occasionally using the names of their siblings. (RP 9). Deputy Korten then checked the name "Terald Dave" through his system and observed that the picture associated with the name matched the front passenger and also observed that there were two active warrants for his arrest. (RP 10). Deputy Korten then called for backup to take the defendant into custody on the outstanding warrants. (RP 10-11).

When backup arrived and after verifying the warrants, Deputy Korten re-contacted the vehicle and took the defendant into custody on the outstanding warrants. (RP 9-13). Deputy Korten frisked the defendant and then escorted him to his patrol vehicle and placed him inside. (RP 14, 16). Deputy Korten returned to the stopped

vehicle and advised Brenton of the defendant's bail amount. (RP 17). Upon returning to his patrol vehicle, Deputy Korten observed a baggie of white powder near the rear passenger door. (RP 17-18). Deputy Korten asked the defendant what the baggie was, and the defendant responded, "That's not my meth." (RP 19).

The defendant was charged with one count of Unlawful Possession of a Controlled Substance - Methamphetamine. (CP 1). The case proceeded to a jury trial where the defendant was found guilty as charged. (CP 29). The defendant was sentenced, and subsequently filed this appeal. (CP 30-38, 39).

## II. ARGUMENT

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show (1) deficient performance on the part of counsel, and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L. Ed. 2d 674 (1984). If one of these two elements is absent, an ineffective counsel claim will fail. *Id.* at 687-89.

Deficient performance of trial counsel is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But Appellate Courts engage in a strong presumption that representation is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995)). Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Id.* at 336.

To satisfy the prejudice prong of the ineffective assistance of counsel claim, the defendant must show that counsel's performance was so inadequate that there is a reasonable probability that, given competent counsel, the

result would have differed, thereby undermining this Court's confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

Deputy Korten's stop of the vehicle was lawfully based upon reasonable suspicion that the crime of driving under the influence of intoxicants was being committed; and therefore, defense counsel's failure to bring a suppression motion on the basis of an unlawful stop did not constitute ineffective assistance of counsel. Furthermore, the temporary detention of the vehicle to determine the identity and driver's status did not create an unlawful detention of the defendant. Since there was no unlawful detention, trial counsel's failure to bring a suppression motion on that basis did not constitute ineffective assistance of counsel.

**A. THE INITIAL STOP OF THE VEHICLE WAS  
LAWFULLY BASED UPON REASONABLE  
SUSPICION THAT THE DRIVER WAS UNDER  
THE INFLUENCE OF INTOXICANTS.**

The defense contends that Deputy Korten unlawfully seized the defendant, because there

was no evidence to support probable cause to believe that a traffic infraction or criminal acts were taking place. This argument ignores the facts of this case and the laws of the State of Washington. It is uncontested that a traffic stop is a "seizure" for the purpose of constitutional analysis, no matter how brief. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). An ordinary traffic stop has been analogized to investigative detention subject to the criteria of reasonableness set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Id.* A law enforcement officer is entitled to stop a vehicle without a warrant when the officer has probable cause to believe that a traffic infraction has been committed in his presence. RCW 46.64.030; *Ladson*, 138 Wn.2d at 361. The probable cause required before an officer stops a vehicle to enforce the traffic code is a *reasonable articulable suspicion* that a traffic infraction has occurred. (Emphasis

added). *Id.* at 349. Therefore, officers need reasonable suspicion to stop a vehicle in order to investigate whether the driver committed a traffic infraction or a traffic offense. See *State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002). "Terry has also been extended to traffic infractions, 'due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidence in the broad regulation of most forms of transportation.'" *State v. Day*, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007), quoting *State v. Johnson*, 128 Wn.2d 431, 454, 909 P.2d 293 (1996). This reasonable suspicion standard for traffic infractions, as adopted by the Washington State Supreme Court, is consistent with the standard utilized by almost every other Circuit Court of Appeals. See *U.S. v. Booker*, 496 F.3d 717, 721 (D.C. Cir. 2007) (applying reasonable suspicion standard to stop for improper display of temporary license plate);

*U.S. v. Pierre*, 484 F.3d 75, 84 (1st Cir. 2007) (upholding traffic stop because officer had reasonable suspicion that driver's license was suspended); *U.S. v. Delfin-Colina*, 464 F.3d 392, 397 (3d Cir. 2006) (joining the other circuits "in holding that the *Terry* reasonable suspicion standard applies to routine traffic stops," in case involving driver's obstructed vision); *U.S. v. Bueno*, 443 F.3d 1017, 1024-25 (8th Cir. 2006) (upholding stop on reasonable suspicion grounds where officers could not see temporary registration affixed to vehicle's windshield until after the stop); *Holeman v. City of New London*, 425 F.3d 184, 189 (2nd Cir. 2005) ("The Fourth Amendment requires that an officer making . . . a stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation . . . ."); *U.S. v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005) ("For a traffic stop to be justified at its inception, an officer must have an objectively reasonable

suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur . . . ."); *U.S. v. Lopez-Soto*, 205 F.3d 1101, 1104-05 (9th Cir. 2000) (joining the other circuits and "reaffirm[ing] that the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops," in case involving display of registration sticker).

In the present case, the trial testimony of Deputy Korten establishes that he stopped the vehicle because he believed the driver might be intoxicated based on his observations of "some lane violations was drifting back across the fog line [at] 12:30, 1:00 in the morning." (RP 4). It is true that the Courts in Washington have held that a brief single lane incursion over a fog line without more does not justify a stop. *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008). In *Prado*, the Court held that "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. Here, Deputy Korten testified that he stopped the vehicle for suspicion of driving under the influence. He testified that this was based on his observations of the vehicle and the time of night. (RP 4). Since there was a reasonable suspicion to believe that the driver of the vehicle was under the influence, Deputy Korten had probable cause to stop the vehicle. Trial counsel's failure to file a suppression motion based on the lawfulness of the stop did not constitute ineffective assistance of counsel, as any such motion would have been fruitless.

**B. THE TEMPORARY DETENTION OF THE VEHICLE WAS WARRANTED TO ALLOW DEPUTY KORTEN TO ASCERTAIN THE IDENTITY AND WARRANT STATUS OF THE DRIVER.**

The scope of the stop was proper and was based on Deputy Korten's legitimate attempts to positively identify the driver and distinguish between the identities of the driver and passenger in the vehicle. The initial scope of a traffic

stop has been codified in RCW 46.61.021(2), which reads:

Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

In the present case, Deputy Korten followed the statute by checking the driver's name through his computer databases. (RP 8-9). When the driver's name returned with a similar associated name, it became necessary for Deputy Korten to further verify the information provided by the driver versus the information in the database. Deputy Korten testified that in his experience, occasionally people use names and identifications of others when stopped by police. (RP 9). The name of the defendant and his active warrant status were discovered as a result of Deputy Korten's attempts to verify the driver's information. (RP 10). Deputy Korten did not

unlawfully detain the passenger, as the scope of the stop was limited to identifying the driver, checking for outstanding warrants, and determining the status of his driver's license.

A motion to suppress on the basis of an unlawful seizure would also have been fruitless; and therefore, trial counsel was not ineffective by failing to file such a motion. Defendant has failed to demonstrate that trial counsel's performance was ineffective, and that he was prejudiced as a result.

### III. CONCLUSION

The State respectfully requests the Appellate Court to deny the appeal and remand to Superior Court for proceedings consistent with that decision.

RESPECTFULLY SUBMITTED this 17th day of  
October 2012.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

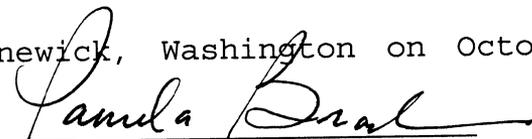
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