

FILED
Court of Appeals
Division III
State of Washington
2/14/2018 3:07 PM

No. 34711-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Appellant

v.

ERICA MAGALLON ALVAREZ,

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 16-1-00070-7

OPENING BRIEF OF APPELLANT

ANDY MILLER
Prosecuting Attorney
for Benton County

Andrew J. Clark
Deputy Prosecuting Attorney
BAR NO. 46667
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS1

III. ARGUMENT.....3

 A. The defendant was lawfully seized where the testimony demonstrates a violation of the plain meaning of RCW 46.61.670.3

 1. Standard of review.3

 2. The plain language of RCW 46.61.670 requires drivers to keep all wheels on “the roadway,” and off the shoulder.4

 3. Trooper Bivins lawfully stopped the defendant when she drove with two wheels on the shoulder of I-82.6

 B. Recent decisions from Division One and Division Three concur that RCW 46.61.670 was violated by the defendant.7

IV. CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

Becker v. Tacoma Transit Co., 50 Wn.2d 688, 314 P.2d 638 (1957).....5
State v. Arreola, 176 Wn.2d 284, 290 P.3d 983 (2012).....3, 6
State v. Brooks, No. 35002-9-III, 2018 WL 652635 (Wash. Ct. App. Feb. 1, 2018)8, 9, 10
State v. Huffman, 185 Wn. App. 98, 340 P.3d 903 (2014)4
State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003).....4
State v. Jones, 186 Wn. App. 786, 347 P.3d 483 (2015).....7
State v. Kocher, 199 Wn. App. 336, 400 P.3d 328 (2017)3, 8, 10
State v. Lee, 147 Wn. App. 912, 199 P.3d 445 (2008)7
State v. McLean, 178 Wn. App. 236, 313 P.3d 1181 (2013).....6
State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004).....3, 4
State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012).....7
Swinomish Indian Tribal Cmty. v. Dep’t of Ecology, 178 Wn.2d 571, 311 P.3d 6 (2013).....4

FEDERAL CASES

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....6

WASHINGTON STATUTES

RCW 46.04.5003, 5
RCW 46.37.4505, 9
RCW 46.61.250(2).....5
RCW 46.61.4282, 4, 6
RCW 46.61.6701, 3, 4, 5, 6, 7, 8, 10
RCW 46.61.7705

OTHER AUTHORITIES

Rumble Strips, WSDOT.WA.GOV,
<http://www.wsdot.wa.gov/Design/Policy/RumbleStrips.htm> (last
visited Feb. 14, 2018).....7

I. ASSIGNMENTS OF ERROR

1. The Superior Court and District Court erred as a matter of law when they decided that driving over the fog line and onto the shoulder of I-82 did not provide reasonable suspicion of a violation of RCW 46.61.670 (driving with wheels off roadway).

II. STATEMENT OF FACTS

Washington State Patrol Trooper Jarryd Bivins graduated from the WSP Academy, which involved 1,040 hours of basic law enforcement training, including a National Highway Traffic Safety Administration (“NHTSA”) training course specific to recognizing and apprehending impaired drivers and standard training on enforcement of traffic laws. CP 79-80. As of December 17, 2015, he had been employed in a patrol capacity in Washington State for 14 months. CP 79. During the Academy, on a weekly basis they reviewed the rules of the roadway and were tested on applying the rules correctly in presented situations. CP 80.

On October 10, 2015, Trooper Bivins was on routine traffic patrol in Benton County, Washington. CP 80-81. At approximately 0212 hours, Trooper Bivins was patrolling eastbound I-82 near MP 84 when he observed a red two-door passenger car traveling in the right lane that drove over the right fog line onto the rumble strips. CP 81-82. When the vehicle crossed the fog line, Trooper Bivins observed both right-side tires

were clearly over the fog line by a tire-width to a tire-width and a half, such that they no longer contacted the fog line, but instead were on the rumble strips, making a distinct audible noise. CP 82. At the time the defendant drove over the fog line, there were no obstructions in the lane of travel or in the shoulder, the defendant's vehicle was not coming to a stop in the shoulder, and the vehicle was not reentering from a stopped position in the shoulder. CP 82-83. The location where the defendant's vehicle crossed the fog line is part of a limited access highway that is not designated by the Washington Department of Transportation pursuant to RCW 46.61.428 for permitting slow moving vehicles to drive on the shoulder. CP 83. Trooper Bivins initiated a traffic stop for lane travel and wheels off roadway infractions. CP 85, 87. When Trooper Bivins initiated the traffic stop, he did not suspect the driver was impaired. CP 85. Upon contact, the defendant exhibited a number of indicators consistent with impairment and was ultimately arrested for DUI. CP 86-87.

Subsequently, this matter came before the District Court on December 17, 2015, on the defendant's Motion to Suppress. CP 49-57. The District Court entered its written findings on January 21, 2016, granting the defendant's motion and dismissing the DUI charge. CP 17-19. The State timely appealed that same day. CP 5-6. On August 4, 2016, the Superior Court affirmed the District Court's decision and the State timely

sought discretionary review before this Court. CP 157-65. This Court stayed the decision on granting review pending the outcome of *State v. Kocher*, 199 Wn. App. 336, 400 P.3d 328 (2017), and after the *Kocher* opinion was issued, accepted review of the case.

III. ARGUMENT

In Washington, an officer who has reasonable suspicion of a traffic violation may make a warrantless traffic stop. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012). Under RCW 46.61.670, it is a traffic infraction to “operate or drive a vehicle . . . on a public highway with one wheel or all of the wheels off the roadway” A “roadway” is defined as “that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder” RCW 46.04.500.

Because a state trooper saw the defendant drive with two wheels on the shoulder, she violated the plain and unambiguous prohibition contained in RCW 46.61.670. Her traffic stop was lawful.

A. The defendant was lawfully seized where the testimony demonstrates a violation of the plain meaning of RCW 46.61.670.

1. Standard of review.

Whether a warrantless stop is lawful is a conclusion of law that is reviewed de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202

(2004). When construing a statute, an appellate court seeks to determine and effectuate legislative intent. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013). A court must first look to the statute's plain language and ordinary meaning. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "[I]f the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end." *State v. Huffman*, 185 Wn. App. 98, 102, 340 P.3d 903 (2014).

2. The plain language of RCW 46.61.670 requires drivers to keep all wheels on "the roadway," and off the shoulder.

RCW 46.61.670 is clear and unambiguous. It prohibits a person from driving with "one wheel or all of the wheels off the roadway," unless one of three limited exceptions applies: (i) authorities have established a special "driving-on-shoulder zone," and marked the zone with signage under RCW 46.61.428,¹ (ii) the vehicle left the roadway "for the purpose

¹ In full, RCW 46.61.428: "Slow-moving vehicle driving on shoulders, when.

- (1) The state department of transportation and local authorities are authorized to determine those portions of any two-lane highways under their respective jurisdictions on which drivers of slow-moving vehicles may safely drive onto improved shoulders for the purpose of allowing overtaking vehicles to pass and may by appropriate signs indicate the beginning and end of such zones.
- (2) Where signs are in place to define a driving-on-shoulder zone as set forth in subsection (1) of this section, the driver of a slow-moving vehicle may drive onto and along the shoulder within the zone but only for the purpose of allowing overtaking vehicles to pass and then shall return to the roadway.
- (3) Signs erected to define a driving-on-shoulder zone take precedence over pavement markings for the purpose of allowing the movements described in subsection (2) of this section.

of stopping *off such roadway*,” or (iii) having stopped off the roadway, the vehicle is merging back onto it. RCW 46.61.670 (emphasis added).

The shoulder is not part of “the roadway.” Instead, the legislature has defined “the roadway” as any paved or unpaved highway “ordinarily used for vehicular travel, *exclusive of the sidewalk or shoulder* even though such sidewalk or shoulder is used by persons riding bicycles.” RCW 46.04.500 (emphasis added).² Given this express definition, courts have long understood the point: “A shoulder of a public highway is not part of the *roadway*” *Becker v. Tacoma Transit Co.*, 50 Wn.2d 688, 697, 314 P.2d 638 (1957) (emphasis in original). As *Becker* noted, “a pedestrian [may] walk[] on the shoulder *where vehicles are forbidden to travel*.” *Id.* (emphasis added). This reflects the legislature’s objective to protect the shoulder against quick-moving vehicles, and for pedestrians, bicycles, and disabled vehicles—all of which have explicit statutory permission to use the shoulder of public roadways. RCW 46.37.450 (disabled vehicles); RCW 46.61.250(2) (pedestrians); RCW 46.61.770

² RCW 46.04.500 states in full:

“Roadway” means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles. In the event a highway includes two or more separated roadways, the term “roadway” shall refer to any such roadway separately but shall not refer to all such roadways collectively.

(bicycles); *see also* RCW 46.61.428 (slow-moving vehicles allowed on shoulder in a specially marked “driving-on-shoulder zone”).

Thus, where a shoulder exists, RCW 46.61.670 protects against vehicle incursions by prohibiting drivers from traveling with one or all of their wheels on the shoulder, except under limited circumstances that do not apply to this case.

3. Trooper Bivins lawfully stopped the defendant when she drove with two wheels on the shoulder of I-82.

In Washington, a law enforcement officer who has reasonable suspicion that a driver committed a traffic infraction may conduct a warrantless traffic stop. *Arreola*, 176 Wn.2d at 292-93 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). *Terry* applies to traffic infractions, not just criminal investigations, because of the “exigenc[ies] created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation.” *Arreola*, 176 Wn.2d at 293 (internal citations, quotations omitted).

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. McLean*, 178 Wn. App. 236, 244, 313 P.3d 1181 (2013) (citing

State v. Snapp, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012)). The reasonableness of an officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008); *State v. Jones*, 186 Wn. App. 786, 790, 347 P.3d 483 (2015).

Here, the undisputed evidence showed the defendant drove with two tires over the right fog line and on the shoulder of I-82 visibly and audibly striking the rumble strip, which was cut into the shoulder to the right of the white fog line on I-82. Trooper Bivins specifically observed that her tires were no longer contacting the fog line as they drove onto the rumble strip.³ As established above, the shoulder of a public highway is not part of the roadway; thus, the defendant drove with two of her tires in the shoulder and off the roadway. Trooper Bivins having observed the violation had lawful authority to stop the defendant's vehicle.

B. Recent decisions from Division One and Division Three concur that RCW 46.61.670 was violated by the defendant.

³ See *Rumble Strips*, WSDOT.WA.GOV, <http://www.wsdot.wa.gov/Design/Policy/RumbleStrips.htm> (last visited Feb. 14, 2018) (“Shoulder rumble strips are placed on the shoulders just beyond the lane edge to warn drivers that they are entering a part of the roadway not intended for routine traffic use.”). Interestingly, I-82 was the first interstate in Washington to get shoulder rumble strips in 1992. *Id.*

Recently, both this Court and Division One issued opinions interpreting RCW 46.61.670. Division One looked at the statute in *Kocher*, 199 Wn. App. 336, and this Court addressed the statute in *State v. Brooks*, No. 35002-9-III, 2018 WL 652635 (Wash. Ct. App. Feb. 1, 2018).

First, in *Kocher*, a trooper observed the defendant driving in the far right lane southbound on I-5 and as traffic to the defendant's front and left came to a stop, she drove two wheels of her vehicle over the fog line for approximately 200 feet and was stopped by the trooper. 199 Wn. App. at 338. The unanimous opinion first declined to construe the statute finding that "RCW 46.61.670 is explicit" as to what is unlawful and that "[u]nder the plain language of this statute, it is a traffic infraction, except in certain situations not relevant here, to drive a vehicle 'on a public highway with one wheel or all of the wheels off the roadway.'" *Id.* at 342-43. The Court specifically found that "driving over the fog line is a traffic infraction unless one of the enumerated exceptions in this statute applies." *Id.* at 344. In *Kocher*, the trooper observed her drive over the fog line and thus Division One found the stop was lawful. *Id.* Here, too, the trooper observed the defendant drive over the fog line and thus the stop was lawful.

Second, in *Brooks*, a trooper observed the defendant driving through the neutral area separating the highway from the highway onramp.

Brooks, at *1. This Court, declining to find the statutory language ambiguous, applied the relevant statutory text to set forth a useful two-part inquiry to decide what falls under the legislature’s definition of a roadway.

The statutory definition of a roadway involves a two-part inquiry. First, we ask whether a given portion of highway meets the triggering definition of a roadway. In other words, is the area improved, designed, or ordinarily used for vehicular travel? If not, the inquiry ends. The area is not a roadway. But if at least one of the three triggering definitions applies, we go on to ask whether the area is excluded from the scope of a roadway because the area constitutes a sidewalk or shoulder. If neither exclusion applies, then the area in question falls under the legislature’s definition of a roadway.

Brooks, at *2. Applying this inquiry, this Court found the neutral area was not improved, designed, or ordinarily used for vehicular travel. *Id.* at *2-3.

Here, like the neutral area, the right shoulder of I-82 was not designed to be a vehicle lane. Plus, while like the neutral area, the shoulder was improved with the use of pavement, the improvement was not for the purpose of facilitating vehicular travel. As the Court noted in *Brooks*, rumble strips are among the improvements that “do not exist for the purpose of facilitating travel. Quite the opposite.” *Brooks*, at *2. Further, while the shoulder may be used for purposes of vehicles stopping for emergencies, *see* RCW 46.37.450, emergency stops are not routine vehicle travel. Thus, under the *Brooks* two-part inquiry the shoulder of I-

82 would not qualify as an area improved, designed, or ordinarily used for vehicular travel.

However, the two-part inquiry is more quickly resolved by skipping to part two where the area in question, the shoulder of I-82, is excluded by definition as it constitutes a shoulder. Thus, under the framework provided in *Brooks*, when the defendant drove with her two tires on the rumble strip cut into the shoulder of I-82, the defendant failed to maintain her vehicle wheels on an area of the highway meeting the statutory definition of a roadway.

Thus, like *Kocher* and *Brooks*, here the defendant was lawfully stopped under Washington's wheels off roadway statute, RCW 46.61.670.

IV. CONCLUSION

Because the defendant drove with her wheels off the roadway, her traffic stop was lawful under RCW 46.61.670. The State respectfully requests this Court to REVERSE the lower court rulings and REMAND the matter to the trial court for reinstatement of the DUI charge.

RESPECTFULLY SUBMITTED on February 14, 2018.

ANDY MILLER
Prosecutor



Andrew J. Clark
Deputy Prosecuting Attorney
Bar No. 46667
OFC ID NO. 91004

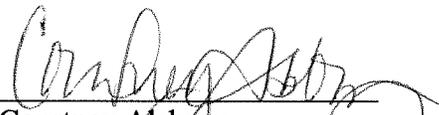
CERTIFICATE OF SERVICE

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:

Eric James Scott
Tri-City Legal
640 Jadwin Avenue, Suite K
Richland, WA 99352

E-mail service by agreement
was made to the following
parties: escott@tri-
citylegal.com

Signed at Kennewick, Washington on February 14, 2018.



Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

February 14, 2018 - 3:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34711-7
Appellate Court Case Title: State of Washington v. Erica Magallon Alvarez
Superior Court Case Number: 16-1-00070-7

The following documents have been uploaded:

- 347117_Briefs_20180214150233D3901227_8791.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 34711-7 Magallon Alvarez_Opening Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- escott@tri-citylegal.com

Comments:

Sender Name: Courtney Alsbury - Email: courtney.alsbury@co.benton.wa.us

Filing on Behalf of: Andrew James Clark - Email: Andrew.Clark@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20180214150233D3901227