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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

RESPONSE BRIEF OF RESPONDENT

Eric Scott
BAR NO. 48913
640 Jadwin Ave. Ste. K
Richland, WA 99352
509 578 1555

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I.
STATEMENT OF FACTS

The substantive facts of this case are straightforward and undisputed. Ms. Magallon was driving on I-82 when Trooper Bivens observed one instance in which her vehicle's tires crossed over the fog line and onto the rumble strips. CP 94 (tr. p. 18, ll. 11-19). Without a warrant, he effected a seizure of Ms. Magallon by activating his overhead lights, and ultimately arrested her for DUI. CP 90-91 (tr. p. 14, ll. 22-25; p. 15, ll. 1-5).

Ms. Magallon moved to suppress the fruits of the seizure, CP 45, and the district court granted her motion. CP 19. The state appealed to the superior court, CP 1, which affirmed the district court on the RALJ appeal. CP 161. Following the superior court's ruling, the state sought discretionary review from this Court, which stayed the proceedings pending the decision of Division I of the Court of Appeals in *State v. Kocher*, 199 Wn.App. 336 (Div. I 2017). After the *Kocher* decision was issued, Ms. Magallon stipulated to the state's motion for discretionary review. This Court granted that motion.

II.
ISSUE ON APPEAL

Whether a vehicle's wheels are off the roadway when they cross over a fog line and onto, but not over, rumble strips.

III. ARGUMENT

A. Standard of Review

The trial court's findings of fact are unchallenged and thus are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644 (1994). "The appellate court conducts a *de novo* review of conclusions of law in an order pertaining to a suppression motion." *State v. Shaver*, 116 Wn. App. 375, 380 (2003) (citing *State v. Mendez*, 137 Wn.2d 208, 214 (1999)). "The interpretation of a statute is a question of law and is therefore reviewed *de novo*." *State v. J.P.*, 149 Wn.2d 444, 449 (2003).

B. Fourth Amendment Standards

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH CONST. ART. 1 § 7. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV.

For purposes of constitutional analysis, a traffic stop is a seizure. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). As a general rule, warrantless searches and seizures are *per se* unreasonable, absent a "jealously and carefully drawn" exception to

the warrant requirement. *State v. Houser*, 95 Wn.2d 143, 149 (1980). The state bears the burden to show that the particular search or seizure falls within one of these exceptions. *Id.* “An officer may make a warrantless investigative stop based on a reasonable, articulable suspicion of unlawful conduct by a driver. When reviewing the validity of an investigative stop, courts evaluate the totality of the circumstances.” *State v. Jones*, 186 Wn.App. 786, 790 (2015).

All evidence obtained as a result of an illegal search or seizure must be suppressed as fruit of the poisonous tree. *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Ladson*, 138 Wn.2d 343, 359 (1999).

C. Analysis

1. Analytical Framework

The seizure in this case was premised on a purported violation of the “wheels off roadway” statute. That statute provides:

It shall be unlawful to operate or drive any vehicle or combination of vehicles over or along any pavement or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway thereof, except as permitted by RCW 46.61.428 or for the purpose of stopping off such roadway, or having stopped thereat, for proceeding back onto the pavement, gravel or crushed rock surface thereof.

RCW 46.61.670.

The essence of this statute is that vehicles may not drive with any wheels off of the roadway. “‘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. . . .” RCW 46.04.500. In contrast, a “highway” is “the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.” RCW 46.04.196.

This Court recently explained the appropriate analytical progression when applying the definition of “roadway”:

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.

State v. Brooks, No. 35002-9-III, No. 35003-7-III, 2018 Wash.App.

LEXIS 258 *4 (Wash. Ct. App. Feb. 1, 2018).

The issue in *Brooks* was whether a “a neutral area separating a highway on-ramp from an adjacent lane of travel” qualified as a portion of the roadway. *Id.* at *1-*3. This Court concluded that the neutral area was not a part of the roadway because it was not improved, designed or ordinarily used for vehicular travel. Instead, “the neutral area [w]as an ‘island’ . . . intended for vehicle ‘separation.’” *Id.* at *5. This Court also explained that “a variety of improvements [may be used] to alert drivers to the presence of the neutral area,” and that those improvements included “crosshatching, reflective marks, or

rumble strips.” *Id.* at *6. Such improvements “do not exist for the purpose of facilitating travel. Quite the opposite.” *Id.*

2. Step 1: Improved, Designed, or Ordinarily Used for Vehicular Travel

This case bears several similarities to *Brooks*, but must be distinguished on a critical point. Ms. Magallon crossed over a fog line and onto rumble strips that were placed next to the shoulder. In contrast to a “neutral area,” a shoulder *is* designed for vehicular travel. “Shoulder” is statutorily undefined but is generally understood to be contiguous with the roadway. *See, e.g.,* LaR.S. § 48:1(22) (“Shoulder’ means the portion of the highway **contiguous with the roadway** for accommodation for stopped vehicles, for emergency use and for lateral support of base and surface.”); R.R.S. Neb. § 39-101(12) (**same**); 67 Pa. Code § 601.1 (**same**); MCLS § 257.59a (“Shoulder’ means that portion of the highway **contiguous to the roadway** generally extending the contour of the roadway, not designed for vehicular travel but maintained for the temporary accommodation of disabled or stopped vehicles otherwise permitted on the roadway”); ORS § 801.480 (“Shoulder’ means the portion of a highway, whether paved or unpaved, **contiguous to the roadway** that is primarily for use by pedestrians, for the accommodation of stopped vehicles, for emergency use and for lateral support of base and surface courses”); <https://www.fhwa.dot.gov/pavement/t504029.cfm> (“DEFINITION.

Shoulder - the portion of the roadway **contiguous with the traveled way** for accommodation of stopped vehicles for emergency use, and for lateral support of the base and surface courses”).

Because a shoulder is contiguous with the roadway, and because a shoulder is designed for vehicular travel, a vehicle never leaves pavement designed for vehicular travel when it moves from the roadway to the shoulder. Of course, Ms. Magallon is not arguing that she drove on the shoulder, as shoulders are excluded from the definition of “roadway.” The point is that shoulders are used for vehicular travel and are contiguous with the roadway, which means that a vehicle does not leave the roadway until it enters the shoulder. Since both the roadway and the shoulder are used for vehicular travel, and since nothing separates the roadway and the shoulder (i.e., they are contiguous), step 1 of the *Brooks* test is satisfied.

To be clear, there should be no doubt that shoulders are designed for vehicular travel, because Washington has specifically provided for the circumstance in which travel may occur on the shoulder. The shoulder may be traveled upon whenever the “state department of transportation and local authorities” have placed appropriate signage on the highway, in order to allow “slow-moving vehicles [to] **safely drive onto improved shoulders** for the purpose

of allowing overtaking vehicles to pass . . .” RCW 46.61.428(1), (2) (emphasis added).

Thus, shoulders are designed and improved for vehicular travel. If they were not so designed, the Legislature would not have permitted such travel. While the shoulder is *designed* for vehicular travel, vehicular travel often is not *permitted*. But the reason travel is not permitted has nothing to do with the design or improvement of shoulders; the reason is that the department of transportation usually has not placed the requisite signage on the highway necessary to allow shoulder travel.

Because shoulders are designed for vehicular travel, the facts of this case contrast with those addressed in *Brooks*, which involved a “neutral area.” *Brooks, supra*. For that reason, the significance of the rumble strips is vitiated by the fact that the shoulder is used for vehicular travel. In *Brooks*, this Court noted that rumble strips, placed next to the neutral area, would be designed to prevent vehicular travel into the forbidden area. *Brooks*, at *6. But here, the rumble strips were either on the roadway or they were on the shoulder, because the shoulder is contiguous with the roadway. Either way, the rumble strips were placed on a location that is improved for vehicular travel—the shoulder or the roadway.

Because the roadway and shoulder are *both* improved for vehicular travel, the first step of the *Brooks* test is satisfied irrespective of the location or existence of the rumble strip. The heart of the issue on this appeal is whether the rumble strips were located on the shoulder or on the roadway.

3. Step 2: The Driving was not on a Sidewalk or Shoulder

Step 2 of the *Brooks* test is to determine whether the property was a sidewalk or shoulder. It was clearly not a sidewalk. RCW 46.04.540. Therefore, the final question is the most challenging: whether the property was a shoulder or a part of the roadway. The issue is challenging largely because “shoulder” is undefined by Washington’s statutes.

a. The Rumble Strips were not on the Shoulder

Statutorily undefined terms are given their ordinary meaning, when read in the context of the statute, including its subject matter and other provisions within the statute. *Port of Seattle v. Dep’t of Revenue*, 101 Wn.App. 106, 111 (Div. II 2000). “[S]tatutes pertaining to the same subject matter must be harmonized, if possible.” *Public Util. Dist. No. 1 v. Wash. Public Power Supply Sys.*, 104 Wn.2d 353, 369 (1985) (quotations, alterations omitted) (emphasis added).

In *Brooks*, the Court relied heavily on the *Manual on Uniform Traffic Control Devices for Streets and Highways* (MUTCD). *Brooks*,

*5-6. According to MUTCD, the rumble strips “extend across the travel lane to alert road users to unusual traffic conditions or are located **along the shoulder**, along the roadway center line, **or within islands** formed by pavement markings to alert road users that they are leaving the travel lanes.” MUTCD § 1A.13 (emphasis added). Clearly, when MUTCD referred to rumble strips *inside* an area, it used the preposition “within,” and when it referred to rumble strips *next to* an area, it used the preposition “along.” That use is consistent with the ordinary understanding of “along,” which is defined as “through, on, **beside, over, or parallel to the length or direction of.**” <http://www.dictionary.com/browse/along> (emphasis added); see also, <https://www.merriam-webster.com/dictionary/along> (“in a line matching the length or direction of walking *along* the road; *also* : at a point or points on **a house *along the river***”) (bold added, italics supplied). If the MUTCD description is followed, then the rumble strips were *next to* the shoulder and therefore were *on* the roadway. Consequently, Ms. Magallon did not exit the roadway when the wheels touched the rumble strips.

b. Minor Incursions over the Fog Line are Permitted by the Wheels off Roadway Statute, when Read in Context with the Lane of Travel Statute

1. Other Jurisdictional Support Regarding the Interpretation of “As Nearly as Practicable”

Even more compelling is the significance of the context of the wheels off roadway statute, specifically as it relates to the “lane of travel” statute. As explained above, if possible, the wheels off roadway statute must be harmonized with the lane of travel statute, which provides: “[w]henver any roadway has been divided into two or more clearly marked lanes for traffic [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 (emphasis added).

Perfect driving is not required of all of Washington’s motorists. The “as nearly as practicable” qualification acknowledges this point. If that language did not serve the purpose of affording drivers some reasonable latitude, it would be difficult to determine the purpose served by that language. Thus, if the statute were interpreted not allow drivers some latitude in their driving pattern, the “as nearly as practicable” language would be essentially superfluous. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”

J.P., 149 Wn.2d at 450 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)).

If “as nearly as practicable” were removed from the statute, the statute would still allow deviations from the lane for road obstructions such as debris, because the statute allows movement from a lane once the driver has ascertained that the movement can be made with safety.

Compare the following:

<u>As RCW 46.61.140 actually reads</u>	<u>RCW 46.61.140 without the relevant language</u>
“A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.”	“ <i>A vehicle</i> shall be driven as nearly as practicable entirely within a single lane and <i>shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.</i> ”

Therefore, in order for “as nearly as practicable” to be given meaning, it must be interpreted such that its purpose is to avoid imposing a strict liability standard for instances in which a driver commits a minor incursion on the fog line. The “as nearly as practicable” language clearly *qualifies* the requirement that vehicles maintain their lanes. The word “practicable” alone is most obviously intended to provide latitude to drivers. But the Legislature went even further, qualifying *that* qualification with the words “as *nearly* as.”

The Legislature plainly recognized a truth apparent to anyone who has driven a vehicle: it is not practicable for a driver to maintain a perfect driving pattern throughout his entire commute. *See, People v. Manders*, 740 N.E.2d 64, 67 (App. Ct. of Ill. 2000) (“[The Illinois statute] recognizes that a vehicle cannot be driven in a perfectly straight line. It states, ‘A vehicle shall be driven *as nearly as practicable* entirely within a single lane’”) (emphasis supplied). Otherwise, the statute effectively would be a “stop at will” statute. But “[t]he word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.” *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971). “[I]f failure to follow a perfect vector down the highway . . . were sufficient reason[] 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.” *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993).

Thus, the statute creates one general requirement—safely maintaining and changing lanes—that is modified with some legislative common sense, by demanding less than perfect driving. In *Corbin v. State*, the Texas court explained that the “statute presumes a certain degree of common sense will be applied to the review of a driver’s actions by requiring that a driver shall drive ‘as nearly as practical entirely within a single lane’ and that he may not move from

the lane unless the movement can be made safely.” 33 S.W.3d 90 (Tex. App. 2000) (rev’d on other grounds, 85 S.W.3d 272 (Tex. Crim. App. 2002)).

The state of Florida analyzes the issue similarly. In *Crooks v. State*, despite the fact that the vehicle crossed the edge line on three occasions, there was no violation of the statute. The Florida court said “Because the record does not establish how far into the right-hand emergency lane Mr. Crooks drove on any of the three occasions, there is no basis to state that he was outside the ‘practicable’ lane. Even if he was briefly outside this margin of error, there is no objective evidence suggesting that Mr. Crooks failed to ascertain that his movements could be made with safety.” 710 So. 2d 1041, 1042 (Fla. Dist. Ct. App. 2d Dist. 1998).

In *United States v. Ozbirn*, the Tenth Circuit held that “when an officer merely observes someone drive a vehicle outside the marked lane, he does not automatically have probable cause to stop that person for a traffic violation. The use of the phrase ‘as nearly as practicable’ in the statute precludes such absolute standards, and requires a fact-specific inquiry[.]” 189 F.3d 1194 (1999); *see also*, *United States v. Peters*, 2012 WL 1120665 (U.S. S.D. Indiana) at *8 (“To the extent that the Government argues that probable cause existed because, on one occasion, Officer Borgmann might have reasonably

believed that the Denali momentarily and slightly touched the fog line, that argument fails as a matter of law. *The statute commands only that drivers drive 'as nearly as practicable within' the lane.*") (Emphasis added).

2. The *Kocher* interpretation of the Wheels off Roadway Statute is in Disharmony with the *Jones* interpretation of the Lane of Travel Statutes

Washington's Court of Appeals has itself acknowledged the purpose of the "as nearly as practicable" language in RCW 46.61.140. In *State v. Jones*, the Washington Court of Appeals addressed much more egregious facts, and found the basis for the stop insufficient. 186 Wn.App. 786 (2015). Here, it is undisputed that Ms. Magallon drove over the fog line on only one occasion. In *Jones*, the defendant drove over the fog line three times. *Id.* at 788 ("As [the law enforcement officer] followed Jones in her patrol car for about a mile, she observed Jones's vehicle 'pass over the fog line approximately an inch' three times"). The question was whether Jones' diving violated the lane of travel statute.

The *Jones* court chose to apply a flexible "totality of the circumstances" standard to the fog line incursions in that case. According to *Jones*, the analysis of RCW 46.61.140 is "a more sophisticated analysis than a simple tally of the number of times a tire crossed a line." *Id.* at 792. Instead, the analysis required consideration

of the totality of the circumstances; specifically, the court looked to the level of danger posed by the relevant driving. *Id.* at 791-92 (“we used a totality of the circumstances analysis that included factors such as other traffic present and the danger posed to other vehicles.”) Thus, “‘brief incursions’—not necessarily a single incursion—‘will happen’ and do not violate the lane travel statute.” *Id.* at 792.

Such a flexible standard is inconsistent with the inflexible *per se* standard applied in *State v. Kocher* to the wheels off roadway statute. 199 Wn.App. at 345 (holding, effectively, that the wheels off roadway statute contained a *per se* standard for fog line incursions because the lane of travel statute “contains the qualifier ‘as nearly as practicable’ that [the wheels off roadway statute] does not.”) Thus, the *Kocher* court effectively acknowledged that the lane of travel statute *affirmatively permits* incursions over the fog line, while the wheels off roadway statute *categorically prohibits* those same incursions. That interpretation of RCW 46.61.670 therefore is inconsistent with the Court of Appeals’ interpretation of RCW 46.61.140. When possible, the statutes should be harmonized with one another.

Noticeably absent from the *Kocher* opinion is any discussion of the second step of the analysis described by this Court in *Brooks*. In other words, *Kocher* did not analyze whether the relevant vehicle entered the shoulder when it crossed the fog line. Rather, *Kocher*

implicitly assumed, without discussion, that the fog line defines where the shoulder begins and where the roadway ends. *See, id.* at 343-44 (simply citing the wheels off roadway statute, and concluding that “[t]hus, driving over the fog line is a traffic infraction” absent an exception expressed in that statute). As explained below, the fog line does not define where the shoulder begins.

3. The Meaning of “Shoulder” may be Ascertained by Harmonizing the two Statutes

At the outset, it must be emphasized that this subsection addresses the meaning of the *undefined* term, “shoulder.” In *Kocher*, the court derided the notion that “as nearly as practicable” should be read into the *wheels off roadway* statute, which contains no such language. The *Kocher* court characterized the issue as follows: “Kocher unpersuasively argues that harmonizing RCW 46.61.140 [the lane of travel statute] with RCW 46.61.670 [the wheels off roadway statute] requires reading into the latter statute the former’s ‘as nearly as practicable’ language.” *Id.* at 344-45. The court concluded that “We will not, in the guise of construing the statute, add language to RCW 46.61.670 that the legislature chose not to put there.” *Id.* at 345.

The *Kocher* court’s reasoning is, frankly, sound. Statutory interpretation does not require statutory hallucination. For that reason, courts should not add language to statutes that contain no such language. But the issue here involves complete legislative *silence*

with regard to the meaning of “shoulder.” The legislature did not provide a definition of “shoulder” that included *or* excluded the language “as nearly as practicable.” Instead, it provided no definition at all. Thus, in interpreting the meaning of “shoulder,” this Court should provide an interpretation that resolves the conflict between the two statutes.

And it is not difficult to avoid the conflict arising out of the *Kocher* interpretation of RCW 46.61.670. No conflict exists if the fog line does not define the edge of the roadway. As the Idaho Supreme Court has recognized, “the edge line may or may not even be present on the roadway; its purpose is not to create a lane boundary but to inform the driver of the road’s edge so that under certain conditions the driver can safely maintain his or her position on the roadway[.]” *State v. Neal*, 362 P.3d 514, 520-21 (Idaho 2015).

Fog lines are exactly that: they indicate that the edge of the roadway is near, especially under foggy conditions, but they do not *define* the edge of the roadway. In order to harmonize RCW 46.61.140(1) with RCW 46.61.670, then, this Court should interpret “shoulder” in a manner that gives effect to both legislative imperatives. The “shoulder” therefore is that portion of the highway *beyond the area where one maintains his lane “as nearly as practicable.”* This interpretation perfectly harmonizes the statutes. The shoulder begins

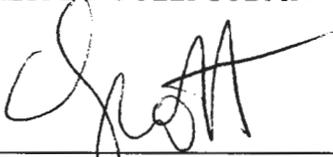
where the driving is expected to end. Driving is expected to end where it is outside the range of practicable lane travel. The range of practicable lane travel ends where the rumble strips end.

Here, Ms. Magallon drove "onto" the rumble strips; she did not drive *past* them. The shoulder, therefore, is the portion of the highway to the right of the rumble strips. Because the rumble strips are not a part of the shoulder, and because shoulders are contiguous with the "roadway," the rumble strips were are part of the roadway. As a result, Ms. Magallon did not leave the roadway when she drove on the rumble strips.

**IV.
CONCLUSION**

For the foregoing reasons, this Court should affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 26th day of March, 2018



Eric Scott, WSBA # 48913

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:

Benton County Prosecutor
7122 W. Okanogan Pl #A
Kennewick, WA 99336

[] U.S. Mail, Postage Prepaid; [X] Hand-Delivery

DATED: 3-26-18



Eric Scott, WSBA# 48913