

No. 23732-0-III

IN THE
COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CALEB GEORGE NICHOLS,
Appellant.

APPELLANT'S BRIEF

Carol A. Elewski, WSBA # 33647
Attorney for Appellant
P.O. Box 4459
Tumwater, WA 98501
(360) 570-8339

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

A. ASSIGNMENT OF ERROR 1

Assignments of Error 1

1. The trial court erred in allowing the defendant to be tried and sentenced in violation of his constitutional rights to counsel 1
2. The superior court erred in finding that the stop was valid because the vehicle improperly crossed a double yellow line and made an improper lane change . . . 1
3. The superior court erred in holding that the violation justifying the traffic stop was the failure to drive "as nearly as practicable entirely within a single lane." 1
4. The superior court erred in citing State v. Chelly, 94 Wn. App. 254, 259, 970 P.2d 376 (1999), for the prior proposition. 2
5. The superior court erred in holding that the officer's observation of the way the vehicle drove "justified a detention for purposes of identifying" the driver and running a warrants check and potentially issuing a notice of infraction." . . . 2
6. The superior court erred in holding that the seizure of the evidence was valid. 2
7. The superior court erred in denying

defendant's motion to suppress.. . . . 2

Issue Pertaining to Assignments of Error 2

A police officer observed the vehicle in which the defendant was a passenger pull out of a parking lot and turn left, crossing a double yellow line and pulling into the far right lane. The officer believed "the vehicle (driver) was trying to avoid driving in front of me." CP at 11. Without enumerating any further cause, the officer stopped the vehicle. Under these circumstances, was the defendant deprived of his right to effective counsel when his attorney conceded the key fact that required suppression of the evidence found as a result of that stop: The validity of the traffic stop? 3

Standard of Review 3

B. STATEMENT OF THE CASE 3

Procedural History 3

Substantive Facts 5

Introduction 5

The Traffic Stop 6

The Searches 7

The Suppression Hearing and the Court's Ruling 9

C. ARGUMENT 10

Trial Counsel Was Ineffective in Conceding the Legality of the Traffic Stop when such Concession was Unsupported by the Record and a Challenge to

the Stop Would have Resulted in the Suppression of all the State's Evidence Against Mr. Nichols	10
A. No Traffic Infraction Occurred	12
B. If a Traffic Violation Occurred, the Stop Was Nevertheless Pretextual	16
C. Trial Counsel was Ineffective	20
D. CONCLUSION	23
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

Table of Cases

State v. Chelly, 94 Wn. App. 254, 970 P.2d 376 (1999)
 1, 10

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)
 10, 16-18

State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999)
 10

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004)
 11, 20, 21, 23

State v. S.M., 100 Wn. App. 401, 996 P.2d 1111 (2000)
 3

Strickland v. Washington, 466 U.S. 668, 104 S. Ct.
 2052, 80 L. Ed.2d 674 (1984) 11

Constitutional Provisions

Const. art. 1, § 7 5, 16, 20

U.S. Const. Amend. IV 5, 19

Statutes

RCW 69.50.401 3

RCW 46.61.130 13, 14

RCW 46.61.140 10, 15, 16

RCW 46.61.290 14

A. ASSIGNMENT OF ERROR

Assignments of Error

1. The trial court erred in allowing the defendant to be tried and sentenced in violation of his constitutional rights to counsel. See Report of Proceedings (RP)1 & RP2.¹

2. The superior court erred in finding that the stop was valid because the vehicle improperly crossed a double yellow line and made an improper lane change. Factual Finding No. 4, Clerk's Papers (CP) at 23, (Defense Motion to Suppress: Findings of Fact and Conclusions of Law).

3. The superior court erred in holding that the violation justifying the traffic stop was the failure to drive "as nearly as practicable entirely within a single lane." Conclusion of Law No. 2, CP at 24.

4. The superior court erred in citing State v. Chelly, 94 Wn. App. 254, 259, 970 P.2d 376 (1999), for

¹ Two volumes of transcripts were filed in this case, each beginning pagination with the number one. The transcript of the suppression hearing of November 18, 2004, is referred to herein as RP1 and the transcript of the trial and sentencing of January 5, 2005, is referred to as RP2.

the prior proposition. Conclusion of Law No. 2, CP at 24.

5. The superior court erred in holding that the officer's observation of the way the vehicle drove "justified a detention for purposes of identifying" the driver and running a warrants check and potentially issuing a notice of infraction." Conclusion of Law No. 3, CP at 24.

6. The superior court erred in holding that the seizure of the evidence was valid. Conclusion of Law No. 11, CP at 26.

7. The superior court erred in denying defendant's motion to suppress. Conclusion of Law No. 12, CP at 26.

Issue Pertaining to Assignments of Error

A police officer observed the vehicle in which the defendant was a passenger pull out of a parking lot and turn left, crossing a double yellow line and pulling into the far right lane. The officer believed "the vehicle (driver) was trying to avoid driving in front

of me." CP at 11. Without enumerating any further cause, the officer stopped the vehicle. Under these circumstances, was the defendant deprived of his right to effective counsel when his attorney conceded the key fact that required suppression of the evidence found as a result of that stop: The validity of the traffic stop?

Standard of Review

This Court reviews a claim of ineffective assistance of counsel de novo. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

B. STATEMENT OF THE CASE

Procedural History

The State charged the Defendant in this case, Caleb George Nichols, with possession of a controlled substance, methamphetamine, in violation of RCW 69.50.401. CP at 1.

Mr. Nichols, the passenger in a vehicle that was stopped by law enforcement, moved to suppress the

evidence recovered as a result of that stop. While challenging the validity of Mr. Nichols's detention, his attorney conceded that the initial traffic stop was lawful. CP at 2-3, 4-20 & 55; RP1 at 4. After a hearing on the matter, the Honorable Gregory D. Sypolt presiding, the superior court denied Mr. Nichols's motion. RP1 at 3-18; CP at 22-26. No testimony was taken at that hearing; the parties instead relied on the facts in the police report (included in the Court's Papers at 11-20).

Mr. Nichols waived his right to a jury trial. RP2 at 4-11. The Honorable Tari S. Eitzen conducted the bench trial. RP2 at 4-17. The court found Mr. Nichols guilty, RP2 at 16-17, made an additional finding of chemical dependency, and sentenced him to 98 days' imprisonment with credit for time served of 98 days, plus 12 months' community custody. RP2 at 23; CP at 30 & 35-36. The court imposed the standard \$500 victim assessment fee, \$110 in court costs, the \$100 DNA collection fee and a \$1,000 VUCSA fine. RP2 at 24; CP at 32-33.

This appeal followed. CP at 41-54.

Substantive Facts

Introduction

Mr. Nichols was the passenger in a car stopped by law enforcement. Pursuant to that stop, Mr. Nichols was arrested, a Terry patdown was conducted, and Mr. Nichols consented to the search of his person. Methamphetamine was discovered during the search. When Mr. Nichols conceded the validity of the initial traffic stop, the trial court denied Mr. Nichols's motion to suppress and subsequently convicted him of possession of a controlled substance.

On appeal, Mr. Nichols argues that his trial counsel was ineffective in failing to protect his rights under the Fourth Amendment to the U.S. Constitution and Washington Constitution article I, section 7, by challenging the validity of the traffic stop. The traffic stop was illegal when the vehicle committed no traffic infractions prior to its detention. If this Court finds that the vehicle's

actions did violate a traffic law, it should find such a violation pretextual as the stop was predicated on the officer's belief that "the vehicle (driver) was trying to avoid driving in front of me." CP at 11.

The Traffic Stop

The arresting officer in this case, Officer Hause, was parked in the parking lot of a commercial establishment shortly after midnight on the night in question. He observed the vehicle in which Mr. Nichols was a passenger pull into the lot, drive slowly around the lot, turn around, and exit the parking lot the same way it had entered. RP at 11. As the vehicle exited the lot, it apparently made a left turn, crossing the westbound traffic lane: "[I]t crossed a double yellow line and pulled immediately into the far right lane," heading east. CP at 11.

From his observations, the officer concluded that "the vehicle (driver) was trying to avoid driving in front of me." CP at 11. Accordingly, the officer began to follow the vehicle in his patrol car. Id. As

he pulled out of the parking lot, he saw the vehicle make a right turn, to head south. CP at 11.

When Officer Hause caught up with the vehicle, he activated his lights. Id. Although the patrol car's lights were on, the vehicle continued to drive slowly for a time, ultimately stopping in the parking lot of a car wash. CP at 11-12.

The officer's only observations prior to his decision to stop the vehicle were of the vehicle's drive through the parking lot and its turn out of the lot. See CP at 11-14.

The Searches

The officer spoke with the driver, who revealed he had a suspended license. CP at 12. The officer arrested the driver and called for backup. A search of the driver revealed no contraband. CP at 12-13.

At the time of the stop, Officer Hause observed that Mr. Nichols was not wearing his seat belt. CP at 12. After backup arrived, the officer had Mr. Nichols step out of the car and wait with the two additional

officers. CP at 12. One of these officers patted Mr. Nichols down for weapons, finding nothing. CP at 15. The vehicle was then searched, revealing no contraband. CP at 12.

After searching the vehicle, Hause walked around the rear of the vehicle and found a piece of a plastic baggie containing a crystalline substance on the pavement near where he had handcuffed the driver. CP at 12 & 13. Officer Hause believed the driver had dropped the baggie sometime during or before being handcuffed. CP at 13.

Officer Hause stated that Mr. Nichols appeared intoxicated or under the influence but did not smell of intoxicants. CP at 12. After discovering the baggie on the pavement, Hause asked Mr. Nichols if he could search him for drugs. CP at 13. Mr. Nichols answered that he had already been searched. Hause explained he wanted to do a more thorough search. Mr. Nichols agreed to the search. It was during this search that the officer discovered methamphetamine in Mr. Nichols's sock. See CP at 13.

The Suppression Hearing and the Court's Ruling

Mr. Nichols's attorney moved to suppress the evidence against him on the ground that he was detained illegally and his consent to the search was the fruit of the illegal detention. CP at 2-3 & 4-20. However, she did not challenge the initial stop, instead conceding that the traffic stop was appropriately initiated. RP1 at 4, CP at 55.

No testimony was taken at the suppression hearing. Instead, the parties relied on the facts from the police report. See RP1. The police report's description of the vehicle's actions was detailed above.

The court denied Mr. Nichols's suppression motion. CP at 22-26. In its findings of fact regarding the suppression hearing, the court stated that the stop was valid "because the vehicle improperly crossed a double yellow line and made an improper lane change." CP at 23. In its conclusions of law, the court stated that the traffic infraction was "a failure to drive 'as

nearly as practicable entirely within a single lane.'"

CP at 24.²

C. ARGUMENT

Trial Counsel Was Ineffective in Conceding the Legality of the Traffic Stop when such Concession was Unsupported by the Record and a Challenge to the Stop Would have Resulted in the Suppression of all the State's Evidence Against Mr. Nichols

Mr. Nichols's constitutional rights to effective counsel were violated when counsel conceded the key fact that required suppression of the evidence against him: The validity of the traffic stop. A traffic stop is a seizure and an officer must have probable cause to believe that a traffic infraction has been committed in order to make such a stop. See generally State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) (discussing legitimate and pretextual grounds for traffic stop); State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999) (referring to probable cause to stop a vehicle for a

² For this proposition, the court cited State v. Chelly, 94 Wn. App. 254, 259, 970 P.2d 37 6 (1999). In fact, the violation identified by the court is codified at RCW 46.61.140(1). Chelly has no bearing on the issue. It involved a stop for a broken brake light under conditions likely to have been deemed pretextual under State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999).

traffic infraction). When the drugs seized as a result of the unlawful seizure in this case comprised the sum total of the State's evidence against the defendant, the attorney's baseless concession of the legality of the seizure denied Mr. Nichols his constitutional right to counsel and this Court should reverse the conviction.

A defendant's right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citations omitted). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

In this case, counsel's performance regarding the suppression hearing was both deficient and prejudicial. Although the record either does not support the existence of a traffic violation to justify the traffic stop in this case or shows that the traffic violation was a mere pretext, see Parts A and B, below, counsel unreservedly conceded the legality of the stop. Without that concession, the evidence would have been suppressed. When the case against Mr. Nichols consisted solely of the illegally obtained evidence, counsel was manifestly ineffective.

A. No Traffic Infraction Occurred.

In this case, the police officer's description of the vehicle's actions do not support the finding of a traffic violation. CP at 11-14. The officer described the vehicle driving slowly around a parking lot, pulling out, making a left turn, and immediately moving into the far right lane. CP at 11. Using these facts,

the trial court stated that the stop was valid "because the vehicle improperly crossed a double yellow line and made an improper lane change." CP at 23. But the law does not support a finding that these actions were traffic infractions.

First, crossing a double yellow line to make a left turn is perfectly legal. Double yellow lines generally indicate no passing. RCW 46.61.130, entitled "No-Passing Zones" addresses the requirement that drivers obey signs and markings, such as double yellow lines, which prohibit passing. Where such no-passing zones are established, the law essentially prohibits drivers from crossing the double yellow lines: "[N]o driver may at any time drive on the left side of the roadway within the no-passing zone or on the left side of any pavement striping designed to mark the no-passing zone throughout its length." RCW 46.61.130(2).

However, that provision explicitly does not apply to vehicles making a left turn from a private road or driveway: "This section does not apply . . . to the driver of a vehicle turning left into or from an alley,

private road, or driveway." RCW 46.61.130(3). Thus, pulling out of a parking lot of a commercial establishment, the vehicle in which Mr. Nichols was a passenger made a legal left turn from a private road or driveway across a double yellow line. CP at 11.

Indeed, the trial court did not even purport to support this alleged basis for the stop with a provision from the RCW. See CP at 22-26. Instead, it focused on the "improper lane change" to provide a legal basis for the stop. CP at 25.

However, the fact that the lane change was improper is not supported by the officer's report. The officer wrote merely that the vehicle "pulled immediately into the far right lane." CP at 11. Nothing from this observations denotes a violation of law; there is no observation of failure to use a turn signal or failure to change lanes safely.

In fact, pulling into the far right lane was the driver's only option if he intended to make an immediate right turn. See RCW 46.61.290 ("The driver of a vehicle intending to turn shall do so as follows:

(1) Right turns. Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.”)

Indeed, that is exactly what the vehicle next did: After the vehicle turned left from the parking lot, the officer observed it turn southbound from its eastbound direction. CP at 11.

The actions described in the police report simply do not support the court’s conclusion that the driver was guilty of “a failure to drive ‘as nearly as practicable entirely within a single lane.’” CP at 25 (See RCW 46.61.140(1): “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.”). The officer did not observe the vehicle swerving in its lane, veering from one lane to another, or even driving on the lines marking the lanes. Instead, the officer merely observed that the vehicle “pulled immediately into the far right lane.” CP at

11. This controlled action, in preparation for a right-hand turn, was not a violation of RCW 46.61.140.

On these facts, no traffic violations justified the traffic stop and Mr. Nichols's seizure was unlawful under both the Fourth Amendment to the U.S. Constitution and Article I, section 7 of the Washington State Constitution.

B. If a Traffic Violation Occurred, the Stop Was Nevertheless Pretextual.

If this Court finds that a traffic violation did occur, the traffic violation was merely a pretext for the actual reason for the stop: The officer's suspicion that the vehicle "was trying to avoid driving in front of me." CP at 11. Article I, section 7 of the Washington State Constitution prohibits pretextual traffic stops. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). A pretextual traffic stop is a seizure "which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e.,

to enforce traffic code) which is at once lawfully sufficient but not the real reason." Id. at 351.

Given the weakness to nonexistence of the grounds for a traffic stop in this case, the stop was pretextual. A court must consider the totality of the circumstances in determining whether a stop is pretextual, "including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Ladson, 138 Wn.2d at 359 (citations omitted).

In Ladson, the officers stopped a vehicle, ostensibly for expired licence plate tabs. However, the underlying reason was an unsubstantiated street rumor that the driver was involved with drugs. 138 Wn.2d at 346. As that rumor would not have been sufficient to permit a seizure of the vehicle and its passengers, the officers found a legal, albeit pretextual, reason for the stop. Id. The Court held that article I, section 7 of the Washington State Constitution prohibits such pretextual stops. Id. at 358.

In this case, consideration of "both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior" requires a conclusion that the stop was pretextual. Here, as in Ladson, the officer's subjective reason for the stop was a speculative criminal investigation. See Ladson, 138 Wn.2d at 346.

In the police report in this case, the officer noted the vehicle's actions: Driving around the parking lot, leaving without having stopped, turning left, and immediately getting in the right hand lane, both latter actions taking the vehicle away from the patrol car. CP at 11. It was these facts that made the officer believe the vehicle was trying to avoid him: "It appeared to me that the vehicle (driver) was trying to avoid driving in front of me." CP at 11. It was for this reason that the officer determined to stop the car. Thus, as was true in Ladson, the subjective reason for the stop was the officer's mere suspicion that the driver of the car had something to hide, in other words a "speculative criminal investigation" that

was not sufficient to support a seizure of the vehicle and its passengers.

When this subjective basis for the stop is viewed in conjunction with the lack of a credible objective basis for the stop, the stop was plainly pretextual. As discussed in Part A, above, the objective reasons given by the trial court were the purportedly illegal crossing of a double yellow line and the equally dubious illegal failure to stay in a single lane. CP at 23 & 25. These "objective reasons," however, dissolve upon closer inspection, since the facts in the police report fail to support the infraction found by the court below. Accordingly, the actual reason for the traffic stop was a "speculative criminal investigation," the stop was pretextual, and, thus, unlawful under the state constitution.

For all of these reasons, Mr. Nichols's seizure was unlawful. Accordingly, he did not voluntarily consent to the search of his person and the baggie of methamphetamine was seized in violation of the Fourth

Amendment to the U.S. Constitution and article I, section 7 of the Washington Constitution.

C. Trial Counsel was Ineffective.

Given these facts, both prongs of the test for ineffective assistance of counsel were met and this Court should reverse Mr. Nichols's conviction. First, trial counsel's performance was deficient. Although there is a strong presumption that defense counsel's conduct is adequate, State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), that presumption can be rebutted. It is rebutted in this case, where no conceivable legitimate tactic explains counsel's failure to challenge the traffic stop that led to the charge against Mr. Nichols. The evidence in this case consisted entirely of evidence obtained as a result of the stop and, as discussed above, there were compelling grounds for suppressing that evidence based on the lack of a legitimate basis for the stop.

In Reichenbach, the Court held trial counsel ineffective when she failed to bring a suppression

motion. In that case, the baggie of methamphetamine discovered pursuant to a search "was the most important evidence the State offered" and there were "serious questions about the validity of the warrant upon which the search was based." 153 Wn.2d at 130. The court found that the presumption against a deficient performance was rebutted when, under those circumstances, counsel failed to bring a suppression motion. Id. at 130-31. No conceivable trial tactic supported that decision. Id.

As the facts in Reichenbach showed a deficient performance, so do the facts in this case. Similar to the situation in Reichenbach, the baggie of methamphetamine in this case was the only evidence against Mr. Nichols. Moreover, just as there were serious questions on the validity of the warrant in Reichenbach, here the police officer's report raised serious questions as to the validity of the traffic stop. Finally, as in Reichenbach, no conceivable trial tactic justified conceding the legitimacy of the

traffic stop when that fact alone provided an infallible reason to suppress the evidence.

Unlike the attorney in Reichenbach who utterly failed to bring the motion, the attorney in this case brought a suppression motion. However, her concession that the traffic stop was valid rendered the motion as ineffectual as if none had been brought at all. Indeed, trial counsel's concession of the one issue requiring suppression made the suppression motion and subsequent hearing little more than a mere formality. Accordingly, just as the attorney's performance in Reichenbach was deficient, so was the attorney's performance in this case.

Next, counsel's performance prejudiced Mr. Nichols when his conviction was based solely on the evidence unlawfully seized. In Reichenbach, the Supreme Court held counsel's failure to suppress the drugs recovered was prejudicial when the defendant's conviction for possession of methamphetamine was dependant on the baggie of drugs that was seized. The Court found that without that evidence, the State could not prove

possession beyond a reasonable doubt. State v. Reichenbach, 153 Wn.2d at 137.

Similarly, here, Mr. Nichols's conviction was predicated solely on the unlawfully-seized evidence. Without that evidence, the State could not have proved possession beyond a reasonable doubt. For these reasons, as the Court held in Reichenbach, this Court should find that Mr. Nichols's right to the effective assistance of counsel was violated and reverse his conviction.

D. CONCLUSION

For all of these reasons, Caleb George Nichols respectfully requests this Court to reverse the superior court's denial of his suppression motion and reverse Mr. Nichols's conviction.

Dated this 31st day of May, 2005.

Respectfully submitted,



Carol Elewski, WSBA # 33647

CERTIFICATE OF SERVICE

I certify that on this 31st day of May, 2005, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Kevin Michael Korsmo, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99201, and one copy of the brief, postage prepaid, to Mr. Caleb Nichols, c/o ABHS, 44 East Cozza Drive, Spokane, Washington, 99208.



Carol Elewski, WSBA # 33647
Attorney for Appellant