

No. 23732-0-III

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

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Washington State, Appeals Division Three  
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STATE OF WASHINGTON,  
Respondent,

v.

CALEB GEORGE NICHOLS,  
Appellant.

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **Trial Counsel Was Ineffective in Conceding the Legality of the Traffic Stop when the Stop was Pretextual And, in Any Event, Not Based on a Valid Traffic Infraction**

As argued in his initial brief, 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. The stop was illegal because it was pretextual: The officer stopped the vehicle based on a suspicion that the driver had something to hide. If this Court finds that the stop was not pretextual, it should find that the stop was nevertheless illegal because the driver violated no traffic law prior to the officer's decision to stop the car. See Appellant's Brief (Nichols's Br.) at 10-23.

The stop was pretextual because the primary reason for it was the officer's suspicion that the driver had something to hide. In the Summary of Facts, the first reason the detective offered for the stop was that the police officer "observ[ed] this vehicle avoid his marked patrol car in a suspicious manner." CP at 61.

The detective provided additional reasons as well:  
"[A]nd also for crossing a double yellow line and not turning into the immediate travel lane while making a turn." CP at 61.

As the arresting officer stated in his police report after describing the vehicle's actions, he stopped the vehicle in which Mr. Nichols was a passenger because he was suspicious of the way the vehicle appeared to avoid him. "It appeared to me that the vehicle (driver) was trying to avoid driving in front of me." CP at 11. Thus, the record reveals that the stop was made primarily because the officer thought the driver was avoiding driving in front of a marked patrol car. Clearly, that suspicion could not justify the stop.

Despite the evidence of pretext in the record, Mr. Nichols's attorney conceded the validity of the traffic stop. For the reasons set forth in Mr. Nichols's initial brief, his counsel was ineffective when she made this concession. See Nichols's Br. at 20-23.

Further, the vague suspicion of the officer in this case - noted both in his police report and the Summary of Facts - does not make the stop any less pretextual than a more particularized suspicion would. The State correctly notes that this is not a situation where the defendant was known to the officer or the officer was acting on some inside information. Brief of Respondent (State's Br.) at 7-8. No, here the officer was merely suspicious of the vehicle's avoiding him. Here, the officer decided to stop the vehicle on an even flimsier pretext than those struck down by other courts. But a flimsy pretext is still a pretext. Under the States' theory, the less reason a police officer has to stop a vehicle, the more sound the stop is. This reasoning cannot be sustained.

The existing record compels the conclusion that the stop was pretextual. To the extent the Court disagrees, the blame for any deficiencies in the record lies squarely with Mr. Nichols's counsel. Had she challenged the stop, the record would have been developed. On appeal, it would be manifestly unjust to

prevent Mr. Nichols from maintaining an ineffective assistance claim because the ineffective assistance of his counsel deprived him of a more complete record.

If the Court finds that the stop was not pretextual, it was illegal as it was not justified by a traffic infraction. That no traffic infraction occurred is made evident by the extent to which the parties are left speculating on appeal as to which violation might have occurred, the inability of the superior court to correctly identify an applicable infraction, and the failure of the arresting officer to name an infraction.

The trial court did not identify a relevant infraction. 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. In his initial brief, Mr. Nichols explained why the facts do not support the commission of this infraction. Appellant's Brief at 14-16. The State does not dispute this conclusion.

Instead, in its brief, the State offered a new violation, this one a violation of RCW 46.61.150. State's Br. at 4-5. This statute may or may not be applicable to the instant case. From the record, its applicability is unclear, as it applies to a specific type of road and the road at issue was not described with any particularity by the officer.

RCW 46.61.150 applies under the following circumstances:

Whenever any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section or by a median island not less than eighteen inches wide formed either by solid yellow pavement markings or by a yellow crosshatching between two solid yellow lines so installed as to control vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers.

RCW 46.61.150 (emphasis added to description of relevant solid yellow pavement markings). These criteria define "such dividing space" referred to in the portion of the statute quoted by the State. See State's Br. at 4. As the record merely states that the

vehicle crossed "a double yellow line," it is unclear whether this provision applies. See CP at 11.

In any event, a vehicle may cross "such dividing space" "at a crossover or intersection established by public authority." RCW 46.61.150. Because the vehicle Mr. Nichols was in was leaving a commercial establishment on a public road, it likely was at a crossover or intersection established by public authority. Accordingly, without additional facts, the State cannot establish that the vehicle committed this traffic infraction.

Indeed, as the law cited by both parties suggests, a traffic infraction does not invariably occur every time a vehicle crosses a double yellow line. See Nichols's Br. at 13-14. Anyone who drives can attest to the fact that double yellow lines are commonly crossed quite legally. For this reason, the officer's failure to name an infraction or more thoroughly describe the double yellow line crossed is fatal to the State's argument that an infraction occurred. Neither the parties nor the Court should be speculating on

appeal as to what, if any, infraction the officer might have had in mind at the time of the stop.

The State next suggests that the vehicle committed infractions by failing to signal properly when it changed lanes and made a right turn. State's Br. at 5-6. But there is utterly no support for these contentions in the record. Nowhere in the Statement of Facts or the officer's report is a failure to use a turn signal mentioned. See CP at 11-18 & 61-62. Thus, even if the vehicle failed to use its turn signal, such failure did not provide a basis for the stop. Accordingly, these arguments should not be countenanced.

In sum, the record fails to support a traffic infraction. The officer did not identify any infraction, merely observing that the vehicle "crossed a double yellow line and pulled immediately into the far right lane." CP at 11. The superior court used this observation to find 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 impropriety of these actions cannot be established. The court could not name a relevant law which these actions violated. The State could not show that this particular crossing of a double yellow line was illegal. The State did not even argue that moving directly into the right hand lane was illegal; it merely argued that the vehicle did not properly signal the move - a contention without support in the record.

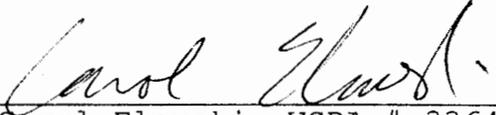
For these reasons and the reasons set forth in Mr. Nichols's initial brief, Mr. Nichols was denied his right to the effective assistance of counsel when his attorney conceded the validity of the traffic stop. See Nichols's Br. at 20-23.

#### **CONCLUSION**

For all of these reasons and the reasons set forth in his initial brief, 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 29th day of August, 2005.

Respectfully submitted,

  
Carol Elewski, WSBA # 33647

**CERTIFICATE OF SERVICE**

I certify that on this 29th day of August, 2005, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Andrew J. Metts, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99201, and one copy of the brief, postage prepaid, to Mr. Caleb Nichols, 1923 East 14th Avenue Spokane, WA 99202.

  
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