

78497-3

Filed at Court of Appeals
on 3-24-2006

FILED
MAR 29 2006
CLERK OF SUPERIOR COURT
SPOKANE COUNTY
WASHINGTON
AK

No. _____

IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

CALEB GEORGE NICHOLS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR REVIEW
of Case No. 23732-0 from Division III

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

Table of Contents

Table of Authorities iii

A. Identity of Petitioner 1

B. Court of Appeals Decision 1

C. Issue Presented for Review 1

Did the Court of Appeals ignore this Court’s precedent regarding pretextual traffic stops, as set forth in State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999), and its law on ineffective assistance of counsel as articulated in State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004), in holding that Mr. Nichols’s counsel was not ineffective in conceding the validity of the traffic stop in this case when the evidence recovered in the stop provided the sole evidence against Mr. Nichols? The facts of the stop can be summarized as follows: A police officer observed the vehicle in which Mr. Nichols 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. . . . 1-2

D. Statement of the Case 2

Procedural History 2

Substantive Facts 4

Introduction 4

The Traffic Stop 5

The Searches 6

The Suppression Hearing and the Superior Court's Ruling	7
Division III's Decision	8
E. Argument Why Review Should be Accepted	9
A. Without Justification, the Court of Appeals Ignored This Court's Precedent on Pretextual Traffic Stops	9
B. The Traffic Stop Was Pretextual	11
C. Counsel was Ineffective in Not Challenging the Pretextual Stop Which Provided all the Evidence Against Mr. Nichols	17
F. Conclusion	20
Certificate of Service	21
Appendix	

Table of Authorities

Table of Cases

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)
..... 1, 10-12

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004)
..... 1, 17-20

State v. S.M., 100 Wn. App. 401, 996 P.2d 1111 (2000)
..... 11

Statutes

RCW 46.61.130 14

RCW 46.61.140(1) 15-16

RCW 46.61.290 15

RCW 69.50.401 2

Constitutional Provisions

Const. art. 1, § 7 10

A. Identity of Petitioner

Petitioner, Caleb George Nichols, asks this Court to accept review of the Court of Appeals, Division III, decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Mr. Nichols seeks this Court's review of the decision of the Court of Appeals of the State of Washington, Division III, No. 23732-0-III, filed February 23, 2006.

A copy of the decision is attached as the Appendix to this petition.

C. Issue Presented for Review

Did the Court of Appeals ignore this Court's precedent regarding pretextual traffic stops, as set forth in State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999), and its law on ineffective assistance of counsel as articulated in State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004), in holding that Mr. Nichols's counsel was not ineffective in conceding the validity of the traffic stop in this case when the

evidence recovered in the stop provided the sole evidence against Mr. Nichols? The facts of the stop can be summarized as follows: A police officer observed the vehicle in which Mr. Nichols 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.

D. 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 was convicted after a bench trial, the Honorable Tari S. Eitzen presiding. 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.

Mr. Nichols appealed the ruling on the suppression motion, arguing that his counsel was ineffective in conceding the validity of the traffic stop when it was invalid for two reasons: 1) The vehicle had committed no traffic infraction prior to the stop and 2) the stop was solely for the purpose of investigating a vehicle the officer believed was avoiding him and, thus, was

pretextual. See Appellant's Brief at 10-23. The Court of Appeals, Division III, affirmed the superior court's decision. See Appendix.

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.

In this petition, Mr. Nichols argues that the Court of Appeals ignored this Court's precedent regarding pretextual traffic stops and ineffective assistance of counsel. Even assuming that the vehicle committed a traffic infraction prior to its detention (a point Mr. Nichols does not concede), the stop was plainly pretextual as it was predicated on the

officer's belief that "the vehicle (driver) was trying to avoid driving in front of me." CP at 11. Under these circumstances, when the pretextual nature of the stop compelled suppression of the evidence discovered as a result of the stop, and such evidence comprised the sole evidence against Mr. Nichols, his attorney was ineffective in conceding the validity of the stop and the court of appeals erred in holding otherwise.

The Traffic Stop

The arresting officer in this case 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 the officer 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 and vehicle revealed no contraband. CP at 12-13. However, the officer discovered a piece of a

plastic baggie containing a crystalline substance on the pavement near where he had handcuffed the driver. CP at 12 & 13. The officer attributed this substance to the driver. CP at 13. The officer searched Mr. Nichols for drugs, discovering methamphetamine in his sock. CP at 13.

The Suppression Hearing and the Superior 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.

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.

Division III's Decision

Division III did not address Mr. Nichols's argument that his counsel was ineffective in failing to challenge the pretextual traffic stop. Appendix at 6. Instead, it addressed his argument that his counsel was ineffective in failing to challenge the traffic stop when it was not based on the violation of any traffic laws. Appendix at 3-6. Reviewing the statutes alleged to have been violated and noting that the prosecutor, judge and arresting officer all believed such statutes had been violated, the court found that it would have been reasonable for Mr. Nichols's trial attorney also to believe that the vehicle had violated certain traffic statutes. Appendix at 3-6. Thus, it found that counsel was not ineffective in this regard.

Having reached this conclusion, the court held that it "need not address Mr. Nichols' claim that the stop was a pretext." Appendix at 6. It also pointed

out that the argument was made for the first time on appeal. Appendix at 6.

E. Argument Why Review Should be Accepted

The Court of Appeals Ignored this Court's Precedent Regarding Pretextual Traffic Stops and Effective Assistance of Counsel in Failing to Address Mr. Nichols's Claim that his Trial Counsel Was Ineffective in Conceding the Validity of the Pretextual Traffic Stop

A. Without Justification, the Court of Appeals Ignored This Court's Precedent on Pretextual Traffic Stops

In his brief in the court of appeals, Mr. Nichols argued that his trial counsel was ineffective in failing to challenge the traffic stop in this case when the stop was legally infirm in two regards: 1) The vehicle had committed no traffic infraction prior to the stop and 2) the stop was solely for the purpose of investigating a vehicle the officer believed was evading him and, thus, was pretextual. See Appellant's Brief at 10-23. The court of appeals rested its decision on the first issue, without reaching the second. When a stop may be pretextual even if based on a plain violation of traffic laws, the court erred in failing to address the pretext argument.

For a court to find that a traffic stop was pretextual, it need not find that no traffic laws were violated. To the contrary, by definition a pretextual stop is one which is objectively legitimate, but motivated by improper subjective reasons: 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." See State v. Ladson, 138 Wn.2d 343, 352, 979 P.2d 833 (1999). Article I, section 7 of the Washington State Constitution prohibits pretextual traffic stops. Ladson, 138 Wn.2d at 358.

For these reasons, the court of appeals could not decline to consider the pretextual nature of the stop merely because it found legitimate objective reasons for it. Nor could it decline to address this argument for the reason that it was not raised below when the argument is part of Mr. Nichols's claim that his trial counsel was ineffective in conceding the validity of

the stop. See Appendix at 6. Appellate courts review ineffectiveness claims de novo. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

B. The Traffic Stop Was Pretextual

As argued in the court of appeals below, the traffic stop in this case was plainly 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. This Court held

that 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: The officer believed the vehicle was trying to evade his patrol car. 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 argued in Appellant's Brief in the court of appeals, the vehicle did not actually violate any law before being stopped. The officer described the vehicle driving slowly around a parking lot, pulling out, making a left turn across a double yellow line, 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 from a private roadway 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. However, the 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.

In sum, the traffic violations supporting the stop in this case were exceedingly tenuous and, moreover, supplied by the trial court, not the arresting officer. When the tenuous objective reasons are viewed in light of the stated subjective reason - that the officer believed the vehicle was trying to avoid his patrol car - the totality of the circumstances reveal that the actual reason for the traffic stop was a "speculative criminal investigation." Accordingly, the stop was pretextual and unlawful under the state constitution and the court of appeals ignored this Court's precedent in not addressing this issue.

**C. Counsel was Ineffective in Not Challenging the
Pretextual Stop Which Provided all the Evidence
Against Mr. Nichols**

Given these facts, both prongs of the test for ineffective assistance of counsel were met and the court of appeals erred in affirming 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. 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.

F. Conclusion

For all of these reasons, Caleb George Nichols respectfully requests this Court to accept review of this case for the reasons indicated in Part E and reverse the court of appeals' decision affirming his conviction.

Dated this 22nd day of March, 2006.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Petitioner

Certificate of Service

I certify that on March 22, 2006, I mailed one copy of the attached Petition for Review, postage prepaid, to the attorney for the Respondent, Andrew J. Metts, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99201.



Carol Elewski, WSBA # 33647
Attorney for Petitioner

APPENDIX

FILED

FEB 23 2006

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 23732-0-III
)	
Respondent,)	
)	Division Three
v.)	
)	
CALEB GEORGE NICHOLS,)	
)	UNPUBLISHED OPINION
Appellant.)	

SWEENEY, J.—Ineffective assistance of counsel requires some showing that the conduct of the defendant’s lawyer fell below an objective standard of reasonableness. Here, the claim is that defense counsel should have challenged the propriety of an initial traffic stop which ultimately led to the discovery of drugs. But the stop was facially, at least, valid, based on our (and the trial court’s) reading of the traffic code. And, therefore, we are unable to conclude that defense counsel’s conduct fell below an objective standard of reasonableness. We therefore affirm the conviction.

FACTS

Caleb Nichols was the passenger in a pickup driving on a Spokane street a little past midnight. The driver pulled into a commercial parking lot, drove slowly around, and

left the way it came. The driver pulled out of the parking lot, crossed the double yellow center line, and entered the far eastbound traffic lane. He then made an immediate right turn. A Spokane police officer on patrol watched the pickup from his patrol car. He believed the driver avoided passing in front of his patrol car. The officer turned on his emergency lights, followed the pickup, and signaled it to stop. The driver did not immediately comply, but eventually pulled over. Mr. Nichols was not wearing his seat belt.

The officer asked the driver and Mr. Nichols for identification. The driver had a suspended license. He also had a prior felony conviction for a violent offense. The officer ordered the driver from the car and arrested him. He ordered Mr. Nichols to stay in the pickup with his hands on the dashboard. Backup arrived within a few minutes. They patted Mr. Nichols down for weapons. An officer found a bundle of methamphetamine on the ground where the driver had been standing. Another officer frisked Mr. Nichols for weapons. The officer believed, and the trial court found, that the driver dropped this bundle.

Based on this, and the officer's opinion that Mr. Nichols appeared to be under the influence of some intoxicant other than alcohol, he asked Mr. Nichols if he could search him for drugs. Mr. Nichols consented. And the officer found a bundle of meth in his sock and arrested Mr. Nichols for possession.

Mr. Nichols moved to suppress the drugs. Defense counsel stipulated to the validity of the traffic stop—“for what appears to be an appropriate infraction and violation.” Report of Proceedings at 4. Counsel argued for suppression on the grounds that the lawful stop of the driver did not justify seizing and searching Mr. Nichols.

The court entered findings in line with the statement of facts here and concluded that the initial stop was justified by multiple traffic infractions. The court found that the circumstances of the stop gave rise to articulable grounds to briefly detain Mr. Nichols and frisk him for weapons. The court found that Mr. Nichols freely consented to a second, evidentiary, search that turned up the drug evidence. It accordingly denied the motion to suppress. And the court convicted him on stipulated facts.

DISCUSSION

Mr. Nichols contends that his lawyer was ineffective because she did not challenge the grounds for the initial traffic stop. He maintains that the driver of the pickup violated no traffic laws and therefore the initial stop could have and should have been challenged.

The State responds that Mr. Nichols violated the divided highway statute, RCW 46.61.150. It prohibits crossing physical barriers, median islands, or solid pavement markings forming divided highways except at an opening or intersection. And the driver also violated RCW 46.61.305(1) and (2). These subsections prohibit moving right or left

No. 23732-0-III
State v. Nichols

unless it is safe to do so or without signaling the intent to turn right continuously for at least 100 feet.

We review a claim of ineffective assistance of counsel de novo. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P.3d 688 (2003); *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The claim requires a showing that defense counsel's conduct fell below an objective standard of reasonableness; and that there is a reasonable possibility that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *Strickland*, 466 U.S. at 687.

Mr. Nichols claims his lawyer was ineffective by failing to challenge the lawfulness of the stop which led to the discovery of the physical evidence used to convict him. He must show that such a challenge would likely have been successful. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

As a preliminary matter, we note that once the stop was made, the actions of the officers were appropriate. And that conduct is not challenged here on appeal. *State v. Parker*, 139 Wn.2d 486, 495-504, 987 P.2d 73 (1999) (citing *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999)).

The officer concluded that the driver's action violated several traffic laws and so did the trial judge. The trial court found that the vehicle in which Mr. Nichols was a passenger improperly crossed a double yellow line and then made an improper lane

No. 23732-0-III
State v. Nichols

change. Clerk's Papers (CP) at 23 (finding of fact 4). The court also concluded that pulling into the far right lane to turn right violated the requirement "to drive as nearly as practicable entirely within a single lane." CP at 24 (conclusion of law 2). The court held, therefore, that the traffic stop was justified and the subsequent seizure was proper.

It is unlawful to cross double yellow lines into the oncoming lanes to pass another vehicle. RCW 46.61.130(2). Mr. Nichols argues that this provision does not apply, however, to a vehicle turning left from an alley, private road, or driveway. RCW 46.61.130(3). And he says this is what the driver here did.

And, while that is a reasonable argument, his argument here on appeal must be put in context. We are reviewing a claim by Mr. Nichols that his lawyer was ineffective. He contends that, if she had filed a motion challenging the legality of the initial stop, suppression was assured. But the officer on the scene, a trial judge, and certainly a state prosecutor disagreed with Mr. Nichols' reading of these statutes. And it is, therefore, reasonable for us to assume that his lawyer looked at the same statutes and also disagreed with Mr. Nichols.

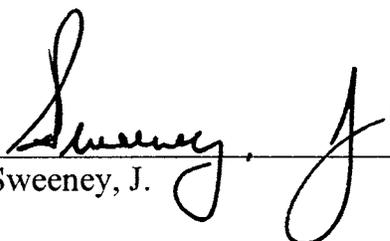
The requirement to drive "as nearly as practicable entirely within a single lane" and not change lanes without first ascertaining that it is safe to do so is found at RCW 46.61.140(1). And a driver is required to signal for the last 100 feet of travel prior to turning. RCW 46.61.305(2). The court concluded that the driver violated this statute and entered a finding of fact—a finding that is not challenged. Again there are certainly

plausible arguments to be made, and that are made, here on appeal that these statutes either were not violated or did not apply. But a police officer, the court, a prosecutor, and defense counsel apparently believed the validity of the violation. Given that, we cannot say counsel's conduct fell below an objective standard of reasonableness.

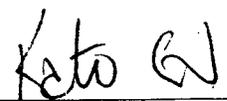
We need not address Mr. Nichols' claim that the stop was a pretext given resolution of the ineffective assistance of counsel claim. But we note in passing that the pretext argument is only made here on appeal.

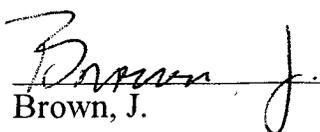
We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.


Sweeney, J.

WE CONCUR:


Kato, C.J.


Brown, J.