

64802-1

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No. 64802-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

A.J.A. (DOB 8/7/93),

Appellant.

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

The Honorable Carol A. Schapira

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REPLY BRIEF OF APPELLANT

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THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT

1. A.J.A.'S BRIEF FOG LINE INCURSIONS DID NOT CREATE PROBABLE CAUSE TO SUPPORT THE OFFICER'S TRAFFIC STOP

In his opening brief, A.J.A. submitted that his three brief lane incursions did not amount to a violation of RCW 46.61.140 under this Court's decision in *State v. Prado*, 145 Wn.App. 646, 649, 186 P.3d 1186 (2008). The State, in an extremely cursory analysis, merely relies on the fact that *Prado* involved one lane incursion, A.J.A. committed three lane incursions, *ergo* there was probable cause to stop A.J.A. Brief of Respondent at 3-4. The State's brief failed to respond to A.J.A.'s analysis of the decision in *Prado* and its underlying rationale which undercuts the entire basis of the State's argument.

The *Prado* decision was not premised merely on one lane incursion; it was that incursion *plus* the fact the driver's actions did not present a danger to any other vehicles. *Prado*, 145 Wn.App. at 649. It is notable this Court in *Prado* used the term "incursions" to denote something more than just one incursion.

Again, if it was merely the singular act of crossing the fog line, *Prado* would not have spent as much time as it does talking about the fact the driving did not endanger anyone else on the

road. Thus, it is not merely the act of crossing the line that is evidence of a lane change violation, but whether the lane change(s) created a danger to any other cars on the road.

Here, one can assume that at 1 a.m. there was little if no traffic present, thus A.J.A.'s action presented no danger to other vehicles. If there had been traffic present, or had A.J.A.'s actions presented a danger to other vehicles, one could be certain Officer Newton would have included those facts in his report. He did not. Further, Officer Newton did not testify that he was investigating A.J.A. for suspected driving while under the influence; the stop was based solely on the incursions over the lane line. Appendix A at 2. The lane incursions alone do not support the resulting traffic stop absent an indication A.J.A.'s driving presented a danger to other drivers. *Prado*, 145 Wn.App. at 649.

2. THE ADMISSION OF THE DOL AFFIDAVIT  
ATTESTING TO THE NONEXISTENCE OF A  
DRIVING RECORD VIOLATED A.J.A.'S  
RIGHT TO CONFRONTATION

To prove that A.J.A. had no valid driver's license, the State admitted the affidavit of a Department of Licensing (DOL) legal custodian of records that there was no existence of a driving record for A.J.A. RP 6-12, 26-27. The State properly responds that this Court in *State v. Jasper*, \_\_\_ Wn.App. \_\_\_, 2010 WL 3666997 (Div. 1, September 20, 2010), determined that admission of this affidavit violates the defendant's right to confrontation under the Sixth Amendment. Brief of Respondent at 5.<sup>1</sup> The State argues that the erroneous admission of the affidavit is nevertheless harmless. Brief of Respondent at 5-8. This Court should apply its harmless error analysis from *Jasper* and find the error was *not* harmless.

The erroneous admission of evidence which violates the Confrontation Clause is subject to the constitutional harmless error analysis. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is presumed to be

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<sup>1</sup> The State attempts to distinguish this matter from *Jasper*, arguing in this case it was an affidavit attesting to the lack of record where in *Jasper* the Affidavit attested to the affirmative fact the defendant had a suspended license. Brief of Respondent at 5. A.J.A. submits this is a distinction without a difference: both affidavits involved a search of the records and an explanation of the results of the search and the affiant's conclusion from the records search. *Jasper*, 2010 WL 3666997 at 5.

prejudicial and the State bears the burden of proving beyond a reasonable doubt that the error was harmless. *Id.*

Officer Newton testified he knew A.J.A. from prior contacts and believed him to be under sixteen years of age. CP 33; Appendix A at 2. Upon request, A.J.A. provided Officer Newton with his name and birthdate. CP 33; Appendix A at 2. Using this information, Officer Newton confirmed that A.J.A. did not have a valid driver's license. CP 33; Appendix A at 2. From this evidence the State contends the admission of the DOL affidavit was harmless. Brief of Respondent at 7.

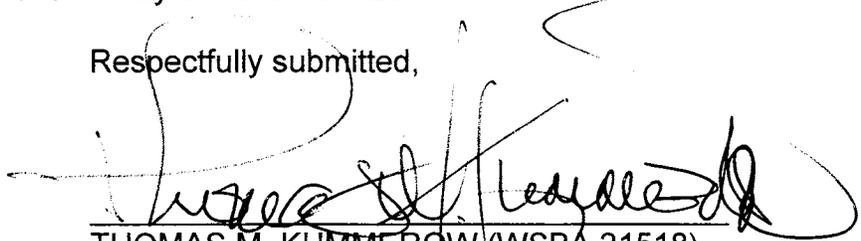
Contrary to the State's assertion that this evidence alone sustained its burden of proof, in the absence of the DOL affidavit, there was no evidence that A.J.A. actually did not have a valid operator's license. *Jasper*, 2010 WL 3666997 at 8. While it is unlikely that A.J.A. had a valid license, only the affidavit proved this fact. Without the affidavit, the State failed to prove that A.J.A. did not have a valid license, which RCW 46.20.005 required the State to prove in order to obtain the conviction. Accordingly, the error in admitting the DOL affidavit was not harmless. A.J.A. is entitled to reversal of the conviction.

B. CONCLUSION

For the reasons stated, A.J.A. requests this Court reverse his conviction with instructions to dismiss.

DATED this 9<sup>th</sup> day of November 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and contact information.

THOMAS M. KUMMEROW (WSBA 21518)  
tom@washapp.org  
Washington Appellate Project – 91052  
Attorneys for Appellant

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DIVISION ONE**

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	)	
Respondent,	)	
	)	NO. 64802-1-I
v.	)	
	)	
A.J.A.,	)	
	)	
Juvenile Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] CHARLES SHERER, DPA	(X)	U.S. MAIL
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APPELLATE UNIT	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2010.

X \_\_\_\_\_ 

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**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710