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Court of Appeals
Division I
State of Washington

NO. 68929-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

SARAH S. HUFFMAN,

Petitioner.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

I. ISSUE..... 1

II. STATEMENT OF THE CASE..... 1

 A. FACTS OF THE INCIDENT..... 1

 B. PROCEDURAL HISTORY..... 2

 1. In The District Court..... 2

 2. In The Superior Court On RALJ Appeal..... 3

III. ARGUMENT..... 4

 A. STANDARD OF REVIEW..... 4

 B. DRIVING OVER THE CENTER LINE CONSTITUTES A VIOLATION OF RCW 46.61.100..... 6

 1. RCW 46.61.100..... 6

 2. The Officer Had A Reasonable, Articulate Suspicion That A Traffic Infraction Had Occurred When He Observed Defendant Cross Over The Center Line..... 6

 C. THE QUALIFIER “NEARLY AS PRACTICABLE” DOES NOT APPLY TO RCW 46.61.100..... 7

 1. RCW 46.61.100 (The “Center Line” Statute)..... 8

 2. RCW 46.61.140 (The “Lane Travel” Statute)..... 8

 3. RCW 46.61.670 (The “Edge Line” Statute)..... 9

 D. PRADO DOES NOT APPLY TO RCW 46.61.100..... 12

IV. CONCLUSION..... 16

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>City of Kent v. Beigh</u> , 145 Wn.2d 33, 32 P.3d 258 (2001)	11
<u>Lundberg ex rel. Orient Found. v. Coleman</u> , 115 Wn. App. 172, 160 P.3d 595 (2002).....	11
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	5
<u>State v. Arreola</u> , 176 Wn.2d 284, 290 P.3d 983, 987 (2012).....	5, 7
<u>State v. Broadway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	5
<u>State v. Day</u> , 161 Wn.2d 889, 168 P.3d 1265 (2007).....	7
<u>State v. Enstone</u> , 137 Wn.2d 675, 974 P.2d 828 (1999)	11, 12
<u>State v. Gaines</u> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	5
<u>State v. Garvin</u> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	5
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986)	7
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004)	5
<u>State v. Prado</u> , 145 Wn. App. 646, 186 P.3d 1186 (2008)..	1, 2, 3, 7, 12, 13
<u>State v. Taylor</u> , 97 Wn.2d 724, 649 P.2d 633 (1982)	8
<u>State v. Tijerina</u> , 61 Wn. App. 626, 811 P.2d 241 (1991), <u>review denied</u> , 118 Wn.2d 1007 (1991).....	10
<u>State v. Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009)	5
<u>State v. Winterstein</u> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	5

FEDERAL CASES

<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ..	2, 3, 4, 7
<u>United States v. Botero-Ospina</u> , 71 F.3d 783 (10th Cir. 1995)	15
<u>United States v. Lyons</u> , 7 F.3d 973 (10th Cir. 1993).....	15

OTHER CASES

<u>Dayton v. Erickson</u> , 76 Ohio St.3d 3, 665 N.E.2d 1091 (1996).....	14
<u>Middleburg Hts. v. Quinones</u> , 2007-Ohio-3643 at 6	14
<u>State v. Caron</u> , 534 A.2d 978 (Me. 1987).....	15
<u>State v. Cerny</u> , 28 S.W.3d 796 (Tex. App. 2000)	13
<u>State v. Drogi</u> , 96 Ohio App. 3d 466, 645 N.E.2d 153 (1994).....	14
<u>State v. Gullett</u> , 78 Ohio App.3d 138, 604 N.E. 2d 176 (1992).....	14
<u>State v. Hodge</u> , 147 Ohio App.3d 550, 771 N.E.2d 331 (2002).....	14
<u>State v. Johnson</u> , 105 Ohio App.3d 37, 663 N.E.2d 675 (1995)....	14
<u>State v. Marx</u> , 289 Kan. 657, 664, 215 P.3d 601 (2009)	14
<u>State v. Mays</u> , 119 Ohio St.3d 406, 894 N.E.2d 1204 (2008).....	14
<u>State v. Moeller</u> , CA99-07-128, 2000 WL 1577287 (Ohio Ct. App. Oct. 23, 2000).....	14

<u>State v. Ross</u> , 37 Kan. App. 2d 126, 149 P.3d 876 (2007).....	14
<u>State v. Tague</u> , 676 N.W.2d 197 (Iowa 2004)	14

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 7	5
----------------------------	---

WASHINGTON STATUTES

RCW 46.....	8
RCW 46.04.500	10
RCW 46.37.450	11
RCW 46.61	6, 7
RCW 46.61.100	1, 2, 4, 6, 7, 8, 9, 10, 12, 13
RCW 46.61.100(1)	6, 8
RCW 46.61.100(1)(a)	6
RCW 46.61.100(1)(b)	6
RCW 46.61.100(1)(c)	6
RCW 46.61.100(1)(d)	6
RCW 46.61.100(1)(e)	6
RCW 46.61.100(2)(5)	6
RCW 46.61.105	6
RCW 46.61.110	6
RCW 46.61.120	6
RCW 46.61.125	6
RCW 46.61.140	1, 4, 8, 9, 10, 11, 12, 13
RCW 46.61.140(1)	4, 9, 11, 12
RCW 46.61.140(2)	9, 11
RCW 46.61.140(3)	
RCW 46.61.140(4)	
RCW 46.61.250	11
RCW 46.61.428	11
RCW 46.61.670	9, 10, 11
RCW 46.61.770	11

OTHER AUTHORITIES

Federal Highway Administration, <i>Manual on Uniform Traffic Control</i> Devices § 3B.06 (2009)	10
Iowa Code Ann. § 321.306(1).....	14
Kan. Stat. Ann. § 8-1522(a).....	14
Ohio Revised Code § 4511.33	14
R.C. 4511.33	15
Tex. Transp. Code Ann. § 545.060(a)(1).....	13

I. ISSUE

RCW 46.61.100 restricts incursions over the center line by requiring that vehicles be driven on the right half of the roadway. Does the court's holding in Prado, interpreting the phrase "as nearly as practicable" contained in RCW 46.61.140, apply to RCW 46.61.100, when no such qualification appears in that statute?

II. STATEMENT OF THE CASE

A. FACTS OF THE INCIDENT.

On October 18, 2010, Trooper Eberle was on duty, southbound on State Route 9, when he observed the vehicle ahead of him weaving within its lane for approximately two miles. The two mile section of the roadway is relatively straight, with no debris or branches to cause a driver to swerve; the speed limit is 55 miles per hour. The center of the roadway is a painted yellow line, at times double and at times with dashes. There is also a "rumble strip" down the center for the entire length of the roadway. The vehicle touched the center line three times, each time jerking back into its lane. On the fourth occasion, the vehicle crossed the center line by one tire width. While there was some oncoming traffic at various times during the two mile observation, Trooper Eberle did not recall any oncoming traffic at the time the vehicle crossed over

the center line. Trooper Eberle thought the vehicle crossing the center line was inherently “very dangerous” explaining, “Unfortunately, we don’t have the opportunity to wait until they hit somebody or a thing to stop the car.” Trooper Eberle stopped the vehicle and subsequently arrested the driver, Sarah Huffman, defendant, for driving under the influence of intoxicants. CP 44-52, 60-65, 109-117, 125-130; RP (3/8/11) 7-15, 23-28.¹

B. PROCEDURAL HISTORY.

1. In The District Court.

Defendant moved to suppress all evidence obtained after the stop arguing that there was no reasonable, articulable suspicion under RCW 46.61.140 and State v. Prado.² The State argued that RCW 46.61.140 and Prado did not control under the facts of this case; the stop was lawful under RCW 46.61.100; and the stop was valid under Terry. The only testimony at the suppression hearing was from Trooper Eberle. The court found: Trooper Eberle has training and experience in detecting impaired drivers; on October 18, 2010, Trooper Eberle was on duty in Snohomish County; at

¹ Petitioner prepared a transcript of the recorded proceedings in the District Court. Copies of the transcripts were filed in the Superior Court and are contained in the Clerk’s Papers. Respondent cites to both the transcript and the Clerk’s Papers.

² 145 Wn. App. 646, 186 P.3d 1186 (2008).

approximately 11:45 p.m., Trooper Eberle observed the defendant continuously weaving within her lane for approximately two miles and then briefly cross the centerline for at most a second; the sole basis for stopping defendant was crossing the center line one time. The court concluded that continuously weaving within one's lane, followed by an incursion over the centerline by one tire's width for one second, did not afford a lawful basis for a traffic infraction stop pursuant to the holding in State v. Prado. The court also concluded that based on Trooper Eberle's training and experience, his observations did not give rise to a reasonable suspicion of criminal activity to stop defendant for a Terry³ investigation. The court granted defendant's motion, suppressed the evidence obtained after the stop, and dismissed the case. CP 32-34, 67-68, 70-72, 75-79, 122-123, 135-137, 140-144, 166-168, 189-191, 211-213; RP (3/8/11) 30-31, 33-35, 38-42; RP (3/29/11) 14-16.

The State appealed.

2. In The Superior Court On RALJ Appeal.

On RALJ appeal the State argued the stop was valid under Terry, was not prohibited by Prado, and was lawful under RCW

³ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

46.61.100. CP 176-188, 198-210. The RALJ Court ruled⁴ that the District Court did not err in concluding that defendant's one time incursion over the lane line was not a violation of RCW 46.61.140 under Prado. CP 13-15. However, the RALJ Court also considered the alternate basis argued by the State, that defendant had violated RCW 46.61.100, which requires that vehicles be drive on the right half of a roadway, and concluded that the infraction stop was lawful. CP 15. In reaching this result, the RALJ Court noted that RCW 46.61.100 does not contain the "nearly as practicable" qualifier contained in RCW 46.61.140(1). CP 15. The RALJ Court reversed and remanded the case to the District court for further proceedings. CP 16.

This court granted discretionary review.

III. ARGUMENT

A. STANDARD OF REVIEW.

The appellate court reviews a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the trial court's factual findings and whether the factual

⁴ The RALJ Court rejected, as unsupported by testimony, the argument that the stop was justified under Terry. CP 12-13. The State maintains that upon observing the vehicle weaving for two miles, touching the center line three times, and crossing the center line, the officer had a reasonable, articulable suspicion that the driver was impaired. However, that issue is not before this court on review.

findings support the trial court's conclusions of law. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009), citing State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005); State v. Lorenz, 152 Wn.2d 22, 36 93 P.3d 133 (2004); State v. Broadway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Defendant does not challenge the trial court's finding that she crossed over the center line. Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. State v. Arreola, 176 Wn.2d 284, 290, 290 P.3d 983, 987 (2012); Garvin, 166 Wn.2d at 249; State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). Warrantless traffic stops are constitutional under article I, section 7 of the Washington State Constitution as investigative stops, if based upon at least a reasonable articulable suspicion of either criminal activity or a traffic infraction, and if reasonably limited in scope. Arreola, 176 Wn.2d at 292-293.

B. DRIVING OVER THE CENTER LINE CONSTITUTES A VIOLATION OF RCW 46.61.100

1. RCW 46.61.100.

RCW 46.61.100 (keep right except when passing, etc.), provides in relevant part: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway" RCW 46.61.100(1). The statute lists a number of exceptions, such as overtaking and passing; getting around an obstruction; driving on a two-way roadway with three lanes, and driving on a one-way street.⁵ RCW 46.61.100(1)(a)-(e), (2)-(5). None of the exceptions were present in this case. Subject to the listed exceptions, RCW 46.61.100(1) requires driving to the right of the center line. Nowhere does the qualifier "nearly as practicable" appear in RCW 46.61.100.

2. The Officer Had A Reasonable, Articulable Suspicion That A Traffic Infraction Had Occurred When He Observed Defendant Cross Over The Center Line.

In the present case, the trial court found, and the facts clearly establish, that defendant crossed over the center line. Where law enforcement stops a vehicle, the stop must be based on objective facts sufficient to create a reasonable, articulable

⁵ Limitations on those exceptions are addressed in subsequent sections of Chapter 46.61. See RCW 46.61.105, .110, .120, .125, and .140.

suspicion that a violation of the law has occurred. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) citing Terry v. Ohio, 392 U.S. 1. The suspected underlying act need not be criminal; reasonable suspicion of a non-criminal traffic code violation will support an investigative stop as well. Arreola, 176 Wn.2d at 293; State v. Day, 161 Wn.2d 889, 897-898, 168 P.3d 1265 (2007). The level of articulable suspicion necessary to support an investigatory detention is “a substantial possibility” that a violation has occurred or is about to occur. Kennedy, 107 Wn.2d at 6. In the present case, reasonable, articulable suspicion that a traffic infraction had occurred was present. The RALJ court’s conclusion that the stop was lawful should be affirmed.

C. THE QUALIFIER “NEARLY AS PRACTICABLE” DOES NOT APPLY TO RCW 46.61.100

Defendant contends that under both Prado and canons of statutory construction the “as nearly as practicable” qualifier is implicit or inherent in RCW 46.61.100 and the other sections of Chapter 46.61. Appellant’s Brief at 12, 18, 20, and 23. He argues in effect, that “as nearly as practicable” must be judicially inserted throughout the traffic code wherever lane travel is addressed. Appellant’s Brief at 12-15, 18-24. The court cannot read into a

statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission, unless the omission renders the statute absurd and undermines its sole purpose. State v. Taylor, 97 Wn.2d 724, 728, 649 P.2d 633 (1982). Omitting the qualifier “as nearly as practicable” does not render RCW 46.61.100 absurd nor undermine its purpose.

1. RCW 46.61.100 (The “Center Line” Statute).

Nowhere in RCW 46.61.100 does the qualifier “nearly as practicable” appear. The statute requires on “all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway” RCW 46.61.100(1).

2. RCW 46.61.140 (The “Lane Travel” Statute).

RCW 46.61.140 (driving on roadways laned for travel) is the only section in Title 46 that uses the qualifier “as nearly as practicable.” RCW 46.61.140 provides in relevant part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(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.

RCW 46.61.140(1). The other subsections of this statute address when a driver can and cannot drive in the center lane of a three-lane roadway, and require compliance with traffic control devices relating to slower drivers and prohibiting lane changes. RCW 46.61.140(2), (3), (4). The qualifier “as nearly as practicable,” does not appear in the more specific subsections of RCW 46.61.140.

RCW 46.61.100 and RCW 46.61.140 address different things. The distinction is critical. RCW 46.61.140(1) addresses lane travel generally, requiring a vehicle be driven “as nearly as practicable” in a single lane. On the other hand, RCW 46.61.100 addresses crossing the center line, *into the lane of oncoming traffic*. As Trooper Eberle testified, crossing the centerline is “very dangerous.” CP 50-51, 115-116; RP 3/8/11 14-15. The purposes of these two statutes do not address the same things at all.

3. RCW 46.61.670 (The “Edge Line” Statute).

RCW 46.61.670 (driving with wheels off roadway) also addresses roadway lines and provides in relevant part:

It shall be unlawful to operate or drive any motor vehicle ... 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 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 qualifier “as nearly as practicable” does not appear in this statute. RCW 46.04.500 defines “roadway” as “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.” The Washington appellate court has specifically found that a single limited instance of driving with wheels over the fog line⁶ constitutes a violation of RCW 46.61.670 and provides sufficient justification to perform a stop. State v. Tijerina, 61 Wn. App. 626, 628-629, 811 P.2d 241 (1991), review denied, 118 Wn.2d 1007 (1991).

When the three statutes addressing roadway lines, RCW 46.61.100, RCW 46.61.140 and RCW 46.61.670, are considered together the logic of the Legislative intent is clear. Crossing the centerline is extremely dangerous. A head-on collision multiplies the speed of the vehicles involved. Consequently, RCW 46.61.100 does not include the “nearly as practicable” qualifier. Driving on the shoulder is also dangerous. The shoulder is used for pedestrians,

⁶ “Fog line” is a colloquial term, not a statutory one, and is actually the “edge line” of the roadway . “If used, right edge line pavement markings shall consist of a normal solid white line to delineate the right-hand edge of the roadway.” Federal Highway Administration, *Manual on Uniform Traffic Control Devices* § 3B.06 (2009) (“Edge line markings have unique value as visual references to guide road users during adverse weather and visibility conditions.”)

bicycles, and slow moving or disabled vehicles. RCW 46.37.450; RCW 46.61.250; RCW 46.61.428; RCW 46.61.770. Accordingly, RCW 46.61.670 does not include the “nearly as practicable” qualifier. Only RCW 46.61.140(1), addressing driving on roadways divided into two or more marked lanes for traffic, uses the “as nearly as practicable” qualifier. A collision between two vehicles traveling in the same direction at approximately the same speed typically causes only minor damage. Significantly, the qualifier “as nearly as practicable,” does not appear in the more specific subsections of RCW 46.61.140, addressing when a driver can and cannot drive in the center lane of a three-lane roadway, and requiring compliance with traffic-control devices when directing slower drivers into a specific lane, or when prohibiting lane changes. RCW 46.61.140(2), (3), (4).

Moreover, the “nearly as practicable” qualifier appears only in RCW 46.61.140(1). Where the Legislature uses language in one instance but different language in another in dealing with similar subjects, a difference in legislative intent is indicated. Lundberg ex rel. Orient Found. v. Coleman, 115 Wn. App. 172, 177, 60 P.3d 595 (2002) citing City of Kent v. Beigh, 145 Wn.2d 33, 45-46, 32 P.3d 258 (2001); State v. Enstone, 137 Wn.2d 675, 680–681, 974 P.2d

828 (1999). The Legislature did not intend the qualifier “as nearly as practicable” to apply to RCW 46.61.100.

D. PRADO DOES NOT APPLY TO RCW 46.61.100.

In the present case, the District Court’s conclusion relied on applying on RCW 46.61.140 and analogizing State v. Prado, 145 Wn. App. 646, 186 P.3d 1186 (2008), to defendant’s driving over the center line. However, as shown above, RCW 46.61.140(1) does not govern all situations where one drives a vehicle outside the regular lanes of travel. Driving over the center line is separately proscribed by RCW 46.61.100.

Prado’s “as nearly as practicable” analysis does not apply to crossing the center line. Prado addressed an incursion between two lanes, both *within* the roadway. In Prado, a DUI prosecution, an officer observed a single instance of a vehicle crossing a white line dividing a freeway exit lane from the adjacent lane by two tire widths for one second. Nothing else was observed. Focusing on the language in RCW 46.61.140, that a driver remain in one lane “as nearly as practicable,” the court found that the Legislature’s use of the phrase demonstrated “a recognition that brief incursions over the lane lines will happen,” and that, under the totality of the circumstances, “[a] vehicle crossing over the line for one second by

two tire widths on an exit lane does not justify a belief that the vehicle was operated unlawfully.” Prado, 145 Wn. App. at 649.

The lower court’s reliance on Prado was thus misplaced. Prado examined only a violation of RCW 46.61.140 (the “lane travel” statute). In Prado, the defendant crossed from one lane into an adjacent exit lane. Prado, 145 Wn. App. at 647. There was no indication in Prado that the defendant was crossing the center line, as governed by RCW 46.61.100. This distinction is important in that RCW 46.61.100 does not share the “as nearly as practicable” language of RCW 46.61.140, the language analyzed in Prado, 145 Wn. App. at 648-649.

Defendant’s reliance on out of state jurisprudence is similarly misplaced. In most of cases defendant cites, the court was comparing defendant’s driving against a “lane travel” statute of the jurisdiction that included the “as nearly as practicable” qualifier, the same language analyzed in Prado. In the other two case, the court found there was no violation, without reference any traffic infraction code.

Texas: State v. Cerny, 28 S.W.3d 796, 800 (Tex. App. 2000); (Tex. Transp. Code Ann. § 545.060(a)(1), “shall drive as nearly as practical entirely within a single lane”);

Kansas: State v. Marx, 289 Kan. 657, 664, 215 P.3d 601 (2009); State v. Ross, 37 Kan. App. 2d 126, 149 P.3d 876 (2007); (Kan. Stat. Ann. § 8-1522(a), “vehicle shall be driven as nearly as practicable entirely within a single lane”);

Iowa: State v. Tague, 676 N.W.2d 197, 203 (Iowa 2004);⁷ (Iowa Code Ann. § 321.306(1), “vehicle shall be driven as nearly as practical entirely within a single lane”);

Ohio: State v. Gullett, 78 Ohio App.3d 138, 144, 604 N.E. 2d 176 (1992);⁸ State v. Drogi, 96 Ohio App. 3d 466, 469, 645 N.E.2d 153 (1994);⁹ State v. Johnson, 105 Ohio App.3d 37, 41, 663 N.E.2d 675 (1995);¹⁰ (Ohio Revised Code § 4511.33, “vehicle ... shall be driven as nearly as practical entirely within a single lane”); see State v. Mays, 119 Ohio St.3d 406, 409, 894 N.E.2d 1204 (2008) (“When an officer observes a vehicle drifting back-and-forth across an edge

⁷ In Tague, the defendant was issued a citation for driving left of center. 676 N.W.2d at 200. The court found that the “line that Tague’s vehicle crossed was an edge line marking, not the center line”. 676 N.W.2d at 203.

⁸ Gullett was overruled by Dayton v. Erickson, 76 Ohio St.3d 3, 665 N.E.2d 1091 (1996) (noted in Middleburg Hts. v. Quinones, 2007-Ohio-3643 at 6).

⁹ Drogi was overruled by State v. Hodge, 147 Ohio App.3d 550, 771 N.E.2d 331 (2002) (holding “the statute without question mandates drivers to maintain their vehicle within a lane without some kind of exigent circumstance forcing the vehicle operator to do otherwise”).

¹⁰ Johnson was overruled by Dayton v. Erickson, 76 Ohio St.3d 3, 665 N.E.2d 1091 (1996) (noted in State v. Moeller, CA99-07-128, 2000 WL 1577287 (Ohio Ct. App. Oct. 23, 2000)).

line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33.”);

Maine: In State v. Caron, 534 A.2d 978, 979 (Me. 1987), no traffic infraction code section was cited. The officer stopped vehicle on suspicion the operator was under the influence of intoxicating liquor or asleep. The court concluded that the single, brief straddling of the center line of the undivided highway, with no oncoming traffic in sight and no vehicles passing on the left, did not constitute a violation of any traffic law.

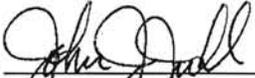
10th Circuit, Utah: In United States v. Lyons, 7 F.3d 973, 976 (10th Cir. 1993), overruled on pretext test grounds by United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995), no traffic infraction code section was cited. Defendant’s vehicle was observed weaving within its lane. The court held that the officer’s inability to articulate any specific reason for pulling the defendant over—other than the officer’s own “sixth sense”—made the stop unreasonable, and thus unconstitutional.

IV. CONCLUSION

For the reasons stated above, the Superior Court should be affirmed, remanding the matter back to the District Court for further proceedings.

Respectfully submitted on February 14, 2014.

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Sent via e-mail

~~On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.~~

I solemnly swear under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office
this 18th day of Feb, 20 14

