

70620-9

70620-9

NO. 70620-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DONALD JONES,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

A police officer stopped Donald Jones's car as he drove along a road at a safe speed, without endangering anyone, because his tire crossed the lane line three times by approximately one inch. The trial judge was unsure whether *Prado's*¹ holding that crossing a fog line one time is insufficient to stop a car would extend to this case and denied Mr. Jones's motion to suppress.

The prosecution charged Mr. Jones with unlawfully possessing a firearm because there was a rifle in his car and he had a prior conviction from Idaho. At a bench trial, the State did not offer the elements or the facts of the Idaho conviction, even though Mr. Jones objected to the insufficient evidence showing the comparability of the out-of-state conviction. Mr. Jones's constitutional right to be free from unreasonable intrusions was violated, and the State failed to meet its burden of proving all of the elements of the crime.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred when it denied Mr. Jones's motion to suppress evidence, contrary to the Fourth Amendment, article I, section 7 of the Washington Constitution, and this Court's interpretation of

RCW 46.61.140 in *State v. Prado*, 145 Wn.App. 646, 186 P.3d 1186 (2008).

2. The court erroneously entered Finding of Fact 2 because it contains assertions about the driving conditions that are not supported by substantial evidence in the record. CP 20 (attached as Appendix A).

3. The prosecutor did not offer sufficient evidence to meet its burden of proving beyond a reasonable doubt that Mr. Jones's Idaho conviction was comparable to a Washington felony, which is an essential element of unlawful possession of a firearm.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. In *Prado*, this Court recognized that the traffic law requiring a person to stay in his lane of travel "as nearly as practicable" recognizes that "brief incursions over the lane lines" are not a basis for police to stop a person's car for unlawful driving. Mr. Jones did not drive unlawfully other than three "minor" instances of "very slightly" driving over the fog line. In the absence of danger to other traffic, does a vehicle's crossing over the line by one inch three times give the police authority to stop the car for unlawful driving?

¹ *State v. Prado*, 145 Wn.App. 646, 186 P.3d 1186 (2008).

2. To convict a person of unlawful possession of a firearm in the second degree, the State had to prove that Mr. Jones was convicted of a crime in Idaho that is comparable to a Washington felony. The prosecution, however, provided the court with only the judgment of an Idaho conviction. In the absence of the statute, charging document, or guilty plea underlying the conviction, did the State meet its burden of proving beyond a reasonable doubt the essential element that the out-of-state conviction was comparable to a Washington felony?

D. STATEMENT OF THE CASE

In the early morning hours of December 16, 2012, Donald Jones was driving his pickup truck on State Route 20. CP 20. Officer Jacqueline Richter began trailing Mr. Jones in her patrol car and followed him for at least one mile. 6/12/12RP 6.² She saw his tire pass over the fog line three times by one inch. 6/12/12RP 3; CP 20. There was not a high volume of traffic and his driving did not endanger other drivers. CP 20. Officer Richter stopped Mr. Jones's car because he

² The verbatim report of proceedings is referred to by the date of the hearing as indicated on the transcript's cover page. Although the suppression hearing occurred in 2013, not 2012, the cover page date will be used to identify the proceeding.

crossed the fog line. 6/12/12RP 6-7; CP 20. Mr. Jones participated in a field sobriety test and passed. CP 12.

Officer Sam King arrived to assist Officer Richter. 8/5/13RP 8. He found an unloaded rifle inside the car that Mr. Jones's close friend, Curtis Speth, had asked Mr. Jones to hold for him until Mr. Speth's divorce was over.³ 8/5/13RP 18; Ex. 2. Mr. Jones admitted he had a prior conviction from Idaho. 8/5/13RP 13-14. Officer King confiscated the rifle. 8/5/13RP 8-9.

Mr. Jones was charged with unlawful possession of a firearm in the second degree under RCW 9.41.040. CP 1. The court denied Mr. Jones's motion to suppress the evidence seized from his car on the grounds that the traffic stop was unlawful. CP 6. He waived his right to a jury trial. CP 25. During the bench trial, the prosecution offered the judgment and commitment document from the Idaho conviction. 8/5/13RP 21-22; Ex. 3. The judgment included neither the elements nor the facts underlying the foreign conviction. Ex. 3. The court found Mr. Jones guilty of unlawful possession of a firearm in the second degree. 8/5/13 RP 43.

E. ARGUMENT

1. **The police lacked legal justification to stop Mr. Jones solely based on his tire crossing the fog line without endangering anyone**

- a. *Police officers lack authority to stop a car without evidence of a crime such as dangerous driving or violations of driving laws.*

The Fourth Amendment prohibits unreasonable, warrantless seizures, and the more protective sweep of article I, section 7 of the Washington Constitution bars the police from seizing a person without authority of law. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010); U.S. Const. amend. IV; Const. art. I, § 7. Exceptions to the warrant requirement are “jealously and carefully drawn,” but in the case where an officer directly observes driving behavior she reasonably believes is unlawful, she is permitted to stop the vehicle without a warrant. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); *State v. Ladson*, 138 Wn.2d 343, 349-350, 979 P.2d 833 (1999). In determining whether a particular stop is justified, the court “evaluate[s] the totality of circumstances presented to the investigating officer.” *Doughty*, 170

³ According to the transcript from Mr. Jones’s bench trial, Mr. Jones’s friend’s name is “Curtis Smith,” but Ex. 2 indicates that the friend’s last name is

Wn.2d at 62. Findings of fact are reviewed for substantial evidence on appeal; conclusions of law based on those facts are reviewed *de novo*. *State v. Ross*, 106 Wn.App. 876, 880, 26 P.3d 298 (2001).

A police officer stopped Mr. Jones solely because his car's tire crossed the fog line three times. 6/12/12RP 7. Otherwise, the car did not endanger any other people or property. CP 20. RCW 46.61.140(1) requires that a driver maintain his vehicle within a single lane of travel "as nearly as practicable" while driving on any two-lane road. This lane travel statute does not impute strict liability. Crossing over a fog line without evidence of dangerous driving, for example, does not justify a stop. *Prado*, 145 Wn. App. at 647.

In *Prado*, an officer observed a driver's car cross over the fog line by two tire widths—a distance of about 16 inches for the average passenger vehicle's tire. 145 Wn.App. at 647. The officer observed no other potential driving violations, and the driving presented no danger to traffic. *Id.* at 649. Washington courts had not yet interpreted RCW 46.61.140's "as nearly as practicable" language, and this Court took discretionary review to determine whether the defendant was driving unlawfully to justify the police stopping his car. *Id.* at 648.

"Speth."

The *Prado* Court examined how other courts interpret statutes with similar terms and found that generally, traversing a lane line alone does not justify a traffic stop. *Id.* at 648-649 (citing *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (Ariz. Ct. App. 2003) (no justification to stop when the defendant briefly traversed the shoulder line); *State v. Gullett*, 78 Ohio App.3d 138, 604 N.E.2d 176 (Ohio Ct. App. 1992) (unreasonable stop when car crossed highway line twice but no danger to other vehicles shows), *State v. Cerny*, 28 S.W.3d 796 (Tex. App. Corpus Christi 2000) (improper to stop driver where wheels touched center line for an unstated period of time)).

The “as nearly as practicable” requirement of RCW 46.61.140 demonstrates the Legislature’s “recognition that brief incursions over the lane lines will happen.” *Prado*, 145 Wn.App. at 648-49. Stopping a car for unlawful driving must be reasonable based on the totality of the circumstances. Where the statute requires driving only “as nearly as practicable” within a single lane, it is unreasonable to stop a car the crosses the lane line one time, even by 16 inches. *Id.* The defendant in *Prado* was unlawfully stopped because his incursion over a fog line “does not justify a belief that the vehicle was operated unlawfully.” *Id.* at 649.

b. *The court misapplied the law by refusing to extend Prado to these minor crossings of a lane line without any resulting danger to others*

Mr. Jones's brief incursions over the fog line did not show that his vehicle was being operated unlawfully. As in *Prado*, Officer Richter stopped Mr. Jones only because he crossed the fog line. CP 20; 6/12/12 RP 6-7. She did not see any other potential driving violations, such as speeding or that his driving indicated impairment or inattention. *Id.* She did not suspect other criminal activity. *Id.* She did not believe his driving was unsafe. *Id.* Mr. Jones's tire only crossed the line by an inch, and the court concluded in its findings that "[t]he driving did not endanger other vehicles." CP 20; 6/12/12RP 7. Mr. Jones "was not endangering anyone." 6/12/12RP 13.

The fact that Mr. Jones's tire crossed the line by an inch three times, as opposed to one time as in *Prado*, does not render Mr. Jones's driving unlawful. After examining *Prado*, the trial court was unsure whether, "any lane violations can be the basis for the stop," but decided that without further direction from this Court, crossing the fog line more than once must be enough. 6/12/12 RP 11-12. But as *Prado* explains, the statute permits sporadic line crossing by drivers because it only requires drivers to stay within the lane "as nearly as possible."

RCW 61.46.140. Determining whether a driver is driving unlawfully requires a totality-of-the-circumstances analysis, which considers potential line traversals in context. The court in *Prado* did not hold that the stop was unjustified because the driver crossed the line only once, rather it held that the stop was unjustified because, by driving mostly within his lane under a statute that mandates drivers to drive within lines “as nearly as practicable,” Mr. Prado had not violated the statute. 145 Wn.App. at 649.

Taken together, three, one-inch incursions across a lane line does not constitute unlawful driving in violation of the statute. In fact, the *Prado* court relied on cases in which multiple lane crossings had occurred. In *Gullett*, for example, a traffic stop was not constitutionally justified under Ohio law when the officer observed “two incidents of crossing the edge line.” 604 N.E.2d at 180. In *Rowe v. Maryland*, the driver’s “momentary crossing of the edge line of the roadway and later touching of that line did not amount” to unsafe driving or violate the statute requiring drivers to keep within lines “as nearly as practicable.” *Rowe v. Maryland*, 769 A.2d 879, 889 (Md. Spec. App. 2001).

Mr. Jones’s brief incursions over the fog line did not demonstrate unlawful driving justifying the police to stop his vehicle.

Prado, 145 Wn.App. at 649. In its findings of fact, the court unreasonably found that “driving is more potentially dangerous” due to “the time of day, [and] time of year.” CP 20 (Finding of Fact 2). Mr. Jones was stopped in the early morning hours of December 16, 2012. CP 20. But this broadly phrased conclusion is not supported by facts in the record before the court. Officer Richter said “there wasn’t a high level of traffic” when she stopped Mr. Jones. 6/12/12RP 6. She did not claim the weather conditions were bad and never said that this time of day or time of year required a driver to make any particular accommodations. No evidence in the record supports this finding.

As the court said in its oral ruling, Mr. Jones only went “very slightly over” the fog line. 6/12/12RP 11. It speculated that this could be potentially dangerous but agreed the testimony was that “there was no other traffic actually endangered at the time.” 6/12/12RP 11. It was unreasonable to stop Mr. Jones for these slight lane violations.

The trial court erred when it concluded that crossing the fog line three times gave the police authority to stop Mr. Jones’s car. 6/12/12RP 12.

c. *Suppression of unlawfully seized evidence is the remedy for the illegal stop.*

The police stopped Mr. Jones in violation of article I, section 7 and the Fourth Amendment. Accordingly, the evidence gathered during that search is inadmissible. *Winterstein*, 167 Wn.2d at 632; *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) (“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.”); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.”). The evidence recovered from this stop supplied the sole basis of the prosecution for unlawful possession of a firearm. 8/5/13RP 8-9. His conviction must be reversed and the charge dismissed with prejudice.

2. The prosecution failed to meet its burden of proving Mr. Jones was prohibited from possessing a firearm due to a comparable out-of-state conviction

a. *The prosecution bears the burden of proving every essential element of the charged crime.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 5; 14; Wash. Const. art. I, §§ 3, 22. It does not meet this burden by asking the court to justify a conviction by “mere surmise or arbitrary assumption.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318, 325 (2013) (quoting *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911)).

Mr. Jones was charged with unlawful possession of a firearm in the second degree, which includes the essential element that the prosecution prove he is prohibited from possessing a firearm due to a prior felony conviction. CP 1; RCW 9.41.040(2). When the prior conviction is from another state, the prosecution must prove that the conviction is of an “out-of-state offense comparable to a felony offense under the laws of this state.” RCW 9.41.010(6).

The State introduced the judgment of Mr. Jones’s conviction from Idaho in an attempt to satisfy this element. 8/5/13RP 19; Ex. 3. However, an out-of-state conviction serves as a valid predicate for unlawful possession of a firearm only if the State proves, beyond a reasonable doubt, that the foreign conviction is comparable to a Washington state felony conviction. RCW 9.41.040(2); RCW 9.41.010(6). The State failed to provide sufficient evidence from which the court could determine that the Idaho conviction was comparable to

a Washington felony because it produced neither the elements nor the facts underlying Mr. Jones's foreign conviction from which the court could conduct the analyses.

b. *The State failed to meet its burden of proving the comparability of Mr. Jones's out-of-state conviction beyond a reasonable doubt when it did not offer the elements of the out-of-state offense or show the underlying facts of conviction.*

If the elements of an out-of-state offense are not identical to, or are narrower than, a Washington statute, the offenses are not legally comparable. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837, 841 (2005). If the elements differ, "the sentencing court must determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). This conduct must have been stipulated to, plead to, or proven beyond a reasonable doubt. *State v. Olsen*, _ Wn.2d _, 2014 WL 1942102, *2 (May 15, 2014); *Lavery*, 154 Wn.2d at 258.

Most case law addressing comparability comes from sentencing hearings, but at a sentencing hearing, the prosecution's burden of proof is lower than at trial, requiring only that the court find the prior conviction's comparability by a preponderance of the evidence. *State v.*

Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). This lesser legal threshold at a sentencing hearing still requires some “minimum indicia of reliability” to prove the prior conviction and its factual basis. *Id.* In contrast, the State’s burden of proof at trial is proof beyond a reasonable doubt, which prohibits a fact-finder from surmising or speculating about the existence of critical facts. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The allocation of the burden of proof maintains the integrity of criminal trials and guards against wrongful convictions. *Winship*, 397 U.S. at 363-64. Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence that the prosecution must establish to garner a conviction. *Id.* at 364. It reduces the risk that factual error results in a conviction and gives “concrete substance to the presumption of innocence.” *Id.* at 363.

At the bench trial, the State did not present evidence proving the comparability of the Idaho offense. It did not present the fact-finder with the elements of the prior conviction, the charging document, a written statement on plea of guilty, or transcripts of a plea hearing or trial testimony. *Id.* It gave only a judgment and commitment document, which states:

[T]he Defendant has been found guilty of the offense of Possession of a Controlled Substance, Methamphetamine, a felony in violation of Idaho Code § 37-2732(c)(1), as charged in the Information on file in the above-entitled matter, the Court having asked if the Defendant had any legal cause to show why judgment should not be pronounced against him and no sufficient cause to the contrary having been shown or appearing to the Court.

It is further ADJUDGED that the Defendant is guilty as charged and convicted and that the offense for which the Defendant is adjudged guilty herein was committed on or about the 24th day of November, 2011.

Ex. 3.

While this document listed the Idaho statute's title and number, the State did not give the court a copy of the statute, or charging documents, or other evidence that Mr. Jones was convicted of elements identical to a Washington felony.

For example, the court did not know whether ingestion and assimilation of a controlled substance would qualify as unlawful possession in Idaho, where it would not qualify in Washington. *See State v. Rudd*, 70 Wn.App. 871, 872-73, 856 P.2d 699 (1993) (“evidence showing assimilation is generally insufficient to support a conviction for possession after ingestion”). In fact, in Idaho, evidence that a person ingested a controlled substance as shown by a positive drug test is sufficient to show the accused person possessed the

controlled substance at the time of ingestion. *State v. Neal*, 314 P.3d 166, 170 (Idaho 2013).

Mr. Jones objected to the insufficiency of the evidence proving the legal and factual basis of Mr. Jones's conviction. 8/5/12RP 3-37, 41. Instead of examining the statute's elements and in the absence of any evidence of Mr. Jones's proven conduct, the court looked at the name of the offense and decided it seemed similar to a Washington conviction for possession of methamphetamine. 8/5/13RP 42-43. It noted Mr. Jones received a suspended prison sentence, and he had a right to appeal in Idaho as he would in Washington. 8/5/13RP 42-43. Based on these observations, and the court's belief that, "[t]here really isn't much to compare between the offense of possession of a controlled substance methamphetamine," it concluded that "the State has prove[n] beyond a reasonable doubt that Mr. Jones was previously convicted... of a felony." *Id.* at 43.

Regardless of the court's intuition, the court's decision was premised on speculation. The court did not know whether Mr. Jones was convicted based on a positive drug test, as in *Neal*, or other conduct that would not be a felony in Washington. Speculation is not a valid basis for proving an essential element. *See Vasquez*, 178 Wn.2d at 16.

The State failed to meet its burden of providing evidence proving beyond a reasonable doubt that Mr. Jones's Idaho conviction is comparable to a similar Washington felony, which is an essential element of the offense.

c. The State's failure to prove the essential elements of the offense requires reversal.

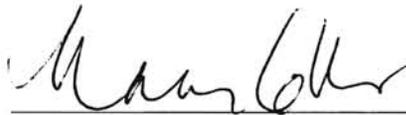
In the absence of any evidence regarding the facts supporting Mr. Jones's Idaho conviction, factual comparability between Mr. Jones's Idaho conviction and a potential Washington felony could not have been proven beyond a reasonable doubt. When there is "insufficient evidence to prove an element of a crime, reversal is required." *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (citing *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)). Mr. Jones's conviction for unlawful possession of a firearm in the second degree should be vacated for insufficiency of the evidence. See *Vasquez*, 178 Wn.2d at 17.

F. CONCLUSION.

The trial court erred when it concluded that, in the absence of dangerous driving, Officer Richter was justified in stopping Mr. Jones after she saw him cross the fog line. This court should reverse the trial court's decision, and all evidence obtained pursuant to the stop should be suppressed. In the alternative, Mr. Jones's conviction for unlawful possession of a firearm in the second degree should be vacated because the State provided neither the elements nor the facts of Mr. Jones's Idaho conviction from which the court could find that the Idaho conviction was comparable to a Washington felony beyond a reasonable doubt.

DATED this 10th day of June 2014.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

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SUPERIOR COURT OF WASHINGTON COUNTY OF SKAGIT	
STATE OF WASHINGTON, Plaintiff,	NO: 13-1-00016-3
vs.	FINDINGS OF FACT AND CONCLUSIONS OF LAW
DONALD KINSELL JONES, Defendant.	

This matter having come before the above entitled Court on June 12, 2013, for: 3.6 Evidentiary Hearing, the State being represented by Karen Pinnell and the Defendant being represented by Nancy Neal, the Court having considered the testimony of Officer Richter, the arguments of counsel and considered the record and files herein, now makes and enters the following findings as to the 3.6 evidentiary hearing:

REC

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FINDINGS OF FACT

1. Defendant Donald Jones was driving on State Route 20, westbound at Thompson Road in the early morning hours of December 16, 2012.
2. Due to the time of day, the time of year, driving is more potentially dangerous. Defendant was driving his car for approximately a mile or so, Officer Richter observed vehicle driving erratically, crossing the fog line, from approximately Reservation Road to Thompson Road on Highway 20. During that distance, Defendant made three incursions over the fog line. There were no other vehicles on the roadway. The driving did not endanger other vehicles. This driving was

ORIGINAL

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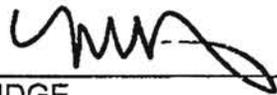
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potentially dangerous and there were more clear lane violations than those noted in the *State v. Prado*, decision. There was a basis for the Officer to stop the vehicle to conduct further investigation as to why there was unsafe lane travel.

ORDER

Defendant's Motion to Suppress is Denied.

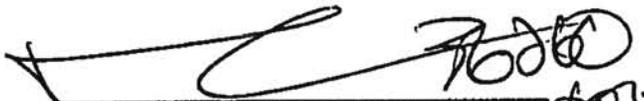
DATED this 20 day of June, 2013.



JUDGE

Presented by:

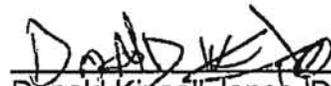
Approved as to form:



KAREN L. PINNELL, WSBA # 35729
Deputy Prosecuting Attorney



NANCY NEAL, WSBA #30357
Attorney for Defendant



Donald Kinsell Jones, Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70620-9-I
v.)	
)	
DONALD JONES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JUNE, 2014.

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