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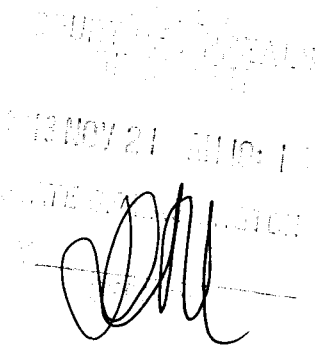


NO. 43522-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent

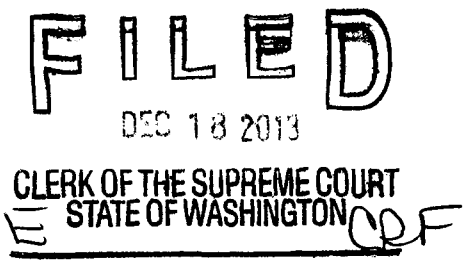
vs.

CHARLES WAYNE MCLEAN,

Petitioner, Pro Se

PETITION FOR REVIEW

Charles McLean, Petitioner Pro Se
33403 NE Morcroft Rd.
La Center Wa, 98629



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ATTATCHMENTS

A. IDENTITY OF PETITIONER

Charles McLean asks this Court to accept review of the decision designated in Part B of this Motion.

B. COURT OF APPEALS DECISION

Petitioner Charles McLean seeks review of the entire decision of the Court of Appeals Division II decision.

A copy of the Court of Appeals decision is attached to this Motion.

C. ISSUES PRESENTED FOR REVIEW

1) Did the arresting officer unconstitutionally stop Mr. McLean.

2) Did Mr.Mclean receive constitutionally ineffective counsel.

D STATEMENT OF THE CASE

The State of Washington charged the Defendant with one count of DWI (DUI) pursuant to RCW 46.61.502. The State pursued a conviction under the theory that the Defendant's ability to drive was affected to an appreciable degree. RCW 46.61.502(1)(b). A jury convicted the Defendant of DUI.

Before trial, a Motion to Suppress Evidence hearing pursuant to CrRLJ 3.6 was heard before the Honorable Judge Vern Schrieber. The motion to suppress was based upon the theory that the arresting officer unconstitutionally stopped the Defendant's vehicle. At the hearing, Washington State Trooper Richard Thompson testified that on August 18, 2010, at approximately 00:28 hours, he was on patrol in Clark County, Washington westbound on SR 500 near the intersection of Andresen Road. He testified that while driving in the right lane he observed a Buick Regal a short distance in front of him in the left lane. Trooper Thompson testified that while following a couple car lengths behind the Defendant, that the vehicle "appeared to be weaving" within the lane of travel and while following the vehicle over the next mile, he observed the left tires cross over the left fog line three times. He clarified in testimony that the tires crossed the line once, and touched the line twice but didn't cross the line.

As the vehicle approached the intersection of SR 500 and Falk Rd, Trooper Thompson moved from the right lane to the left lane behind the Defendants vehicle and activated his emergency lights. Trooper Thompson testified that he pulled the Defendant

over for remaining in the left lane too long, lane violation and suspicion of DUI. However, Trooper Thompson admitted that he was unaware that RCW 46.61.100 creates an exception that if the vehicle is going to turn left, then remaining in that lane is justified. RCW 46.61.100(2)(d). In fact, the defendant's vehicle moved into the left turn lane at Falk Road to make a left turn before the stop occurred.

After the Defendant stopped, Trooper Thompson contacted the Defendant and noted the smell of alcohol about his person, that his speech was slurred, that he had some difficulty producing requested documents, and that he appeared to have some difficulty responding to the Trooper's questions. Based upon these observations, Trooper Thompson had the Defendant get out of his vehicle to perform a "horizontal gaze nystagmus test". Following this test, Trooper Thompson arrested the Defendant on two charges: driving while intoxicated and driving while suspended. Once at the jail, the Defendant refused the breath test.

[1]At trial, the State presented evidence from two witnesses: Christy Mitchell from the Washington State Crime Lab and Trooper Thompson from the Washington State Patrol. Ms. Mitchell, among other things, testified to the following statement: "If an individual displays VGN or vertical gaze nystagmus or VGN, it's indicative of higher dose of that depressant for that individual." (RP 25). Defense Counsel objected and there is an inaudible ruling on the evidence. However, from the context of the trial, it appears that the trial judge overruled the objection because later the prosecutor argues in closing this point. (RP 93).

[1]From this point until Arguments the text is copied from the Appellant's brief filed in the Superior Court of the State of Washington in and for the County of Clark on December 21, 2011. The petitioner is writing this Pro Se and has no transcripts or recordings of the trial.

Trooper Thompson testified to substantially the same facts articulated above with the additional evidence of the field sobriety tests and the Defendant's refusal to take a breath test. However, in his testimony, Trooper Thompson repeatedly linked the facts that he saw to the law in the case without objection from defense counsel. He made the following statements:

1. "One is whether or not they're appreciably affected. The other is whether or not they're over the per se level. So if you're appreciably affected, in other words whatever's in your system whether it's alcohol in this case, or some other type of drug that impairs driving, if you're not appreciably affected, if you're not impaired, you're not going to get arrested for DUI. So if 1do the standardized field sobriety tests, the standard battery of tests with them. And determine that they're not impaired, they do not get arrested." (RP 33-34).

2. Prosecutor: "During your training and experience, have you learned what type of driving patterns might signify a driver who's impaired?" Trooper: "Yes, Ma'am, 1have." (RP 34).

3. Trooper: "I tend to see impaired driving coming at-, what I look for indicators of impaired driving is lane travel, following too close, speeding and improper signal. And I would probably put those in the order of lane travel, speeding, following too close and improper signal. So those are the indicators that-, I had like 400 lane travel stops approximately last year. And 200 DUI arrests. So lane travel is a big one." (RP 34-35).

4. Trooper: "But the standardized field sobriety tests will then tell you-, the walk and turn and one-leg stand will then tell you if that person is in fact impaired or appreciably affected is what we like to call it." (RP 47).

5. Prosecutor: "Based on your training and experience, was the defendant's performance on the horizontal gaze nystagmus consistent with the performance of someone under the influence of alcohol?" Trooper: "Yes, Ma'am, it was." (RP 51).

6. Prosecutor: "Okay. So overall, how did the defendant perform on this test?" Trooper:

"Consistent with being impaired."

7. Trooper: "I was able to do the standard battery of tests with the individual and I did believe he was under the influence of intoxicating liquor.

Prosecutor: So your decision wasn't based on a single one of those 3 tests?

Trooper: No Ma'am.

Prosecutor: Okay. So what did you do once the field sobriety tests were completed?

Trooper: I arrested the subject for DUI.

Prosecutor: Can you describe the arrest procedure?

Trooper: Yes, Ma'am." (A description of the arrest, handcuffing, towing of the defendant's vehicle, and his transport to jail went on for two pages of transcript. This was all without objection). (RP 58-60).

The Prosecutor, later in closing argument, repeatedly asked the jury to believe the Trooper as summarized by the following:

1. Quoting the Trooper directly, she said: "That's what raised the red flag to say, 'That is a pattern of driving that in my experience in training I associate with people who are impaired. With people who are under the influence of an intoxicant. '" (RP 90).

2. Later in closing, the prosecutor reminded the jury that getting arrested for DUI means you are impaired. Again, she quotes the Trooper: "'No, I added up all the component pieces, he wasn't impaired,' he's not going to get arrested for DUI. In this case though, each of those layers leads us to the next bit of evidence which confrrms or corroborates the notion that this is a guy who's impaired." (RP 92).

3. Finally, after summarizing the field sobriety tests, she explicitly asks the jury to trust the Trooper's training and experience and come to the conclusion that arrest means impairment: "So then we get to the issue of, okay, all of these things combined then. The driving, the walking, the odor of alcohol, or intoxicating beverages I should say. The

field sobriety tests, layer on layer on layer on layer, according to the trooper's training and experience, every one of those layers is hitting the mark for, "Yeah, this person's impaired." He says, "You know what? You're under arrest.'?' (RP 95).

E ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) This Court should grant review to vacate and dismiss this case because Trooper Thompson did not constitutionally stop and and detain the Defendant

A seizure occurs if "'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *State* v. *Aranguren, 42* Wn. App. 452,455, 711 P.2d 1096 (1985) (quoting *United States* v, *Mendenhall,* 446 U.S. 544, 554,64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980». The Washington Court of Appeals has held that a seizure occurs when police officers pull up behind a parked vehicle and activate their emergency lights and high beam headlights. *State* v. *Stroud,* 30 Wn. App. 392, 394, 634 P.2d 316 (1981), *review denied,* 96 Wn.2d 1025 (1982). In the present case, the arresting State Trooper was in a marked patrol vehicle and activated his emergency lights directly behind the Defendant's vehicle. The clear and direct actions by the uniformed State Trooper constituted a traffic stop and a seizure of the Defendant.

A law enforcement officer may lawfully perform a traffic stop if he or she has reasonable suspicion that a traffic violation has occurred. A seizure is reasonable only if an officer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *State* v. *Larson,* 93 Wn.2d 638, 644, 611 P.2d 771 (1980) (quoting *Brown* v. *Texas,* 443 U.S. 47, 51, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979)); *see also State* v. *Kennedy,* 107 Wn.2d

1,5, 726 P.2d 445 (1986).

The minimum level of proof necessary to substantiate a reasonable suspicion as defined in *State* v. *Kennedy,* 107 1 Wn.2d 1, 6, 726 P.2d 445 (1986), is "a substantial possibility that criminal conduct has occurred or is about to occur." The facts reported must be specific, articulable, and objective, as opposed to subjective, and then the objective facts must rise to a minimum level of evidence. *State* v. *DeArman;* 54 Wn.App 621, 625, 774 P.2d 1247 (1989). There are two prongs of analysis. First, the evidence must be sufficient in a qualitative way, which means that there must be articulable and objective versus subjective facts. Second, the police officer's subjective motive for a traffic stop, in addition to the reasonableness of the stop, determines the constitutional propriety of the stop. *Id.*

The Trooper stopped the Defendant's vehicle for a presumed violation of RCW 46.61.100.

The citation issued by the Trooper alleges a violation of subsection (3) of the statute, which regulates vehicles towing trailers in excess of 10,000 pounds. In the present matter, it is clear that the Defendant was driving a Buick Regal automobile and not towing a trailer. Though this is a mistake of fact, it should be noted.[2]

The State claims that Trooper Thompson believed that the Defendant committed a traffic infraction based upon RCW 46.61.100(2)

RCW 46.61.100(2) Upon all roadways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lane then available for traffic, except (a) when overtaking and passing another vehicle proceeding in the same direction, (b) when traveling at a speed greater than the traffic flow, (c) when moving left

[2]A copy of the full text of RCW 46.61.100 is attached as well as a copy of the traffic ticket.

to allow traffic to merge, or (d) when preparing for a left turn at an intersection, exit, or into a private road or driveway when such left turn is legally permitted. On any such roadway, a vehicle or combination over ten thousand pounds shall be driven only in the right-hand lane except under the conditions enumerated in (a) through (d) of this subsection.

The record definitively shows that Trooper Thompson, for the majority of the time he followed the Defendant, he was located in what many people would call the "Blind Spot". *He accelerated up to McLean's car and followed behind him in the right lane as McLean continued in the left. MT at 9.*[3]

Trooper Thompson maintained this position behind and to the right of the Defendants vehicle for almost a mile. Effectively, Trooper Thompson, by maintaining his position in the Defendants "Blind Spot" removed any and all opportunity for the Defendant to move out of the left lane and into the right lane. The argument could be made that there was enough room to move over, but as Trooper Thompson and the Defendant were the only two vehicles within sight on the road at this time, it would have been rude to move over and "Cut Off" another driver that close without exceeding the speed limit or possibly causing a road rage incident.

The statute **RCW 47.36.260**[4] **Signs indicating proper lane usage** states: "The department shall erect signs on multilane highways indicating proper use". SR 500 has no signs posted anywhere along its route that say "Keep Right Except to Pass" or any other sign of that nature.

On the Washington State Patrol's information web page for frequently asked question, a question is asked by a unknown source, then answered by the WSP:

[3] Copied from the States Motion for Discretionary Review
[4] A copy of the full text of RCW 47.36.260 is attached

Can I travel in the left lane of traffic all of the time?
No. The law reads "stay to the right except to pass." Signs are posted.[5]

Understandably, a information web site isn't law, but it strongly implies that signs are posted only were the left lane law is inforced.

The Honorable Judge Diane Woolard found the District Court had erred when it denied the defendant's motion to suppress because the evidence presented at the suppression motion had demonstrated that the Trooper's initial stop of the defendant was pretextual. The Superior Court's findings were as follows on this issue:

> The Court, after reviewing the record, considering the briefs submitted by the parties and hearing oral argument, comes to the following conclusions of law:
>
> 1. Pursuant to *State* v. *Prado,* 145 Wn.App. 646 (2008), 145 Wn.App. 646 (2008), Trooper Thompson's stop of Defendant for DUI was not supported by reasonable Suspicion.
>
> 2. Although reasonable suspicion existed for an infraction (violation of RCW 46.61.100(2), "Keep right except when passing, etc."), to the extent that the stop was based on that infraction the stop was pretextual. The Court concludes: "How many cars do we see pulled over because they have been traveling in the left lane? How many times have we all driver down the road behind somebody who is in the left lane and won't pull over? That's you know, that's a stop that doesn't make it at least in my mind, in terms of being anything other than a pretext so under the case law, the stop is not good." *State* v. *Ladson,* 138 Wn.2d 343 (1999).

[5]Text copied directly from the web page.
Source: http://www.wsp.wa.gov/information/faqs.htm
A copy is attached

3. Trooper Thompson gave improper opinion testimony on an ultimate issue to be decided by the jury, and the error was not harmless.

4. As a result of the foregoing Conclusions of Law, insufficient evidence remains to prove the elements of DUI. The case is hereby remanded to District Court for dismissal. with prejudice, consistent with this opinion.[6]

The Superior courts ruling was in favor of the Defendant, but failed to see that the traffic infraction was a invalid stop, lacking any reasonable suspicion, but she gives a reasonable insight as to the purpose of the law, and that is to keep people from impeding traffic and to help improve the flow of traffic, not to pull the only car on the road over as a pretext.

Trooper Thompson's stop was not reasonable based on his mistake of law.

Referencing State v. Kennedy

Whether defendant's rights were violated begins with the stop of the car. If the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); *State v. Larson,* 93 Wn.2d 638, 611 P.2d 771 (1980).

In State v Ladson,

Id. (emphasis added) (quoting Houser, 95 Wash.2d at 149, 622 P.2d 1218 (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S.Ct. 2586, 2590-91, 61 L.Ed.2d 235 (1979), abrogated on other grounds by California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991))). They are, however, subject to "a few ' "jealously and carefully drawn" exceptions' . which 'provide for those cases where the societal costs of obtaining a warrant . outweigh the reasons for prior recourse to a neutral magistrate.' " State v. Hendrickson, 129 Wash.2d 61, 70, 917 P.2d 563 (1996) (quoting State v. Houser, 95 Wash.2d 143, 149, 622 P.2d 1218 (1980)). " 'As a general rule, warrantless searches and seizures are per se unreasonable.' "

Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry [2] Hendrickson, 129 Wash.2d at 71, 917 P.2d 563. The burden is always on the state to prove one of these narrow exceptions. Hendrickson, 129 Wash.2d at 71, 917 P.2d 563 (citing Robert F. Utter, Survey of Washington Search and Seizure Law: 1988 Update, 11 U. Puget Sound L.Rev. 411, 528-80 (1988)). investigative stops.

[6]See Opinion and Remand attatched

In U.S. v. Colin, *supra*, the 9th Circuit Court of Appeal held that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to investigatory traffic stops. (U.S. v. Arvizu, (2002) 534 U.S. at 273; U.S. v. Sigmond-Ballesteros (2002) 285 F.3d 1117, 1121, reh'g en banc denied by 309 F.3d 545 (9th Cir., 2002). In order to justify an investigative stop, a police officer must have reasonable suspicion that a suspect is involved in criminal activity. (U.S. v. Lopez- Soto (2002) 205 F.3d at 1101, 1104-05.) Reasonable suspicion is formed by "specific articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity." *Id.* at 1105 (internal quotation marks and citations omitted); see also U.S. v. Mariscal, (2002) 285 F.3d at 1130; U.S. v. Twilley (2002) 222 F.3d 1092, 1095. An officer's inferences must "be grounded in objective facts and be capable of rational explanation." *Lopez-Soto, supra*, 205 F.3d at 1105 (internal quotation marks and citations omitted); see also *Mariscal, supra*, 285 F.3d at 1130; *U.S. v. Twilley, supra*, 222 F.3d at 1095. In reviewing the district court's (trial court) determination of reasonable suspicion, we must look at the "totality of the circumstances" to see whether the officer had a "particularized and objective basis" for suspecting criminal activity. U.S. v. Arvizu, *supra*, (internal quotation marks and citations omitted); see also U. S. v. Diaz-Juarez (2002) 299 F.3d 1138, 1141-42. Officers are encouraged to draw upon their own specialized training and experience in assessing the "totality of the circumstances." *Arvizu, supra*, 534 U.S. at 750-51. The Officer's inferences must be grounded in objective facts and be capable of rational explanation. In the *Colin* case, the traffic stop was based on an observation by the Officer that the defendant's car touched, but did not cross the fog line (the white line on the right side of the road), as well as touched, but did not cross, the solid yellow line. Accordingly, the defendant did not violate Vehicle Code §21658(a) (lane straddling), nor was the action enough to cause a reasonable officer to think that the defendant was under the influence (VC §23152), therefore, the Officer did not have the requisite reasonable suspicion in order to lawfully make an investigatory traffic stop.

Trooper Thompson testified at trial, that in 2010 he made approximately 400 lane travel stops. A substantial number, which would lead one to believe he should know the law better than most.

Trooper Thompson also claims that the Defendant was weaving in his lane and crossed the fog line. No statute was referenced, but later in appeals the State uses RCW 46.61.140(1)[7] A vehicle shall be driven as nearly as practicable entirely within a

[7]A copy of the full text is attatched

single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. Trooper Thompson did not stop the vehicle for this violation, though he could have, so one has to conclude that at the time he was following the Defendant, he did not feel it was a valid stop.

The Prado court, in affirming the illegality of the stop and suppression of the resulting evidence obtained, stated:

"We believe the legislature's use of the language "as nearly as practicable" demonstrates a recognition that brief incursions over the lane lines will happen. Here, like in *Livingston,* the officer did not testify to anything more than a brief incursion over the lane line. 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. This stop was unlawful and thus we need not undertake a review of whether the search was reasonable. This is particularly so as the officer testified that there was no other traffic present and no danger posed to other vehicles. We agree with the RALJ judge that the totality of the circumstances here do not create a traffic violation under the statute."

The Livingston matter referenced by the court was an Arizona matter wherein the court ruled similarly that when a statute requires a vehicle to be driven as nearly as . practicable within the lane, the mere fact that a vehicle commits brief, momentary, and minor deviations of lane lines does not support the stop of the vehicle. State v. Livingston. 206 Ariz. 145, 75 P.3d 1103 (Ct. App. 2003).

Based on the Trooper Thompson's actions and decisions that lead to the Defendant's arrest, and the facts that have been presented, the Court should grant review to vacate and dismiss this case because Trooper Thompson did not constitutionally stop and and detain the Defendant.

(2) This Court should grant review for a new trial because his counsel was constitutionally ineffective.

The following text till conclusion is copied from the Appellant's Brief filed with the Superior Court in Clark County on December 21, 2011. Understanding court rules is way beyond my pay scale, hopefully the Court will look at this from a different light and allow for review.

It is the Defendant's position that because defense counsel failed to object to the repeated opinion evidence given by Trooper Thompson and relied upon by the prosecutor in closing, it is highly likely that the outcome of the trial would have been different but for defense counsel's failure to object.

RAP 2.5(a) prevents the Defendant from raising a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Because this assignment of error is not a challenge to the trial court's jurisdiction or a challenge to the sufficiency of evidence, subsections (1) and (2) of RAP 2.5(a) are inapplicable.

Regarding RAP 2.5(a)(3), the Supreme Court has chosen a balanced approach when reviewing constitutional claims for the first time of appeal. On one hand, the Supreme Court has indicated that "[c]onstitutional errors are treated specially because they often result in serious injustice to the accused." *State* v. *Scott,* 110 Wn.2d 682,686, 757 P.2d 492 (1988). On the other hand, the Court has also stated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'Identify a constitutional issue not litigated below. „„ *Id.* at 687 (quoting *State* v. *Valladares,* 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part,* 99 Wn.2d 663,664 P.2d 508 (1983».

As a result, the Supreme Court has developed a two-part analysis to determine whether RAP 2.5(a)(3) should allow the Defendant to argue constitutional issues for the first time on appeal. *State* v. *Lynn,* 67 Wn. App. 339, 345, 835 P.2d 251 (1992). First, the

court must determine whether the alleged error is truly constitutional. *Lynn,* 67 Wn. App. at 345. Second, the court must determine whether the alleged error is "manifest," i.e., whether the error had "practical and identifiable consequences in the trial of the case."

State v. *Stein,* 144 Wn.2d 236, 240,27 P.3d 184 (2001); *Lynn,* 67 Wn. App. at 345.

Further, an evidentiary error is not of constitutional magnitude and is prejudicial only if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State* v. *Bourgeois,* 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting *State* v. *Tharp,* 96 Wn.2d 591, 599,637 P.2d 961 (1981». The error is harmless if "the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Id.* (quoting *Nghiem* v. *State,* 73 Wn. App. 405, 413,869 P.2d 1086 (1994». Thus, to show manifest constitutional error through ineffective assistance of counsel, the Defendant must demonstrate that the testimony is inadmissible and that the outcome of this trial would have been different if defense counsel had objected.

To establish ineffective assistance of counsel, the Defendant must show that: (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State* v. *McFarland,* 127 Wn.2d 322,334-35,899 P.2d 1251 (1995). In this analysis, the Defendant must overcome a strong presumption that his counsel's representation was adequate and effective. *McFarland,* 127 Wn.2d at 335; *State* v. *Brett,* 126 Wn.2d 136, 198,892 P.2d 29 (1995). Further, to show prejudice, he must establish

"there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant

"because it "invad[es] the exclusive province of the [jury]." *State* v. *Demery,* 144 Wash.2d 753, 759, 30 P.3d 1278 (2001) (alterations in original) (quoting *City of Seattle* v. *Heatley,* 70 Wash.App. 573, 577, 854 P.2d 658 (1993) (quoting *State* v. *Black,* 109 Wash.2d 336,348, 745 P.2d 12 (1987»); *see also* ER 608 cmt. (noting, "drafters of the Washington rule felt that impeachment by use of opinion is too prejudicial and on a practical level is not easily subject to testing by cross examination or contradiction"). Thus, neither a lay nor an expert witness "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *Black,* 109 Wash.2d at 348, 745 P.2d 12. A law enforcement officer's opinion testimony may be especially prejudicial because the "officer's testimony often carries a special aura of reliability." *Kirkman,* 159 Wash.2d at 928, 155 P.3d 125.

As the Court can readily see in the statement of facts, Trooper Thompson repeatedly testified to the way he evaluates evidence as it relates to the law, how he testified to statistics that compare arrests to observable driving behavior, how he testified to the ultimate issue of fact, how he explained the law, and how he testified that arrest equals guilt. Such testimony cannot be allowed into evidence because of its extremely prejudicial effect. This is especially true where there is a lack of a breath test. Therefore,

defense counsel's failure to object was constitutionally ineffective and this court should remand for a new trial.

The State will of course rely on *City of Seattle* v. *Heatley,* 70 Wash. App. 573 (1993) which stands for the proposition that a police officer can testify as a lay witness to impairment. However, as the record clearly shows, Trooper Thompson testified far beyond the allowable opinion evidence in *Heatley.* Further, the prosecutor used such evidence in her closing argument to convict the Defendant.

F. CONCLUSION

For the above stated reasons, this court should accept review of this case and reverse petitioner's conviction, or remand for a new trial.

DATED this 20 day of NOV, 2013

Respectfully submitted

Charles McLean PRO SE

INFRACTION [X] TRAFFIC [ ] NON-TRAFFIC **I 6323155**

IN THE [X] DISTRICT [ ] MUNICIPAL COURT OF CLARK , WASHINGTON
[X] STATE OF WASHINGTON , PLAINTIFF VS. NAMED DEFENDANT
[ ] COUNTY OF
[ ] CITY/TOWN OF

L.E.A. ORI #: WAWSP COURT ORI #: WA006025J

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO.	STATE	EXPIRES	PHOTO I.D. MATCHED
MCLEAN[illegible] 48	WA	101	[X] YES [ ] NO

NAME: LAST	FIRST	MIDDLE	CDL
MCLEAN	CHARLES	WAYNE	[ ] YES [X] NO

ADDRESS			
[illegible] NE [illegible]			[ ] IF NEW ADDRESS [ ] PASSENGER

CITY	STATE	ZIP CODE	EMPLOYER	LOCATION
[illegible]	WA	98629		

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	EYES	HAIR
[illegible]	W	M	[illegible]	[illegible]	BLU	BLK

RESIDENTIAL PHONE NO.	CELL/PAGER NO.	WORK PHONE NO.
( )	( )	( )

VIOLATION DATE MONTH	DAY	YEAR	TIME 24 HOUR	[ ] INTERPRETER NEEDED
ON OR ABOUT			0021	LANG:

AT LOCATION, [illegible] M.P. 1 CITY/COUNTY OF CLARK

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO.	STATE	EXPIRES	VEH. YR.	MAKE	MODEL	STYLE	COLOR
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		[illegible]

TRAILER #1 LICENSE NO.	STATE	EXPIRES	TR. YR.	TRAILER #2 LICENSE NO.	STATE	EXPIRES	TR. YR.

OWNER/COMPANY IF OTHER THAN DRIVER

ADDRESS CITY STATE ZIP CODE

ACCIDENT NO NR R I F	CMV [ ] YES [X] NO	16+ PASS [ ] YES [X] NO	HAZMAT [ ] YES [X] NO	EXEMPT VEHICLE [ ] FARM [ ] R.V.	[ ] FIRE [ ] OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

#1 VIOLATION/STATUTE CODE RCW [illegible] VEHICLE SPEED IN A ZONE [ ] SMD [ ] PACE [ ] AIRCRAFT

[illegible] 1025

#2 VIOLATION/STATUTE CODE RCW [illegible]

[illegible] PASSING 12400

#3 VIOLATION/STATUTE CODE RCW

PENALTY U.S. $ 1999

RELATED # [illegible] DATE ISSUED [illegible]

READ THE BACK

[X] Served on Violator
[ ] Sent to Court for Mailing
[ ] Referred to Prosecutor

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OFFICER [illegible] 692

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I 6323155

WASHINGTON UNIFORM COURT DOCKET - DEFENDANT COPY

RCW 46.61.100
Keep right except when passing, etc.

(1) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

(b) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

(c) Upon a roadway divided into three marked lanes and providing for two-way movement traffic under the rules applicable thereon;

(d) Upon a street or highway restricted to one-way traffic; or

(e) Upon a highway having three lanes or less, when approaching a stationary authorized emergency vehicle, tow truck or other vehicle providing roadside assistance while operating warning lights with three hundred sixty degree visibility, or police vehicle as described under *RCW 46.61.212(2).

(2) Upon all roadways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lane then available for traffic, except (a) when overtaking and passing another vehicle proceeding in the same direction, (b) when traveling at a speed greater than the traffic flow, (c) when moving left to allow traffic to merge, or (d) when preparing for a left turn at an intersection, exit, or into a private road or driveway when such left turn is legally permitted. On any such roadway, a vehicle or combination over ten thousand pounds shall be driven only in the right-hand lane except under the conditions enumerated in (a) through (d) of this subsection.

(3) No vehicle towing a trailer or no vehicle or combination over ten thousand pounds may be driven in the left-hand lane of a limited access roadway having three or more lanes for traffic moving in one direction except when preparing for a left turn at an intersection, exit, or into a private road or driveway when a left turn is legally permitted. This subsection does not apply to a vehicle using a high occupancy vehicle lane. A high occupancy vehicle lane is not considered the left-hand lane of a roadway.

The department of transportation, in consultation with the Washington state patrol, shall adopt rules specifying (a) those circumstances where it is permissible for other vehicles to use the left lane in case of emergency or to facilitate the orderly flow of traffic, and (b) those segments of limited access roadway to be exempt from this subsection due to the operational characteristics of the roadway.

(4) It is a traffic infraction to drive continuously in the left lane of a multilane roadway when it impedes the flow of other traffic.

(5) Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, a vehicle shall not be driven to the left of the center line of the roadway except when authorized by official traffic control devices designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under subsection (1)(b) of this section. However, this subsection shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private road or driveway.

[2007 c 83 § 2; 1997 c 253 § 1; 1986 c 93 § 2; 1972 ex.s. c 33 § 1; 1969 ex.s. c 281 § 46; 1967 ex.s. c 145 § 58; 1965 ex.s. c 155 § 15.]

Notes:

Rules of court: Monetary penalty schedule -- IRLJ 6.2.

***Reviser's note:** RCW 46.61.212 was amended by 2010 c 252 § 1, changing subsection (2) to subsection (1)(d)(ii), effective January 1, 2011.

Legislative intent -- 1986 c 93: "It is the intent of the legislature, in this 1985 [1986] amendment of RCW 46.61.100, that the left-hand lane on any state highway with two or more lanes in the same direction be used primarily as a passing lane." [1986 c 93 § 1.]

Information on proper use of left-hand lane: RCW 28A.220.050, 46.20.095, 46.82.430, 47.36.260.

RCW 47.36.260
Signs indicating proper lane usage.

The department shall erect signs on multilane highways indicating proper lane usage.

[1986 c 93 § 6.]

Notes:

Keep right except when passing, etc: RCW 46.61.100.

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RCW 46.61.140
Driving on roadways laned for traffic.

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.

(2) Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle traveling in the same direction when such center lane is clear of traffic within a safe distance, or in preparation for making a left turn or where such center lane is at the time allocated exclusively to traffic moving in the same direction that the vehicle is proceeding and such allocation is designated by official traffic-control devices.

(3) Official traffic-control devices may be erected directing slow moving or other specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway and drivers of vehicles shall obey the directions of every such device.

(4) Official traffic-control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every such device.

[1965 ex.s. c 155 § 23.]

Notes:

Rules of court: Monetary penalty schedule -- IRLJ 6.2.

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Appeal Judgement

FILED
2012 APR 18 AM 10: 33
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. CHARLES W. MCLEAN, Defendant.	Superior Court No. 11-1-01628-5 District Court No. 774387 OPINION AND REMAND TO DISTRICT COURT

The Court, after reviewing the record, considering the briefs submitted by the parties and hearing oral argument, comes to the following conclusions of law:

1. Pursuant to *State v. Prado*, 145 Wn.App. 646 (2008), Trooper Thompson's stop of Defendant for DUI was not supported by reasonable suspicion.
2. Although reasonable suspicion existed for an infraction (violation of RCW 46.61.100(2), "Keep right except when passing, etc."), to the extent that the stop was based on that infraction the stop was pretextual. The Court concludes: "How many cars do we see pulled over because they have been traveling in the left lane? How many times have we all driven down the road behind somebody who is in the left lane and won't pull over? That's, you know, that's a stop that doesn't make it at least in

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my mind, in terms of being anything other than a pretext so under the case law, the stop is not good." *State v. Ladson*, 138 Wn.2d 343 (1999).

3. Trooper Thompson gave improper opinion testimony on an ultimate issue to be decided by the jury, and the error was not harmless.
4. As a result of the foregoing Conclusions of Law, insufficient evidence remains to prove the elements of DUI. The case is hereby remanded to District Court for dismissal with prejudice, consistent with this opinion.

DATED this 17 day of April, 2012.

Diane M. Woolard
Superior Court Judge, Dept. 8

Presented by:

Erin Culver, WSBA #35678
Deputy Prosecuting Attorney

Agreed as to form by:

Jack Peterson, WSBA #38362
Attorney for Defendant

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IN THE DISTRICT COURT OF WASHINGTON
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. CHARLES McLEAN, Defendant.	774387, 774388, Case No. 86323155 MOTION TO SUPPRESS EVIDENCE – CrRLJ 3.6

Comes now the Defendant, through his attorney of record, and moves the court to suppress all evidence obtained as a result of the traffic stop in this matter. This motion is based upon CrRLJ 3.6, The Constitutions of the United States and the State of Washington, and the Declaration of Counsel in Support of Motion to Suppress filed concurrently with this motion.

Dated this 13th day of September, 2010.

Respectfully submitted,

STEVEN M. SOWARDS; WSB#20815
ATTORNEY FOR DEFENDANT

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IN THE DISTRICT COURT OF WASHINGTON
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. CHARLES McLEAN, Defendant.	Case No. 774387,774388, 6323155 DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO SUPPRESS

The defendant, CHARLES McLEAN, has made a request that the court suppress all of the evidence gained due to the stop of his vehicle. Mr. McLean bases this request on the lack of any reasonable suspicion of criminal activity prior the stop of her vehicle.

I. FACTS AS ALLEGED

Based upon the police reports filed in this matter, it is believed that the State will provide testimony alleging that on August 18, 2010, at approximately 00:28 hours, Washington State Trooper Richard Thompson was on patrol in Clark County, Washington. He will testify that he observed a Buick Regal travelling westbound on SR 500 in the left lane near the intersection of SR 500 and Andresen Road. He will also

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testify that the vehicle "appeared to be weaving" within the lane of travel and while following the vehicle over the next mile, he observed the left tires cross over the left fog line three times. His report does not state how far the vehicle traveled onto or over the fog line boundary of the left lane.

As the vehicle approached the intersection of SR 500 and Falk Road, the Trooper activated his emergency lights. After activating his emergency lights, the Trooper observed the Defendant discard a lit cigarette out his window. After the vehicles were parked on the side of the highway, the officer contacted the Defendant and stated that he had been pulled over for a left lane violation, lane travel and throwing the cigarette out the window. The remaining testimony from Trooper Thompson is not relevant to the present motion before the court.

II. ARGUMENT AND AUTHORITY

1. The Defendant's vehicle was seized upon the arresting officer's demand that he pull over and park his vehicle.

A seizure occurs if "'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" STATE v. ARANGUREN, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (quoting UNITED STATES v. MENDENHALL, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980)). The Washington Court of Appeals has held that a seizure occurs when police officers pull up behind a parked vehicle and activate their emergency lights and high beam headlights. STATE v. STROUD, 30 Wn. App. 392, 394, 634 P.2d 316 (1981), REVIEW DENIED, 96 Wn.2d 1025 (1982). In the present case, the arresting State Trooper was in a marked patrol vehicle and activated his emergency lights directly

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behind the Defendant's vehicle. The clear and direct actions by the uniformed State Trooper constituted a traffic stop and a seizure of the Defendant.

2. The alleged discard of cigarette cannot be considered when evaluating the Trooper's basis for the seizure of the Defendant's vehicle.

The arresting Trooper clearly states that he observed the Defendant discard a cigarette after he had activated his emergency lights. Accordingly, the alleged cigarette violation cannot be used to substantiate his decision to seize the Defendant's vehicle. The observations in support of determining probable cause for the stopping of the Defendant's vehicle must be limited to the allegations of lane travel.

3. The Seizure Of The Defendant's Vehicle Was Not Reasonable.

A law enforcement officer may lawfully perform a traffic stop if he or she has "probable cause to believe that a traffic violation has occurred." State v. Chelly, 94 Wn. App. 254, 259, 970 P.2d 376 (1999). A seizure is reasonable only if an officer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." State v. Larson, 93 Wn.2d 638, 644, 611 P.2d 771 (1980) (quoting Brown v. Texas, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 99 S. Ct. 2637 (1979)); SEE ALSO State v. Kennedy, 107 Wn.2d 1, 5, 726 P.2d 445 (1986).

The minimum level of proof necessary to substantiate a reasonable suspicion as defined in State v. Kennedy, 107 1 Wn.2d 1, 6, 726 P.2d 445 (1986), is "a substantial possibility that criminal conduct has occurred or is about to occur." The facts reported must be specific, articulable, and objective, as opposed to subjective, and then the objective facts must rise to a minimum level of evidence. State v. DeArman, 54 Wn.App 621, 625, 774 P.2d 1247 (1989). There are two prongs of analysis. First, the evidence

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must be sufficient in a qualitative way, which means that there must be articulable and objective versus subjective facts. Second, the police officer's subjective motive for a traffic stop, in addition to the reasonableness of the stop, determines the constitutional propriety of the stop. Id.

The issue of a vehicle weaving within its lane of travel has recently been addressed in the matter of State v. Prado, 145 Wn.App. 646 (2008). Although the Trooper fails to identify the statute upon which the stop of the Defendant's vehicle was based, RCW 46.61.140 provides that:

> 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.

The Prado court, in affirming the illegality of the stop and suppression of the resulting evidence obtained, stated:

"We believe the legislature's use of the language "as nearly as practicable" demonstrates a recognition that brief incursions over the lane lines will happen. Here, like in *Livingston,* the officer did not testify to anything more than a brief incursion over the lane line. 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. This stop was unlawful and thus we need not undertake a review of whether the search was reasonable. This is particularly so as the officer testified that there was no other traffic present and no danger posed to other vehicles. We agree with the RALJ judge that the totality of the circumstances here do not create a traffic violation under the statute."

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The Livingston matter referenced by the court was an Arizona matter wherein the court ruled similarly that when a statute requires a vehicle to be driven as nearly as practicable within the lane, the mere fact that a vehicle commits brief, momentary, and minor deviations of lane lines does not support the stop of the vehicle. State v. Livingston, 206 Ariz. 145, 75 P.3d 1103 (Ct. App. 2003).

The Trooper also indicates that he stopped the Defendant's vehicle for a presumed violation of RCW 46.61.100. The full text of the statute is attached as Exhibit A.

The citation issued by the Trooper alleges a violation of subsection (3) of the statute, which regulates vehicles towing trailers in excess of 10,000 pounds. In the present matter, it is clear that the Defendant was driving a Buick Regal automobile and not towing a trailer. The State will likely argue that an amendment of the charges to the proper subsection will cure this defect.

The State may reference subsection 1 which requires that "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway." This restriction is subject to many exceptions, including subsection (1)(d) which makes the rule inapplicable to any street or highway restricted to one-way traffic. It is undisputed that SR 500, between the Andresen and Falk Road interchanges, has two travel lanes in each direction separated by a concrete "jersey barrier" median which makes the eastbound and westbound lanes restricted to one-way traffic. This subsection cannot justify the stop of the Defendant's vehicle.

The State may attempt to use subsection (2) of the statue which states "Upon all roadways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lane then available for traffic." This subsection also lists

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a number of exceptions, including (2)(d), which allows left lane travel "when preparing for a left turn at an intersection, exit, or into a private road or driveway when such left turn is legally permitted."

The distance from the Andresen/SR 500 intersection and the Falk Road/SR 500 intersection is just over one mile. The Trooper will testify that he began observing the Defendant's vehicle at the Andresen intersection and initiated the stop of the vehicle "with plenty of distance to stop on the right shoulder prior to Falk". The Trooper's testimony indicates that he observed the Defendant's vehicle for less than one mile, possibly much less.

Just after the Trooper activated his emergency lights, the Defendant's vehicle turned into the left turn lane for Falk Road. The Defendant made this turn within approximately one minute or less of the Trooper beginning his observation of the Defendant's vehicle. This period of observation time is insufficient to justify a stop based upon the referenced statute.

4. The stop and seizure of the Defendant's vehicle for the alleged lane violations was a pretext for the Trooper's subjective intent to obtain evidence of other possible crimes.

Even should the court rule that the allegations of the Trooper describe technical violations of the traffic code, it can be argued that the Trooper was not concerned about the de minimus lane violations or use of the left lane by the Defendant. The Trooper observed the vehicle for less than one mile and for less than one minute. He even referenced the wrong section of the lane violation statute when writing the citation served upon the Defendant.

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The subjective intent of the officer may well have been a very commendable search for drivers who may be driving under the influence of intoxicants. However, the Trooper did not observe the Defendant for a time sufficient to support the infractions alleged. He failed to expend the time to note the correct statute section on the citation. His report indicates that the stop was, in part, based upon the allegation of the discarded cigarette, something that occurred after the traffic stop was initiated. A reasonable and sound argument can be made that the allegations of improper lane travel were only a pre-text to create an opportunity to have direct contact with the Defendant to possibly obtain further evidence of other crimes.

In State v. Ladson, 138 Wn.2d 343 (1999), such pre-textual stops by law enforcement have clearly been ruled to be in violation of Washington's Constitution. After noting that Washington's Constitution provides greater protection than its federal counterpart, the court stated:

"We have observed that ultimately our state constitutional provision is designed to guard against "unreasonable search and seizure, made without probable cause." State v. Fields, 85 Wn.2d 126, 130, 530 P.2d 284 (1975). However, the problem with a pretextual traffic stop is that it is a search or 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. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason."

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The evidence obtained by way of a pre-textual traffic stop was suppressed in Ladson. In the present matter, any evidence obtained by the Trooper after initiating the traffic stop by activating his emergency lights should be similarly suppressed.

IV. CONCLUSION

When looking at the present factual situation as alleged by the arresting Trooper, the court must determine whether the arresting Trooper had sufficient reasons to stop Mr. McLean's vehicle. The observations of the arresting officer in this matter fail to satisfy the requirements for the legal stop of a motor vehicle. Even should the court rule that the arresting Trooper observed de minimus technical violations of the traffic code, the pre-textual reasons for the stop and the Trooper's subjective intent to investigate a possible DUII without the probable cause to do so render the stop unconstitutional. Accordingly, any and all evidence obtained after the initiation of the stop by the activation of the Trooper's emergency lights should be suppressed.

Dated this 13th day of September, 2010.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. CHARLES WAYNE McLEAN, Respondent.	No. 43522-5-II UNPUBLISHED OPINION

WORSWICK, C.J. — The State appeals the superior court's order vacating Charles McLean's district court conviction for driving under the influence of alcohol. The State argues that the superior court erred by ruling that (1) the traffic stop was pretextual and therefore unconstitutional and (2) McLean received ineffective assistance of counsel because his trial counsel failed to object to improper opinion testimony. We agree with the State, reverse the superior court's vacation of McLean's conviction, and reinstate McLean's conviction.

FACTS

Shortly after midnight on August 18, 2010, Trooper Richard Thompson of the Washington State Patrol was traveling westbound on State Route 500 in Clark County. Ahead of Trooper Thompson was a car driven by Charles McLean; no other vehicles were present.

Trooper Thompson had training and experience in identifying impaired drivers. Through this training and experience, he knew that (1) alcohol causes delayed reactions that can result in a driver's drifting through the lane of travel and (2) alcohol impairs a person's ability to simultaneously perform multiple tasks such as maintaining the speed limit, staying within a lane, and using turn signals. Trooper Thompson estimated that in 2010 he stopped about 400 drivers for lane travel violations and he made over 200 arrests for driving under the influence.

McLean's car caught Trooper Thompson's attention because it was weaving from side to side within the left lane. Even though McLean was driving the speed limit, McLean's weaving made Trooper Thompson suspect that McLean might have been impaired. Trooper Thompson followed McLean's car and saw it cross the fog line[1] three times. Trooper Thompson then activated his lights and initiated a traffic stop.

Once McLean pulled over, Trooper Thompson approached and advised that he stopped McLean for driving in the left lane without passing, weaving through the lane, and discarding a lit cigarette after Trooper Thompson activated his emergency lights. Trooper Thompson "immediately smelled an odor of intoxicants coming from the vehicle." Clerk's Papers (CP) at 116.

After administering field sobriety tests, Trooper Thompson arrested McLean for driving under the influence of alcohol. McLean refused to provide a breath sample to measure his blood alcohol content. The State charged McLean with three counts: violating ignition interlock

[1] The fog line separates the left lane from the shoulder and a concrete barrier.

requirements, third degree driving while his license was suspended, and driving under the influence of intoxicants.

McLean filed a motion to suppress evidence obtained from the traffic stop, arguing that Trooper Thompson did not have a reasonable suspicion that McLean was driving under the influence. The district court held a hearing and denied McLean's motion in an oral ruling. McLean then pleaded guilty to violating ignition interlock requirements and driving while his license was suspended, but he proceeded to trial on the driving under the influence charge.

During a jury trial, the State elicited testimony about Trooper Thompson's training and experience in identifying impaired drivers. The State asked Trooper Thompson why he stops some drivers on suspicion of driving under the influence without ultimately arresting them. Trooper Thompson replied that he arrests drivers for driving under the influence only if he believes they are impaired by alcohol or drugs. McLean's counsel did not object to this testimony.

Later, while testifying about the incident involving McLean, Trooper Thompson stated that he arrested McLean for driving under the influence. Again, McLean's counsel did not object. The jury found McLean guilty of driving under the influence and, in a special verdict, found that he refused a lawful request to test his blood or breath.

McLean appealed to the superior court, arguing that (1) the district court erred by denying his motion to suppress because the traffic stop was pretextual and (2) he received ineffective assistance of counsel when his attorney failed to object to Trooper Thompson's testimony. The superior court agreed and remanded for dismissal with prejudice. The State then

sought discretionary review in this court, which our commissioner granted. Ruling Granting Review, *State v. McLean*, No. 43522-5-II (Wash. Ct. App. July 30, 2012).

DISCUSSION

I. DENIAL OF MCLEAN'S MOTION TO SUPPRESS

The State first argues that the superior court erred because the district court correctly denied McLean's motion to suppress evidence from the traffic stop. McLean argues (1) that, as a threshold matter, we cannot effectively review the superior court's reversal because the district court failed to enter written findings and conclusions on the motion to suppress and (2) that the traffic stop was pretextual and therefore unconstitutional. We agree with the State.

RALJ 9.1 governs review of the district court's decision, whether by us or by the superior court. *State v. Ford*, 110 Wn.2d 827, 829-30, 755 P.2d 806 (1988). In reviewing the district court's decision on a motion to suppress, we review factual determinations for substantial evidence and conclusions of law de novo. RALJ 9.1(a), (b); *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Because neither party has challenged the district court's factual determinations, they are verities on appeal. *City of Seattle v. May*, 151 Wn. App. 694, 697, 213 P.3d 945 (2009), *aff'd*, 171 Wn.2d 847 (2011). Accordingly, our review is limited to a de novo determination of whether the district court properly derived conclusions of law from its factual findings. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

A. *This Case Is Reviewable*

As a threshold matter, McLean argues that we cannot effectively review the district court's decision because it failed to enter written findings of fact and conclusions of law following the hearing on McLean's CrRLJ 3.6 motion to suppress. This argument lacks merit.

CrRLJ 3.6(b) requires the district court to "*state* findings of fact and conclusions of law" supporting its ruling on a motion to suppress evidence. (Emphasis added.) But CrRLJ 3.6 does not require the district court's findings and conclusions to be in writing. *State v. Osman*, 147 Wn. App. 867, 881 n.8, 197 P.3d 1198 (2008), *rev'd on other grounds*, 168 Wn.2d 632 (2010); *State v. Anderson*, 51 Wn. App. 775, 778 n.1, 755 P.2d 191 (1988).[2] Accordingly, the absence of written findings and conclusions does not preclude our review of the district court's denial of a motion to suppress. *Anderson*, 51 Wn. App. at 778 n.1.

McLean further claims that the district court's oral decision failed to address his argument that the traffic stop was pretextual. We disagree because the district court properly declined to reach the issue of pretext. The district court concluded that Trooper Thompson stopped McLean on the basis of a reasonable suspicion that McLean was driving under the influence of alcohol. Thus, for Trooper Thompson to conduct a traffic stop to investigate McLean for driving under the influence, "the use of pretext would be unnecessary." *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). McLean's threshold arguments fail.

B. *The Traffic Stop Was Lawful*

The State argues that Trooper Thompson conducted a lawful traffic stop based on a reasonable suspicion that McLean was driving under the influence. McLean argues that the traffic stop was unconstitutional because it was pretextual. We agree with the State.

[2] CrRLJ 3.6 is unlike CrR 3.6, which requires the superior court to enter *written* findings and conclusions on a motion to suppress. *Anderson*, 51 Wn. App. at 778 n.1.

Both the Fourth Amendment and article I, section 7 of the Washington Constitution prohibit unreasonable seizures. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). A traffic stop is a seizure. *Kennedy*, 107 Wn.2d at 4. Warrantless seizures are per se unreasonable, unless an exception to the warrant requirement applies. *Ladson*, 138 Wn.2d at 349. The State bears the burden of establishing an exception to the warrant requirement. *Ladson*, 138 Wn.2d at 350.

One exception is an investigative stop, including a traffic stop, that is based on a police officer's reasonable suspicion of either criminal activity or a traffic infraction. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012); *see Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A reasonable suspicion exists when specific, articulable facts and rational inferences from those facts establish a substantial possibility that criminal activity or a traffic infraction has occurred or is about to occur. *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012).

When reviewing the lawfulness of an investigative stop, we evaluate the totality of the circumstances presented to the police officer. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Those circumstances may include the police officer's training and experience. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Here, the traffic stop was lawful because Trooper Thompson had a reasonable suspicion that McLean was driving under the influence. Trooper Thompson observed McLean's vehicle weave within its lane and cross onto the fog line three times. From the articulable fact of this observation, and from his training and experience identifying driving under the influence, it was rational for Trooper Thompson to infer that there was a substantial possibility that McLean was

driving under the influence. That substantial possibility establishes a reasonable suspicion permitting Trooper Thompson to make a warrantless traffic stop. *See Arreola*, 176 Wn.2d at 292-93; *Snapp*, 174 Wn.2d at 197-98.[3]

Nonetheless, McLean claims that the traffic stop was pretext to investigate him for driving under the influence.[4] We disagree.

A traffic stop is pretextual if it is conducted not to enforce a violation of the traffic code but to investigate some other crime, unrelated to driving, for which reasonable suspicion and a warrant are lacking. *Ladson*, 138 Wn.2d at 349.[5] McLean claims (1) Trooper Thompson had a reasonable suspicion *only* of McLean's driving in the left lane without passing, and (2) Trooper Thompson lacked a reasonable suspicion of driving under the influence. But as we have explained above, Trooper Thompson had a reasonable suspicion that McLean was driving under the influence, and he conducted this traffic stop to investigate that crime. Therefore this traffic stop was not pretextual. McLean's argument fails.

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[3] The State further argues that the superior court misplaced its reliance on *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008) (holding that a one-second incursion over the shoulder line did not establish a reasonable suspicion of a failure to remain "as nearly as practicable" within a single lane of travel). Because we review the district court's decision de novo, we do not address the superior court's reasoning. *State v. Weaver*, 161 Wn. App. 58, 63, 248 P.3d 1116 (2011).

[4] The State asserts that McLean failed to preserve his claim of pretext because he raised it for the first time on appeal in the superior court. But the State is incorrect. In his memorandum supporting his motion to suppress, McLean argued to the district court that the traffic stop was pretextual.

[5] A pretextual traffic stop violates article I, section 7 of the Washington Constitution. *Ladson*, 138 Wn.2d at 353; *see also Arreola*, 176 Wn.2d at 294. But a pretextual traffic stop does not violate the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The State further argues that McLean did not receive ineffective assistance of counsel. McLean claims he received ineffective assistance of counsel when his attorney did not object to Trooper Thompson's allegedly improper opinion testimony. We agree with the State.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact, which we review de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). When claiming ineffective assistance of counsel, a defendant bears the burden of satisfying the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). First, the defendant must show that counsel's performance was deficient. *Fleming*, 142 Wn.2d at 865. Second, the defendant must show that the deficient performance prejudiced the defendant's case. *Fleming*, 142 Wn.2d at 865. A failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687.

McLean's counsel did not object to Trooper Thompson's testimony that (1) he arrests drivers for driving under the influence only if he believes they are impaired by alcohol or drugs and (2) he arrested McLean. McLean now contends that his counsel was ineffective for failing to object because Trooper Thompson's testimony conveyed an improper opinion that McLean was guilty.[6] We disagree.

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[6] McLean concedes that Trooper Thompson properly opined that McLean was intoxicated. *See City of Seattle v. Heatley*, 70 Wn. App. 573, 576, 578-79, 854 P.2d 658 (1993). But McLean argues that Trooper Thompson's testimony "went well beyond proper opinion" because he also stated that he arrested McLean. Br. of Resp't at 26.

McLean fails to carry his burden to show that his attorney's performance was deficient. *See Hendrickson*, 129 Wn.2d at 77-78. When determining whether counsel's performance was deficient, we begin with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient if it falls below an objective standard of reasonableness under all the circumstances. *Fleming*, 142 Wn.2d at 865-66. But counsel's performance is not deficient if it can be characterized as a legitimate trial tactic. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

McLean claims that "there was no possible tactical reason for trial counsel to refrain from objecting" to Trooper Thompson's testimony.[7] Br. of Resp't at 27. But it can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

While laying foundation for testimony based on Trooper Thompson's experience in investigating driving under the influence of alcohol or drugs, the State asked why some of his investigations do not lead to arrests. Trooper Thompson explained that "if you're not impaired, you're not going to get arrested for DUI. So if I do the standardized field sobriety tests . . . [a]nd determine that they're not impaired, they do not get arrested." CP at 106-07. Later, after describing his investigation of McLean and administration of field sobriety tests, Trooper Thompson stated, "I arrested [McLean] for DUI." CP at 131. McLean's attorney did not object to these statements.

[7] McLean asserts that the superior court implicitly determined that counsel's failure to object was not a legitimate trial tactic. But because we review the district court's decision de novo, the superior court's determinations are not binding on us. *Weaver*, 161 Wn. App. at 63.

Under the circumstances here, withholding an objection can be characterized as a legitimate trial tactic seeking to avoid emphasizing Trooper Thompson's testimony about McLean's intoxication and arrest. *See Davis*, 152 Wn.2d at 714. Because McLean's counsel's performance did not fall below an objective standard of reasonableness, it was not deficient. *Fleming*, 142 Wn.2d at 865-66. Therefore McLean's ineffective assistance claim fails.

McLean also fails to demonstrate prejudice. A deficient performance prejudices the defendant's case when, within reasonable probabilities, the trial's result would have been different had the deficient performance not occurred. *Hendrickson*, 129 Wn.2d at 78. Counsel's failure to object to evidence cannot prejudice the defendant unless the trial court would have ruled the evidence inadmissible. *Hendrickson*, 129 Wn.2d at 79-80; *McFarland*, 127 Wn.2d at 337 n.4. Here, McLean fails to show that Trooper Thompson's testimony was inadmissible.

It is generally improper for a witness to opine that the defendant is guilty; to do so is to invade the jury's exclusive province. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). To determine whether a witness's statement is improper opinion testimony on the defendant's guilt, we consider the circumstances of the case, including the type of witness involved, the nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact. *Demery*, 144 Wn.2d at 759; *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

However, a police officer may opine that, based on his experience and observations, the defendant was intoxicated and impaired. *Heatley*, 70 Wn. App. at 579-80. Under the circumstances of this case, Trooper Thompson's testimony did no more than convey his opinion that McLean was intoxicated.

Arguing to the contrary, McLean claims that "the fact of an arrest is not [admissible as] evidence because it constitutes the arresting officer's opinion that the defendant is guilty." Br. of Resp't at 25. But McLean cites no authority stating that the fact of an arrest is categorically inadmissible. And the two cases McLean cites are distinguishable.

McLean first cites *State v. Carlin*, 40 Wn. App. 698, 700 P.2d 323 (1985). In *Carlin*, a police officer testified that a police dog followed a "fresh guilt scent" from the scene of a burglary to the location where one defendant was found. 40 Wn. App. at 703; *see id.* at 700. But the *Carlin* court stated that this testimony "arguably was an improper opinion" before deciding that any error was harmless. 40 Wn. App. at 703. Moreover, stating that a defendant emitted an objectively ascertainable "guilt scent" is not comparable to stating the fact of an arrest.

McLean next cites *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), another case that fails to support his argument. *Warren* is a civil case in which defense counsel argued that the jury should find that a driver was not negligent because police officers decided not to issue a traffic citation at the scene of a car accident. 71 Wn.2d at 517. *Warren* says nothing about admitting evidence showing the fact of a criminal defendant's arrest.

Because McLean fails to show that evidence of his arrest was inadmissible, his attorney's failure to object to this evidence did not prejudice his case. McLean's ineffective assistance of counsel claim fails.

The district court properly denied McLean's motion to suppress, and McLean received the effective assistance of counsel. Therefore, we reverse the superior court's vacation of McLean's conviction, and we reinstate McLean's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Johanson, J.