

NO. 65553-1-1

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

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STATE OF WASHINGTON,

Petitioner,

v.

TIMOTHY P. GIDDENS,

Respondent.

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STATE OF WASHINGTON

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BRIEF OF PETITIONER

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MARK K. ROE  
Prosecuting Attorney

CHARLES F. BLACKMAN  
Deputy Prosecuting Attorney  
Attorney for Petitioner

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in suppressing all evidence gleaned after the stop of the defendant's vehicle.

2. The trial court erred in dismissing the prosecution.

3. The Superior Court on RALJ appeal erred in affirming the trial court based on a factual issue neither litigated nor developed below.

4. Assuming the Superior Court did not exceed the scope of appellate review, it erred in concluding that a late-night stop for an observed infraction or for erratic driving was unlawful, as a pretext to investigate for DUI.

## **II. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Can a Superior Court on RALJ appeal affirm on a basis that was not raised by the parties, if that affirmance depends on factual issues that were not litigated or developed in the trial court?

2. When a police officer observes a motorist commit the infraction of improper lane travel or driving off the roadway, and the officer believes that this infraction might have resulted from the driver's intoxication, is the stop unlawful as a pretext?

### **III. STATEMENT OF THE CASE**

#### **A. FACTUAL FINDINGS RE THE TRAFFIC STOP.**

The factual findings of the trial court, Snohomish County District Court, Everett Division, are not in dispute. The trial court's findings established that defendant was driving a car eastbound on 88<sup>th</sup> St. NE, a two lane road in Marysville, at 3:00 am on July 2, 2008. 1 CP 184-86 (decision of trial court). He was observed by Trooper R. Oliphant. Id. The trial court further found:

4. [The] road contains [c]learly marked fog lines on each lane.

5. Fog lines are the lines that separate the lane of travel from the areas that are not considered part of the roadway.

6. [The] Trooper observe[d] the Defendant's tires drift past the fog line, although how far past the line is not in evidence. The record also does not record for what period of time the tires drifted over the fog line.

7. The drifting occurred two times for an unspecified time and length of travel over a total distance of approximately 200-250 feet[.]

...

10. There were no other indications of poor driving, apart from what has already been described.

Id.; see also 1 CP 50, 53, 56 (Trooper's testimony). The RALJ court added two unchallenged findings; namely, that a) a fog line was on each side of the road "with a bit of a shoulder;" and b) Trooper

Olipphant had testified he was on his way home after coming off shift on the morning in question. 1 CP 17; see 1 CP 49, 53 (Trooper's testimony).

The Trooper made the usual observations concerning alcohol intoxication immediately upon contacting the defendant, and ultimately arrested Mr. Giddens for DUI. 1 CP 56-85.

**B. SUPPRESSION MOTION AND RULING IN TRIAL COURT;  
DENIAL OF MOTION FOR RECONSIDERATION.**

Respondent, as defendant below, filed a motion challenging whether the trooper had a reasonable articulable suspicion that a crime had occurred or was occurring sufficient to support a stop of the vehicle. A testimonial hearing was held August 9, 2009, before judge pro tem. Joanna Bender. See 1 CP 45-127 (transcript of pretrial hearing).<sup>1</sup>

The State argued the trooper was justified in stopping the vehicle because he had observed a lane travel violation contrary to RCW 46.61.140(1), which provides:

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.

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<sup>1</sup> The transcript of the hearing in the trial court is designated as Clerk's Papers here.

RCW 46.61.170(1); see 1 CP 112-15, 118-20 (argument). He argued actually crossing twice over a fogline was more egregious than, and distinguished the case from, State v. Prado, 145 Wn. App. 646, 186 P.3d 1186 (2008) (holding *de minimis* incursions over lane line insufficient for stop).<sup>2</sup> Id. The trial court disagreed:

. . . I am going to find that there was not probable cause to stop. . . . [T]he testimony was that the defendant drifted over the fog line twice. I am considering the fact that it happened within a very short distance, and I do think that fact weighs in the State's favor. But I don't know what drifting means. I don't know how far off of the line it was. I don't know for what period of time it was. I don't have any testimony of any evasive action taken by the defendant or anyone else, or any danger posed to the defendant or anyone else. I don't have any testimony of any significant corrective maneuvers such as drifting within the lane of travel, of speed, of failure to signal. In short, I don't have evidence of either an amalgamation of minor infractions or a very serious infraction. And by serious I mean some instant where a significant danger was posed to somebody.

And the bottom line is that Prado really stands for the fact that a very minor deviation from the lane of travel may not be an infraction at all, depending on the circumstances. The circumstances that Prado asks the Court to consider include whether there was erratic driving or safety problems posed by the defendant's behavior. On the record before me, I can't make that factual conclusion. I do think it's also notable that in the Prado case the deviation from the assigned lane was fairly substantial. Here I just don't

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<sup>2</sup> For a result contrary to Prado, see Dods v. State, 240 P.3d 1208 (Wyo. 2010) (crossing over fogline violates Wyoming's lane travel statute, despite its identical "as nearly as practicable" language).

have the evidence to know whether it was or not. Based upon all of that, I am going to make a finding that there was not probable cause to stop.

1 CP 120-22. In its written ruling, the trial court held the officer did not have articulable suspicion that an infraction had occurred per RCW 46.61.140(1), based on Prado; and that the officer also did not have articulable suspicion of the crime of DUI based on the observed driving. 1 CP 185. The trial court suppressed all evidence gathered after the stop, and, since this effectively terminated the case, dismissed the prosecution. 1 CP 122, 185. It agreed this satisfied RALJ 2.2, to permit a State's appeal. 1 CP 122.

The State timely asked the trial court to reconsider its ruling as a violation of a separate infraction, RCW 46.61.670. 1 CP 187-88. The State argued that while RCW 46.61.140(1) governs crossing or drifting lane-to-lane *within the roadway*, RCW 46.61.670 governed drifting or crossing over the fog line *off the roadway* onto the shoulder. The latter statute reads in relevant part:

It shall be unlawful to operate or drive any vehicle . . . over or along any pavement or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway thereof[.]

RCW 46.61.670. Given that the latter infraction statute, unlike the former, has no "as nearly as practicable" qualifier, and speaks in starker terms, the State argued the defendant's driving violated this

statute, and the stop was justified. 1 CP 187-88. The State noted this has been found to be a lawful basis for an infraction stop. Id., citing State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991), review denied, 118 Wn.2d 1007 (1991). The trial judge in a written decision “considered the brief filed by the State, as well as the full record in this matter” and denied the motion for reconsideration. 1 CP 189. The State timely appealed as a matter of right. RALJ 2.2(c)(2).

**C. DECISION OF THE RALJ COURT AFFIRMING TRIAL COURT BASED ON PRETEXT STOP, AN ARGUMENT NOT RAISED BY THE PARTIES.**

The RALJ court, the Snohomish County Superior Court, the Hon. Ronald L. Castleberry, initially questioned whether the State had a right to appeal at all. 1 CP 38; Verbatim Report of Proceedings 2-5. The State briefed the matter. 1 CP 33-37. At a second hearing the RALJ court, convinced the State could proceed, affirmed the trial court, but not based on either infraction statute. Instead, noting an appellate court can affirm on any basis supported by the record, it held the stop was an unlawful pretext stop:

[T]estimony from the Trooper reveals that he was on his way home at approximately 3:00 or 3:30 am on the morning in question. . . . He testified that he

observed defendant's vehicle travel over the fog line twice and stopped the vehicle. This court finds . . . given the circumstances, the officer, in fact, stopped the vehicle on the basis that he suspected the defendant was driving under the influence of some substance. The claim that the officer intended to stop the vehicle for observed lane travel violations was a pretext for the officer's intent to engage in a further DUI investigation. As a result, the lower court's suppression of the evidence and subsequent dismissal is affirmed.

In this court's opinion it is doubtful that a trooper on his way home at 3:00 or 3:30 AM after his shift had been completed would stop a driver for simply crossing the fog line. It is more reasonable to conclude that in fact he was stopping the defendant because he believed the defendant was under the influence.

1 CP 17-18, citing State v. Montes-Malindas, 144 Wn. App. 254, 182 P.3d 999 (2008); see also Verbatim Report of Proceedings 16-17 (oral ruling). This necessitated a finding not made below; namely, that "given the circumstances, the officer, in fact, stopped the vehicle on the basis that he suspected the defendant was driving under the influence of some substance." 1 CP 17. The RALJ court added that the record did not support a finding that the officer's subjective intent was to cite for a "wheel off the roadway" infraction. 1 CP 18. Neither side had argued pretext, and neither side had developed facts below to address the question. In particular, Trooper Oliphant was never asked what his subjective

intent had been in stopping the defendant. See 1 CP 46-85 (direct of Trooper Oliphant), 85-87 (cross-examination), 105-09 (rebuttal).<sup>3</sup>

#### **D. THIS COURT'S GRANT OF DISCRETIONARY REVIEW.**

The State timely sought discretionary review in this Court. It sought review on three grounds: first, that the RALJ court had erred by exceeding the scope of appellate review, in affirming on grounds not litigated below, and upon an insufficient factual record; secondly, that if the RALJ court properly reached the issue, that it erred in concluding the stop was an unlawful pretext stop, since an investigation for DUI was still an offense "related to the driving;" and thirdly, that the trial court erred in ignoring the distinction between crossing over lane dividers *within* the roadway, as in Prado, and crossing over a fogline *off* the roadway onto the shoulder, as here. This Court granted review on the first two grounds, but not on the third. See Order Granting Discretionary Review.

### **IV. ARGUMENT**

#### **A. THE RALJ COURT ERRED IN BASING ITS DECISION ON FACTS NOT FOUND BELOW.**

An appellate court can affirm on a ground not presented to

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<sup>3</sup> The Trooper testified he was coming off shift. 1 CP 46. He described his duties on patrol as "Just work patrol, go out, work speed, to find people driving under the influence, drugs, anything." Id.

or considered by the trial court, but only if the record is sufficiently developed to fairly consider the ground. State v. Lakotiy, 151 Wn. App. 699, 707, 214 P.3d 181 (2009), review denied, 168 Wn.2d 1026 (2010), citing RAP 2.5(a). The alternative ground or theory, to be fairly considered, must be “established by the pleadings and supported by proof.” Id. “While we may affirm a trial court’s decision on a different ground if the record is sufficiently developed to consider the ground fairly, [there is] no authority for reversing a trial court on alternative grounds not considered below.” State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997).

Here, the RALJ court affirmed on an alternate ground or theory for which the record was not sufficiently developed.

Generally the lawfulness of a traffic stop – whether based on the commission of an infraction, or on articulable suspicion that a crime is occurring – is examined based on an objective standard. An officer detaining a driver for an infraction notice must possess “reasonable cause,” that is, facts and circumstances within the officer’s knowledge sufficient to warrant a cautious person’s belief that an infraction has been committed. IRLJ 2.2(b)(1); RCW 7.80.050(3); State v. Cole, 73 Wn. App. 844, 849, 871 P.2d 656 (1994), review denied, 125 Wn.2d 1003 (1994); overruled on other

grounds by Maryland v. Wilson, U.S., 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). For a “Terry stop” to be lawful, the State must be able to point to “specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.” State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). Such facts are “judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” See State v. Barber, 118 Wn.2d 335, 343, 823 P.2d 1068 (1992) (quoting Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). These then are objective inquiries, for both infraction and Terry stops.

On the other hand, the “essence” of a pretextual traffic stop is that “the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.” State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). “When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the *subjective intent of the officer* as well as the objective reasonableness of the officer's behavior.” Id. at 358-59 (emphasis

added). This subjective component makes pretext-stop analysis a qualitatively different inquiry. Yet subjective intent was not developed in the trial court, because neither litigant had felt the need to. Instead, the RALJ court inferred it on its own:

[G]iven the circumstances, the officer, in fact, stopped the vehicle on the basis that he suspected the defendant was driving under the influence of some substance. The claim that the officer intended to stop the vehicle for observed lane travel violations was a pretext for the officer's intent to engage in a further DUI investigation. . . . In this court's opinion it is doubtful that a trooper on his way home at 3:00 or 3:30 AM after his shift had been completed would stop a driver for simply crossing the fog line. It is more reasonable to conclude that in fact he was stopping the defendant because he believed the defendant was under the influence.

1 CP 17-18; see also Verbatim Report of Proceedings 17. Given the very different analytical standard, the record from the trial court was not sufficiently developed to fairly consider this alternate ground. See Lakotiy, 151 Wn. App. at 707. It was hardly established by the pleadings, nor was it supported by proof. Id. A reviewing court may only infer facts that have substantial evidentiary support in the record. State v. Weber, 159 Wn. App. 779, 787, 247 P.3d 782 (2011). These did not. The RALJ court exceeded the scope of its appellate review when it decided on this alternate ground.

Caselaw supports reversal. In Rosalez, a DUI defendant sought to have his breath-test result suppressed based on alleged violations of the protocols at RCW 46.61.506; alleged violations of ER 702 and 703, governing expert testimony; and on due process grounds. State v. Rosalez, 159 Wn. App. 173, 175-77, 246 P.3d 219 (2010). The trial court had denied the suppression motion, finding that shortcomings, *inter alia* by the former manager of the State Toxicology Lab, Ann Marie Gordon, however blameworthy went to weight, not admissibility. Id. On RALJ appeal the superior court reversed based on the alleged violations of the statutory protocols and on due process grounds. Id. But it also reversed on a third argument not raised below, namely, that the trial court did not exercise its inherent discretion under ER 403 to balance the “obvious and substantial danger of prejudice caused by the extensive misconduct of the [state toxicology lab] staff against the probative value of the breath test evidence.” Id. at 177. Since an ER 403 argument had not been raised in the trial court, Division III held that the RALJ court had exceeded the scope of its appellate review, and reversed and remanded. Id. at 178-80.

Allegedly failing to balance prejudice against probative value under an ER 403 exercise of discretion is different than measuring

compliance with statutory protocols or upholding standards governing expert testimony. There is an even greater discrepancy between a subjective and an objective standard to measure the lawfulness of a stop. Like in Rosalez – even more so than in Rosalez – the RALJ court exceeded the scope of appellate review in deciding the appeal on pretext-stop grounds without an adequate record of the officer’s subjective intent to support it. The matter should be reversed and remanded for the RALJ court to decide the appeal on the issues briefed.

**B. THE RALJ COURT ERRED IN CONCLUDING THAT AN INFRACTION STOP, COUPLED WITH SUSPICION OF DUI, IS UNCONSTITUTIONAL.**

Assuming *arguendo* that the RALJ court did not exceed the scope of appellate review, it erred as a matter of law in concluding *sua sponte* that the stop here was an unlawful pretext stop.

**1. Standard Of Review.**

An appellate court conducts de novo review of conclusions of law in a suppression order. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). And whether a warrantless stop is constitutional is a question of law reviewed de novo. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Here, the State as appellant has not assigned error to an exercise of judicial

discretion. Rather, the standard of review is de novo, with no especial deference to the RALJ court.

**2. An Infraction Stop On Suspicion Of DUI Is Not An Unlawful “Pretext” Stop, Because Any Contemplated Further Investigation Is Still “Related To The Driving.”**

On the merits, the RALJ court erred in finding this an unlawful “pretext” stop, even if one were to assume, as the RALJ court did by inference, that the officer’s subjective intent indeed was to investigate for DUI.

“An unlawful pretext stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code.” State v. Montes-Malindas, 144 Wn. App. at 256, citing State v. Ladson, 138 Wn.2d 343, 349, 351, 979 P.2d 833 (1999). In determining whether a stop is pretextual, the totality of the circumstances must be considered, including (as noted above) the subjective intent of the officer and the objective reasonableness of the officer's conduct. State v. Wright, 155 Wn. App. 537, 558-59, 230 P.3d 1063 (2010).

In Ladson, the flagship case, officers on “proactive gang patrol” “tailed” what they deemed a suspicious vehicle and eventually pulled it over for expired tabs. Officers candidly

explained they pulled the car for further gang- or drug-related investigation, not for the driving infraction. When the driver turned out to have a suspended license, a search of the vehicle and occupants yielded contraband and a stolen handgun. Ladson, 138 Wn.2d at 345-47. The Supreme Court held the stop unlawful, as based on a pretext to conduct a criminal investigation *unrelated to the driving*. Id. at 349, 351.

In DeSantiago, an officer saw the defendant exit an apartment complex that was a narcotics “hot spot.” He followed the defendant as he left in his automobile because the officer wanted to identify the license plate and because he was looking for a reason to stop the vehicle. After following for several blocks, the officer saw the defendant make an improper left hand turn and stopped him. Division III held the stop was a pretextual stop. State v. DeSantiago, 97 Wn. App. 446, 452, 983 P.2d 1173 (1999).

In Montes-Malindas (cited by the RALJ court), an officer saw three people in a van “acting nervously” and decided to watch them. One of the other two then switched places with the driver. When the van drove past without its headlights on, the officer stopped it. An arrest of the driver for no valid operator’s license (that is, for having no ID at all) and a search of the vehicle incident

to that arrest yielded a firearm, and methamphetamine was later found in the patrol car where the defendant had been secured. Montes-Malindas, 144 Wn. App. at 256-57. Division III held this to be an unlawful pretext stop, to investigate for a reason other than traffic violations. Id. at 259-63.

In Hoang, on the other hand, an officer, unobserved, was watching people at a late night narcotics “hot spot” in Seattle. He watched a vehicle approach one group of individuals and apparently engage them in conversation. He then saw the vehicle slowly approach a second group, and again engage these in conversation. He then watched the vehicle leave. In doing so, it made a turn without signaling, and the officer pulled behind and stopped it. It turned out the driver’s license was suspended. Division I held this was not a pretext stop, because the officer would have made the routine traffic stop in any case. State v. Hoang, 101 Wn. App. 732, 735-36, 741-42, 6 P.3d 602 (2000). “[P]atrol officers whose suspicions have been aroused may still enforce the traffic code, so long as the enforcement of the traffic code is the actual reason for the stop.” Hoang at 742.

In Johnson an officer “ran” the license plate of a vehicle doing nothing suspicious. Upon learning the registered owner was

suspended, he pulled the car over. Since DWLS is a crime, and that was the crime the officer was stopping the defendant for, the stop was not a pretext stop. State v. Johnson, 155 Wn. App. 270, 273-74, 279-81, 229 P.3d 824 (2010).

In Nichols, a deputy observed a driver acting suspiciously, as if trying to avoid driving in front of him; in doing so, the driver committed an infraction. The officer caught up to the vehicle and stopped it. The driver turned out to have a suspended license, and an investigation ultimately uncovered drugs. State v. Nichols, 161 Wn.2d 1, 4-6, 162 P.3d 1122 (2007). The officer had not elected to commence any investigation before he saw the infraction, nor had he followed the car first before the infractions occurred. *Id.* at 11, 12. The same court that decided Ladson held here that trial counsel had not been ineffective in failing to argue pretext. *Id.* at 11-16 (citing Hoang with approval).

In Weber, a trooper “paced” a speeder and pulled him over shortly before 3:00 a.m. He testified this was the reason for the stop, but also that he was always on the lookout for drunk drivers. State v. Weber, 159 Wn. App. at 783-85. Division III held this was not a pretext stop: “[A] patrol officer who makes a traffic stop in the course of his patrol duties does not commit a pretext stop merely

because there is reason to believe that other criminal activity is afoot.” Weber at 789-90 (citing Nichols and Hoang).

Certain patterns emerge from these cases. First, in those cases finding unlawful pretext, “officers suspected criminal activity and followed vehicle waiting for commission of a traffic infraction so the vehicle could be stopped.” Nichols, 161 Wn.2d at 12. “Tailing” a vehicle until the driver commits an infraction tends to be indicative of pretext. Secondly, “[m]ost cases of pretextual traffic stops . . . follow the pattern of the arresting officer having a suspicion of nontraffic related criminal activity and subsequently following an arrestee’s vehicle until a traffic infraction occurs, initiating the stop, and discovering evidence of an unrelated crime during a search incident to arrest. Johnson, 155 Wn. App. at 280. Thus, if the underlying suspicion is non-traffic, that will tend towards a finding of pretext as well. On the other hand, when an officer happens to see suspicious persons commit an infraction, he can stop for that infraction, despite any other suspicions. Weber, 159 Wn. App. at 789-91; Hoang, 101 Wn. App. at 735-36, 74-42. And an officer generally can stop a vehicle upon confirmation that its registered owner is suspended. Johnson, 155 Wn. App. at 273-74, 278-80.

Here, an officer on routine traffic patrol late at night observed a vehicle twice go over the fog line onto the shoulder, a violation of the “no-wheels-off-the-roadway” infraction at RCW 46.61.670. He had not been “tailing” the driver, and there is nothing to indicate he was thinking of pulling the driver over before he saw the infraction. That the trooper may also have had suspicions of DUI once he saw the infraction (as the RALJ court inferred) did not invalidate the stop, for police were not engaged in a “speculative criminal investigation *unrelated to the driving.*” Montes-Malindas, 144 Wn. App. at 256; Ladson, 138 Wn.2d at 349, 351 (emphasis supplied). DUI is a traffic-code violation, listed in RCW 46.61 under “Motor Vehicles” – “Rules of the Road. RCW 46.61.502, ~504. It is not “unrelated.”<sup>4</sup> This is not the situation as condemned in Ladson, Montes-Malindas, and DeSantiago.

Lastly, the observed driving over the fogline also

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<sup>4</sup> But see State v. Myers, 117 Wn. App. 93, 69 P.3d 367 (2003), review denied, 150 Wn.2d 1027 (2004), where an officer not on routine patrol admitted he “tailed” and pulled over a driver he recognized to check if the driver’s license was suspended (it was not), rather than cite the driver for an observed improper lane change. Myers appears to hold that Ladson’s “not unrelated to the driving” standard only encompasses infractions, not the traffic code generally. Myers, 117 Wn. App. at 97-98. Myers is wrongly decided, for the Supreme Court has never so held. See Nichols, 161 Wn.2d at 8; Ladson, 138 Wn.2d at 349. And this Court is not bound by Myers. Marley v. Dep’t of Labor & Industries, 72 Wn. App. 326, 330, 864 P.2d 960 (1993) (decision of one Division of Court of Appeals does not bind another Division).

independently provided articulable suspicion of the traffic-code violation of DUI under Terry v. Ohio. Terry, 392 U.S. at 21, 25-26; Berkemer v. McCarty, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (Terry applies to vehicle stops); State v. Kennedy, 107 Wn. 2d 1, 4, 726 P.2d 445 (1986) (same); State v. Knight, 42 Kans. App. 2d 893, 895-96, 901-02, 218 P.3d 1177, 1180, 1183-84 (Ks 2009) (infraction of weaving onto shoulder independently affords basis for Terry stop for DUI).

The DUI context is a unique and recurrent one. It involves a traffic-code offense, and one, moreover, where infractions – at least moving ones, like here – can afford articulable suspicion of the crime. Officers out on late-night patrol to some degree suspect *everyone* on the road of possibly being DUI. This does not make every nighttime stop they make impermissible under Ladson. No case holds that to pull over for an observed moving infraction, while also harboring suspicion of DUI, is unlawful. Caselaw in fact is to the contrary. Weber, 159 Wn. App. at 789-91; Hoang, 101 Wn. App. at 735-36, 74-42. Yet the RALJ court so held. In doing so, it not only improperly expanded the scope of appellate review, but also erred on the merits.

**V. CONCLUSION**

The decision of the RALJ court should be *reversed* and the matter remanded.

Respectfully submitted on June 8, 2011.

MARK K. ROE  
Snohomish County Prosecutor

by:   
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CHARLES FRANKLIN BLACKMAN, #19354  
Deputy Prosecuting Attorney  
Attorney for Petitioner