Nº. 47346-1-III

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

STATE OF WASHINGTON
Respondent,

v.

DAVID JAMES KARLSON,
Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 14-1-04402-1
The Honorable Philip Sorensen, Reviewing Judge

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I. REPLY

1. The State misstates the standard of review this court applies when reviewing an RALJ appeal on discretionary review following a direct appeal to the Superior Court.

a. RAP 2.3(d) governs this court's decision of whether to accept discretionary review of an RALJ, not the standard this court applies in reviewing an RALJ once review has been accepted.

As pointed out on page 5 of Mr. Karlson's Opening Brief, when reviewing the decision of a Superior Court on an appeal from a court of limited jurisdiction, the Court of Appeals' inquiry is whether the court of limited jurisdiction committed an error of law and whether substantial evidence supports the factual findings.[1]

> RALJ 9.1 governs review of the district court's decision, whether by us or by the superior court. *State v. Ford*, 110 Wash.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 Wash.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 Wash.App. 694, 697, 213 P.3d 945 (2009), *aff'd*, 171 Wash.2d 847, 256 P.3d 1161 (2011). Accordingly, our review is limited to a de novo determination of whether the district court properly derived

[1] *City of Seattle v. May*, 151 Wn.App. 694, 697, 213 P.3d 945 (2009), *aff'd on other grounds*, 171 Wn.2d 847, 256 P.3d 1161 (2011); RALJ 9.1.

> conclusions of law from its factual findings. *State v. Armenta*, 134 Wash.2d 1, 9, 948 P.2d 1280 (1997).[2]

The State ignores the clear standard stated by Division I in *May* and by this court in *McLean* and, instead, argues that the language of RAP 2.3(d) requires this court to consider the Superior Court's ruling rather than the trial court's ruling. The State is incorrect and fails to read RAP 2.3(d) closely enough.

RAP 2.3(d) is titled, "**Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction,**" and provides, in pertinent part,

> Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:
>
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court.

As the title of the rule and the text of RAP 2.3(d)(1) clearly indicate, RAP 2.3(d)(1) is the standard that governs this court's decision of whether to accept discretionary review of the Superior Court's decision in an RALJ appeal. However, RAP 2.3 ***is not*** the standard of review that this court applies to review of a case once review has been accepted. Once this court has decided to accept

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[2] *State v. McLean*, 178 Wn. App. 236, 242-43, 313 P.3d 1181 (2013) , *review denied*, 179 Wn.2d 1026 (2014).

discretionary review of an RALJ appeal under RAP 2.3, this court then applies the standard discussed in *May* and *McLean*, *supra*.

As discussed in *May* and *McLean*, once the Court of Appeals accepts discretionary review of an RALJ appeal following the Superior Court decision in the appeal, the Court of Appeal applies RALJ 9.1 to conduct a de novo determination of "whether the court of limited jurisdiction committed an error of law and whether substantial evidence supports the factual findings."[3]

b. This court reviews the trial court's decision, not the decision of the Superior Court.

The core issue in this appeal is whether or not the facts known to Trooper Worley at the time he stopped Mr. Karlson's vehicle were sufficient to support an objectively reasonably belief that Mr. Karlson was engaged in criminal activity and, as a result, whether the trial court's finding that probable cause existed to stop the vehicle was an abuse of discretion.[4] Instead of addressing whether the *trial court's* ruling was in error, the State instead spends its brief discussing the Superior Court's decision because of its erroneous conclusion that RAP 2.3(d) requires this court to review the decision of the Superior Court.

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[3] *May*, 151 Wn. App. at 697, 213 P.3d 945.
[4] *See* Appellant's Opening Brief, p. 5-12.

The State's arguments are irrelevant to the inquiry this court must engage in to decide this case, i.e. whether the trial court's findings of fact regarding the stop of Mr. Karlson's vehicle are sufficient to support it's conclusion of law that the stop was lawful.[5]

2. The trial court's denial of Mr. Karlson's motion to suppress is contrary to multiple decisions of the Court of Appeals.

The trial court found that Trooper Worley observed Mr. Karlson for only forty seconds before pulling him over (RP 28), that Mr. Karlson's driving was not unusual with the exception of touching the white border and crossing onto the shoulder (RP 28-29), and that Mr. Karlson didn't swerve in his own lane. RP 29. On the basis of these findings of fact, the trial court concluded that "there [were] observable facts sufficient to justify the stop."[6]

As discussed in Mr. Karlson's Opening Brief, Division I of the Court of Appeals in *State v. Prado*, 145 Wn.App. 646, 649, 186 P.3d 1186 (2008) and *State v. Jones*, 186 Wn.App. 786, 793-794, 347 P.3d 483 (2015), held that a vehicle crossing over a lane dividing line for a short period of time and for a short distance does not justify a belief

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[5] Ultimately, however, the Superior Court's decision is also erroneous for the same reasons as the trial court's decision since the Superior Court did conduct a de novo review of the facts found by the trial court.
[6] RP 30.

that the vehicle was operated unlawfully, even where the vehicle crossed the line multiple times.

Mr. Karlson's case is no different than *Prado* and *Jones*. The trial court found that the only facts known to Trooper Worley that might have indicated that Mr. Karlson's vehicle was being operated improperly were that Mr. Karlson's vehicle crossed the fog line twice. As in *Prado* and *Jones*, this was an insufficient basis to stop Mr. Karlson's vehicle and the stop was unlawful because by using the language that a vehicle must be driven "as nearly as practicable within a single lane" in RCW 46.61.140(1) the legislature recognized that brief incursions over the lane lines will happen.[7]

The trial court's (and Superior Court's) conclusion that the stop of Mr. Karlson's vehicle was supported by probable cause is clearly contrary to *Prado* and *Jones*. While the determination of whether a particular officer had knowledge of facts sufficient to support an investigative stop is a determination that must be made on a case by case basis and by taking the totality of the circumstances into consideration, *Prado* and *Jones* make clear that where the <u>only</u> "suspicious" behavior known to an officer at the time of the stop of a vehicle is that the vehicle's tires pass over a lane line once or even

several times, the officer in that particular instance lacks knowledge of facts sufficient to support an objectively reasonable belief that the vehicle is involved in any criminal activity or violation of any part of the traffic code and the stop is unlawful.

3. *McLean* is distinguishable from this case and does not render the stop of Mr. Karlson's vehicle lawful.

Relying on *State v. McLean*, 178 Wn.App. 236, 244-245, 313 P.3d 1181 (2013), the State argues that the "totality of the circumstances" that a reviewing court must consider include the police officers training and experience and that in this case Trooper Worley's training and experience in dealing with investigating impaired drivers as well as his observation of Mr. Karlson's vehicle weaving in its lane were sufficient to justify stopping Mr. Karlson's vehicle.[8] This argument fails for several reasons. First, the trial court found that there was no observable weaving of Mr. Karlson's vehicle in its lane.[9] Second, if *Jones* and *Prado* prohibit an investigatory stop on the basis of crossing the lane line alone, then a stop based on crossing the lane line and the officer's subjective belief alone is also unlawful. A reviewing court decides whether reasonable suspicion existed based on

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[7] *Prado*, 145 Wn.App. at 649, 186 P.3d 1186.
[8] Brief of Respondent, p. 11.
[9] RP 29.

an objective view of the known facts.[10] The reviewing court does not base its determination of reasonable suspicion upon the officer's subjective belief.[11] Basing a stop on the officers "training and experience in investigating impaired drivers" is basing the stop on the subjective belief of the officer and is the improper standard for a reviewing court to apply in determining the lawfulness of the stop.

Finally, the State appears to suggest that this case is like *McLean* and the stop of Mr. Karlson was lawful. *McLean* is factually distinguishable from this case. In *McLean*, McLean's vehicle was stopped by a State Trooper because it was weaving in its own lane and it crossed the fog line three times and drive in the left lane without passing.[12] This court found that the stop of McLean's vehicle was lawful based on the Trooper's observations combined with the Trooper's training and experience.[13] The significant factual distinctions between *McLean* and Mr. Karlson's case is that here Trooper Worley did not see Mr. Karlson drive in the left lane without passing another vehicle and the trial court found that Mr. Karlson did not weave in his lane. These factual differences distinguish *McLean* from this case and

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[10] *State v. Mitchell*, 80 Wn.App. 143, 147, 906 P.2d 1013 (1995), *review denied* 129 Wn.2d 1019, 919 P.2d 600 (1996).
[11] *Mitchell*, 80 Wn.App. at 147, 906 P.2d 1013.
[12] *McLean*, 178 Wn. App. at 241, 313 P.3d 1181.
[13] *McLean*, 178 Wn. App. at 245, 313 P.3d 1181.

leave *Prado* and *Jones* as the most factually similar cases dealing with the lawfulness of the stop of Mr. Karlson's vehicle.

Prado and *Jones* are clear- where a police officer stops a vehicle knowing only that the vehicle has momentarily crossed a fog line or lane line, that officer has stopped the vehicle without knowledge of a sufficient factual basis to warrant an investigative stop. Only where the officer has knowledge of other facts, such as the vehicle traveling in the left lane without passing as in *McLean*, may the officer lawfully conduct an investigative stop of the vehicle.

II. CONCLUSION

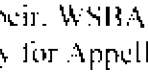
This court must conduct a de novo review of whether the trial court's factual determinations support its determination that the stop of Mr. Karlson's vehicle was lawful. The facts of Mr. Karlson's case are virtually indistinguishable from those in *Prado* and *Jones*. The only observable fact Trooper Worley was aware of when he stopped Mr. Karlson's vehicle was that Mr. Karklson's vehicle had crossed the lane line twice. As a matter of law, knowledge of that fact alone was an insufficient basis to stop Mr. Karklson's vehicle.

For the reasons stated above and in Mr. Karlson's Opening Brief, this Court should vacate Mr. Karlson's conviction and remand

this case for retrial where all evidence discovered pursuant to the stop of his vehicle is suppressed.

DATED this 7 day of January, 2015.

Respectfully submitted.



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CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 19th day of January, 2016, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

David Karlson
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And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached to:

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 19th day of January, 2016.

Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

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