

NO. 47346-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAVID JAMES KARLSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Philip Sorenson

No. 14-1-04402-1

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. The district court denied defendant's motion to suppress, and the Superior Court—acting as a court of review—affirmed that denial. Where the Superior Court conducted a de novo review of the totality of the circumstances of the traffic stop and sufficient observable facts justified the stop, was the Superior Court's decision contrary to existing case law?

B. STATEMENT OF THE CASE.

1. Procedure

On March 13, 2013, the State charged David James Karlson (hereinafter "defendant") with one count of driving under the influence. CP 266–72. The case proceeded to a jury trial before the Honorable Patrick O'Malley. CP 266–72. Prior to trial, defendant filed a motion to suppress under CrR 3.6, challenging the validity of defendant's stop. CP 246– 57. The court subsequently held a hearing, where Trooper Worley testified to his observations. RP 8–30.¹

Trooper Worley stated that on the day in question he observed defendant's vehicle weaving back and forth in its lane, which was on a

¹ The report of proceedings will be referred to by RP and the page number (RP #). The report of proceedings was designated by appellant as CP 29–242.

straight roadway. RP 10. He observed the vehicle drifting over the fog line twice, once going completely onto the shoulder. RP 10, 17. The court also viewed a forty second recording of the stop from the Trooper's patrol car. RP 12–14.

At the conclusion of the hearing, the court found that there were facts sufficient to justify the stop. RP 30. The court specifically noted that defendant's vehicle had crossed the fog line not once but twice, and that on the second occasion, the vehicle swerved into the shoulder of the road. RP 29. The court also noted that it considered the trooper's experience, which the trooper had testified to. RP 30, 12–13.

Defendant's trial began on October 20, 2014. RP 63. Defendant did not testify at trial, and the jury subsequently found him guilty as charged. RP 206. Defendant appealed to the Superior Court challenging the trial court's ruling denying his motion to suppress. CP 266–72. The Superior Court affirmed his convictions. CP 288–89.

2. Facts

On February 14, 2013, Washington State Patrol Trooper Louis Worley observed a vehicle driving and weaving in its lane. RP 75–76. The Trooper watched as the driver drifted over in his lane and his right tire drove on top of the white fog line. RP 76. Trooper Worley moved behind the vehicle and observed as the moving vehicle drifted onto the shoulder and then back onto the roadway. RP 77. Trooper Worley activated his

emergency lights to initiate a traffic stop and the driver pulled over in a “quick jerky motion” by slamming on his brakes. RP 77.

Trooper Worley made contact with the driver, defendant. RP 77. As Trooper Worley approached defendant’s vehicle, he noticed defendant had a difficult time pushing the buttons to roll down his window. RP 78–79. Once defendant opened the window, Trooper Worley immediately noticed an extreme odor of intoxicants emanating from inside the vehicle. RP 79. Trooper Worley observed defendant’s motions were very slow and sluggish, and that he had difficulty grasping the papers that Trooper Worley requested. RP 79.

Trooper Worley asked defendant if he had had anything to drink that evening and defendant admitted to consuming three drinks, the last of which was approximately forty five minutes prior to the stop. RP 80. Defendant subsequently complied with Trooper Worley’s request for him to exit the vehicle. RP 80. As he did so, Trooper Worley noticed defendant was very shaky and uncoordinated with his movements and had trouble keeping himself upright. RP 81. Trooper Worley also observed that the odor of intoxicants remained very strong even after defendant had exited the vehicle. RP 81–82. Defendant’s speech was slow, repetitive, and slurred. RP 82, 85.

Defendant agreed to perform the voluntary field sobriety tests. RP 86. He exhibited six out of six clues on the horizontal nystagmus test. RP 95. Defendant also exhibited eight out of eight clues on the walk and turn

test during which he was unable to maintain balance, and at one point had to lean up against the hood of his car to support himself. RP 100–05. Trooper Worley placed defendant under arrest for driving under the influence.

C. ARGUMENT.

1. THE DECISION OF THE SUPERIOR COURT IS NOT IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS OR THE SUPREME COURT.

a. Standard of review

A trial court's denial of a suppression motion is reviewed for (1) whether its findings are supported by substantial evidence; and, (2) whether its findings support its conclusions of law. *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663 (2013); *see also State v. Levy*, 156 Wn. 2d 709, 733, 132 P.3d 1076 (2006). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn. 2d 641, 644, 870 P.2d 313 (1994). "The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party." *Lewis v. State Dept. of Licensing*, 157 Wn. 2d 446, 468, 139 P.3d 1078 (2006).

Unchallenged findings are verities on appeal. *Hill*, 123 Wn. 2d at 644. Whether the trial court's findings support its conclusions of law is reviewed de novo. *State v. Dancer*, 174 Wn. App. 666, 670, 300 P.3d (2013); *see also State v. McCormack*, 117 Wn. 2d 141, 143, 812 P.2d 483 (1991).

"Conclusions entered by a trial court following a suppression hearing carry great significance for a reviewing court." *State v. Collins*, 121 Wn. 2d 168, 174, 847 P.2d 919 (1993). "It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge." *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (quoting *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985)).

Unlike in Superior Court, a district court does not have to enter written findings of fact and conclusions of law. *See* CrRLJ 3.6(b) ("the court shall state findings of fact and conclusions of law"). Thus, the trial court's conclusions of law challenged by defendant were taken directly from the district court record of proceedings. In his initial appeal, defendant challenged the trial court's conclusion of law that there were sufficient observable facts to justify the stop of defendant's vehicle. CP 22-23; *see* RP 30. The Superior Court received briefing and, after hearing argument by both parties on the matter, entered an order affirming defendant's conviction and finding "[t]he trial court did not err when it

denied defendant's motion to suppress as there were sufficient observable facts to justify the stop of defendant's vehicle." CP 288–89.

Defendant argues that the "*trial court* applied the wrong legal test" and the "*trial court's* decision is contrary" to relevant law. *See* Br. of App. p. 10 (emphasis added). RAP 2.3(d), however, states that discretionary review will only be accepted if "the decision of the *superior court* is in conflict with a decision of the Court of Appeals or the Supreme Court." RAP 2.3(d) (emphasis added). The Superior Court reviews conclusions of law de novo and may affirm on any grounds supported by the record. *See Norlin*, 134 Wn.2d at 582. The issue is whether the Superior Court's decision is in conflict with the law.

- b. The Superior Court's decision was not contrary to case law because it looked at the totality of the circumstances surrounding the traffic stop and found sufficient observable facts justified the stop.

The Superior Court's decision that the trial court did not err when it denied defendant's motion to suppress is not contrary to case law. The Superior Court properly concluded that the trial court reached its conclusions of law by considering both Trooper Worley's subjective intent as well as objectively and independently taking into account the facts at hand, in accordance with the relevant case law.

Warrantless traffic stops based upon a reasonable and articulable suspicion of either criminal activity or a traffic infraction are constitutional under Article I, Section 7 as investigatory stops. *State v. Arreola*, 176 Wn.2d 284, 292–93, 290 P.3d 983 (2012); *See also State v. Ladson*, 138 Wn.2d 343, 350, 351–52, 979 P.2d 833 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). This exception to the warrant requirement for investigatory stops has been extended beyond criminal activity to the investigation of traffic infractions because of “the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation.” *State v. Day*, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007). In considering the validity of these stops, courts 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.” *Arreola*, 176 Wn. 2d at 296 (quoting *Ladson*, 138 Wn. 2d at 359).

Defendant argued to the Superior Court, and again argues to this court, that the trial court improperly reached its conclusion by basing its determination solely on the trooper’s subjective determination. The record from district court, however, contains evidence that the trial court considered both the subjective intent of the trooper in conducting the stop, as well as objectively and independently taking into account the facts at hand. Specifically, the trial court stated at the onset of its ruling that “the

question is is [sic] forty seconds and two crossings sufficient to persuade the officer and the court that those observable facts justify the stop.” RP 29. The trial court considered the video footage from the Trooper’s vehicle and noted that “it was pretty clear that the vehicle had crossed the shoulder…” RP 30. The trial court then concluded by stating that “particularly the second crossing when he crosses over the white line…that’s persuasive.” RP 30. Thus, there was evidence in the record that the trial court reached its conclusion by objectively taking into account all of the facts at hand. The Superior Court’s decision that the trial court considered both the objective and subjective intent of the trooper was supported by the record.

Defendant also argued to the Superior Court that the trial court’s conclusions of law that there were sufficient facts to support the stop of defendant’s vehicle was in conflict with *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008). The Superior Court, conducting a de novo review, found there were sufficient observable facts to justify the stop of defendant’s vehicle. Defendant now argues this decision is contrary to law and in conflict with *Prado, supra*, and *State v. Jones*, 186 Wn. App. 786, 347 P.3d 483 (2015).

Courts evaluate reasonable suspicion by the totality of the circumstances in each case and, thus, a strict reliance upon *Prado* is impermissible. In *Prado*, an officer observed the defendant’s vehicle “cross an eight-inch white line dividing the exit lane from the adjacent

lane by approximately two tire widths for one second.” *Prado*, 145 Wn. App. at 647. Based solely upon that single lane incursion, the officer stopped the defendant. *Id.* at 647–48. The court in *Prado* held that, based upon the totality of the circumstances in that case, the State had not proved reasonable suspicion to stop. *Id.* at 649.

Prado did not give courts a bright line rule to evaluate traffic stops. *See U.S. v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). Rather, courts must weigh the specific set of facts in each case to determine if the officer had reasonable suspicion to stop. *U.S. v. Arvizu*, 534 U.S. at 274 (“we have deliberately avoided reducing [reasonable suspicion] to ‘a neat set of legal rules’”)(citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)).

A post-*Prado* decision confirms that reasonable suspicion is a malleable doctrine. *See State v. McLean*, 178 Wn. App. 236, 244–45, 313 P.3d 1181 (2013). In *McLean*, a trooper observed the defendant’s vehicle “weave within its lane and cross onto the fog line three times.” *Id.* at 245. The court held that “[f]rom the articulable fact this observation, and from [the trooper’s] training and experience identifying driving under the influence, it was rational for [the trooper] to infer there was a substantial possibility that [defendant] was driving under the influence.” *Id.* Because that substantial possibility established reasonable suspicion, the court upheld the stop of the defendant. *Id.*

Another recent case relied upon by defendant is *State v. Jones*, 186 Wn. App. 786 (2015). In *Jones*, the defendant passed over the fog line by approximately an inch three times. *Id.* at 788. *Jones* discusses both *Prado* and *McLean*, stating that neither establishes a rule that relies on the number of times a driver goes into another lane; rather, the decisions look to the totality of the circumstances, including the danger posed to other vehicles and the evidence of the trooper's training and experience. *Id.* at 791–93.

The Superior Court in the present case conducted a de novo review of the trial court's findings of fact and concluded, in accordance with the law, there were sufficient observable facts to justify the stop of the defendant's vehicle. The Superior Court's ruling that the trial court did not err in its conclusion of law as sufficient observable facts existed to justify the stop of defendant's vehicle is not contrary to Division I's case law in *Prado* or *Jones*. Both cases stand for the proposition that whether there is a reasonable, articulable suspicion to stop defendant is dependent upon the totality of the circumstances in each case. Neither of the cases created a bright line rule and subsequent cases interpreting this proposition have held that reasonable suspicion is a malleable doctrine. Rather, in both those cases, the courts held that there were not facts sufficient to support a finding that a reasonable, articulable suspicion existed to stop those vehicles.

In contrast, when the totality of the circumstances is looked at in the present case, it supports a finding that Trooper Worley had a reasonable, articulable suspicion to stop the defendant's vehicle. Trooper Worley testified about his training and experience specifically relating to investigating impaired drivers, evidence the court in *Jones* indicated was missing from that case. RP 9–12; *Jones*, 186 Wn. App. at 793. He described how he first observed defendant weave noticeably within his lane of travel, despite the roadway being completely straight. RP 10, 75–76. He observed defendant cross the fog line not once, as in *Prado*, but twice; driving onto the shoulder the second time. RP 10, 17, 76–77. Additionally, unlike in *Prado*, Trooper Worley observed defendant's erratic driving for approximately forty seconds. *See* RP 12–14. The trial court and the Superior Court properly found that Trooper Worley had sufficient facts to justify a stop of the defendant's vehicle in the present case.

The Superior Court's decision was not contrary to case law presented in either *Prado* or *Jones*; rather, the Superior Court properly applied the case law to the relevant facts.

D. CONCLUSION.

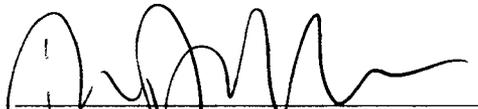
Because the Superior Court's decision was not contrary to case law, the State respectfully requests this Court affirm the superior court's decision to uphold the District Court's denial of defendant's motion to suppress.

DATED: January 6, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



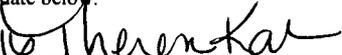
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892



Jordan McCrite
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