

23732-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CALEB G. NICHOLS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE TARI S. EITZEN

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....2

ARGUMENT.....4

 A. THE DRIVER OF THE CAR COMMITTED
 MULTIPLE TRAFFIC VIOLATIONS4

 B. THE DEFENDANT CANNOT SHOW THAT
 THE STOP OF THE CAR WAS PRETEXTUAL6

 C. THE DEFENDANT CANNOT SHOW THAT
 HIS TRIAL COUNSEL WAS INEFFECTIVE.....9

CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. AARON, 95 Wn. App. 298,
974 P.2d 1284 (1999)..... 9

STATE V. LADSON, 138 Wn.2d 343,
979 P.2d 833 (1999)..... 6, 7

STATUTES

RCW 46.61.150 4

RCW 46.61.305 5, 6

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the defendant to be tried and sentenced in violation of his constitutional rights to counsel.
2. The superior court erred in finding that the stop was valid because the vehicle improperly crossed a double yellow line and made an improper lane change.
3. The superior court erred in holding that the violation justifying the traffic stop was the failure to drive "as nearly as practicable entirely within a single lane."
4. The superior court erred in citing *State v. Chelly*, 94 Wn. App. 254, 259, 970 P.2d 376 (1999), for the prior proposition.
5. The superior court erred in holding that the officer's observation of the way the vehicle drove "justified a detention for purposes of identifying" the driver and running a warrants check and potentially issuing a notice of infraction.
6. The superior court erred in holding that the seizure of the evidence was valid.

7. The superior court erred in denying defendant's motion to suppress.

II.

ISSUES PRESENTED

- A. WERE TRAFFIC VIOLATIONS COMMITTED BY THE DRIVER OF THE CAR IN WHICH THE DEFENDANT WAS RIDING?
- B. CAN THE DEFENDANT SHOW THAT THE STOP WAS A "PRETEXT?"
- C. CAN THE DEFENDANT SHOW THAT HIS COUNSEL WAS INEFFECTIVE?

III.

STATEMENT OF THE CASE

The defendant was a passenger in a car driven by Jacob Potter. Shortly after midnight on November 17, 2003, Spokane Sheriff's deputy Hause saw the auto avoiding his patrol car in what the officer described as a "suspicious manner." CP 61. The deputy saw the car exit a parking lot, cross over a double yellow line and then into the far outside lane of travel. The car bypassed the inside lane of travel of the four lane road. CP 61.

Deputy Hause attempted to stop the car but the vehicle would not stop and it appeared to the deputy that the driver was delaying the stop. CP 61. The deputy arrested the driver for driving while license suspended, third degree and handcuffed him. CP 61. The deputy noticed that the defendant was not wearing a seat belt and asked him to step from the car. CP 61.

As the deputy was searching the car incident to the arrest of the driver, he noticed a baggie on the ground near where he had handcuffed the driver. CP 61. The baggie contained a crystal type substance and appeared dry even though the weather was snowy/rainy. CP 61.

The deputy asked the defendant if the defendant would permit a search of his person. CP 61. A baggie with white powder was discovered in the defendant's sock. CP 61. The defendant confirmed to the deputy that the driver had made suspicious turns because he did not want to drive past the deputy. The defendant also admitted that the driver (Potter) had given him the baggie during the traffic stop. CP 62.

Both items field tested positive for methamphetamine. CP 62.

The defendant brought a motion to dismiss. At the motion, defense counsel agreed that the stop for infractions was "appropriate." RP 4. Following conviction at a bench trial, the defendant filed this appeal. CP 41-54.

IV.

ARGUMENT

A. THE DRIVER OF THE CAR COMMITTED MULTIPLE TRAFFIC VIOLATIONS.

The defendant argues on appeal that no traffic violation occurred when he crossed the double yellow lines. He cites to RCW 46.61.135 and claims that crossing the line was appropriate as he was leaving a “driveway.” The RCW section cited by the defendant is inapplicable.

RCW 46.61.135 is applicable to “no passing zones.” Such would be a triple line not a double yellow line as in this case. In this case, the officer’s reports indicate a “double yellow line” not a “no passing zone.” It is doubtful that *any* “no passing zone” lines are present within the business areas of Spokane.

Double yellow lines are discussed in RCW 46.61.150. This statute states (in part):

No vehicle shall be driven over, across or within any such dividing space, barrier or section, or median island, except through an opening in such physical barrier or dividing section or space or median island, or at a crossover or intersection established by public authority.

RCW 46.61.150.

The fact that the vehicle --in which the defendant was riding-- crossed the lines in violation of the law, the officer was acting correctly in stopping the vehicle. The trial court did not err.

In addition to crossing a double yellow line, the defendant proceeded directly to the outside lane. This was a traffic infraction. RCW 46.61.305 requires the use of signals for the last 100 feet of travel prior to turning. RCW 46.61.305. Since the defendant cut directly across the inside lane of travel (there were two lanes going each way) in arriving at the outside lane, he could not have given the proper signal.

Again, this was listed as a factual finding by the trial court and is unchallenged by the defendant. CP 23. The trial court was correct. The trial court found that the stop was valid because the vehicle improperly crossed a double yellow line and made an improper lane change. CP 23.

In it's conclusion of law section, the trial court noted that the driver of the auto in which the defendant was riding did not drive "as nearly as practicable, entirely" within a traffic lane. CP 24.

However the violations are phrased, the fact remains that the driver of the car committed several violations in the operation of the vehicle. Any of these violations would give rise to a reason to stop the car.

The defendant counters that the defendant intended to turn right immediately. There is no record (one way or the other) indicating that the

defendant signaled his intention to turn right. Failure to signal a turn would have been a violation of RCW 46.61.305. *Id.* In any event, the driver could not legally cross over a double yellow line and proceed directly to the outside lane.

There was not just one, but multiple possible traffic infractions committed by the driver of the car. In light of the trial counsel's tacit agreement that the stop was proper, and the multiple traffic violations committed by the driver of the auto, the trial court did not err in finding that the initial stop was proper.

The defendant has not contested, on appeal, the events occurring after the stop of the vehicle.

B. THE DEFENDANT CANNOT SHOW THAT THE STOP OF THE CAR WAS PRETEXTUAL.

The defendant backstops his arguments by claiming that the stop was a pretext stop. It is true that even in the presence of valid reasons to stop the car, the court can determine that the stop was a "pretext" to accomplish some unrelated procedure, such as a search. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).

The basic flaw in the defendant's arguments is that there is no evidence of any sort of pretext. A pretext stop occurs when the stated motivation of the officer for stopping the car is not the officer's actual

reason for stopping the car. *State v. Ladson, supra*. The defendant is forging new ground by claiming a pretext based on the strength of the reasons to stop. Previously, if there was insufficient reason to stop the car, it was a “bad stop.” The defendant would like to go farther and turn alleged insufficient reasons to stop into a “pretext stop.” Under the defendant’s arguments, every “bad stop” would be a “pretext stop.” There is no authority for this position.

The defendant must attempt this approach to support his “pretext stop” argument. This is because there was no debate about the stop itself at the suppression hearing. There is nothing in the record regarding ulterior motives on the part of the officer. There is no reason to believe that the officer “had it in” for this particular defendant or even knew who the defendant was prior to stopping the car. Because there is no evidence supporting a pretext stop, the defendant would like to use the circumstances of the stop itself to “bootstrap” a “pretext stop” argument.

The defendant’s argument will never support a “pretext stop” position as a pretext would require some sort of “foreknowledge” prior to initiating the stop. Only if the car was stopped for a reason *other* than the one(s) stated by the officer can a “pretext stop” be pursued. As mentioned previously, there is nothing in any of the police reports that indicates that the defendant was known to the officer prior to the stop, that the officer

was working with other officers to track the car in which the defendant was riding, or any sort of connection prior to the car coming to the officer's attention as stated in the reports.

Because the initial stop was not contested below (officer's reports were stipulated), there is nothing from which the defendant can argue a "pretext."

In the cases cited by the defendant, there is some sort of information supporting the idea that the stop was a pretext. Items such as leaving a drug house, surveillance of the car, "inside" information pertaining to the contents of the car... etc. In this case, the only thing supporting the idea of a pretext stop is the defendant saying the stop was a pretext.

It is correct that the officer discovered that the driver had a warrant, but this information could not have been known by the officer prior to the stop. There is nothing in the facts to indicate that the officer had special knowledge that the driver had drugs or that the defendant had drugs on his person.

There is nothing in the record to support a "pretext stop" argument and this court should reject the defendant's attempt to expand the concept to allow use of the reasons for the stop alone as a basis to support a pretext argument.

C. THE DEFENDANT CANNOT SHOW THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

The defendant "backstops" his argument on the validity of the initial stop by claiming that trial counsel was ineffective for conceding that the initial stop was proper.

To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that such deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 697) (alteration in original). Moreover, because the defendant must prove both ineffective assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Lord*, 117 Wn.2d at 884.

State v. Aaron, 95 Wn. App. 298, 305, 974 P.2d 1284 (1999).

As was covered fully in an earlier section, the initial stop was valid. The trial counsel chose not to focus on the reasons for the initial stop. The trial counsel's tacit agreement that there were valid reasons to stop the car places defendant in somewhat of a hole on appeal.

The defendant cannot show that his defense counsel's actions prejudiced him as there were no valid arguments to make regarding the

reasons for the initial stop. As mentioned above, a lack of prejudice will resolve any ineffective assistance arguments.

Trial counsel did not contest the validity of the initial stop because there were no grounds. For all the reasons noted previously, the stop was not improper. Trial counsel was not ineffective because trial counsel cannot be found ineffective for failing to pursue an argument that has no merit.

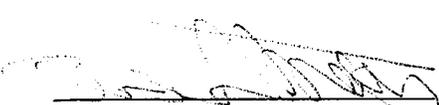
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 23 day of July, 2005.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent