Sup. Ct. No. 78497-3

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CALEB G. NICHOLS,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
07 JAN -8 AM 8:09
CLERK

SUPPLEMENTAL BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney
Spokane County

Andrew J. Metts
Deputy Prosecuting Attorney

Attorneys for Respondent

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

INDEX

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

ARGUMENT 3

A. THERE WAS NO EVIDENCE OF A PRETEXT STOP AND THEREFORE NO SUPPORT FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL 3

B. FAILURE TO CONTEST THE MULTIPLE TRAFFIC VIOLATIONS DOES NOT SUPPORT AN INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT 6

CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

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

STATE V. CHAPIN, 75 Wn. App. 460,
879 P.2d 300 (1994) 4

STATE V. DeSANTIAGO, 97 Wn. App. 446,
983 P.2d 1173 (1999) 7

STATE V. LADSON, 138 Wn.2d 343,
979 P.2d 833 (1999) 3, 4

STATE V. McFARLAND, 127 Wn.2d 322,
899 P.2d 1251 (1995) 5, 9

STATE V. NORDLUND, 113 Wn. App. 171,
53 P.3d 520 (2002) 4

STATE V. POTTER, 156 Wn.2d 835,
132 P.3d 1089 (2006) 1

STATUTES

RCW 46.04.197 7

RCW 46.61.150 ..... 6, 7

RCW 46.61.305 8

COURT RULES

RAP 2.5(a) 5

OTHER AUTHORITIES

PATRICIA LEARY & STEPHANIE RAE WILLIAMS,
Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007 (1996) 4

I.

ISSUES PRESENTED

A. DID THE DEFENDANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL?

B. DID THE DEFENDANT SHOW ACTUAL PREJUDICE FROM TRIAL COUNSEL'S FAILURE TO RAISE TRAFFIC VIOLATION ISSUES AT THE SUPPRESSION HEARING?

II.

STATEMENT OF THE CASE

The defendant was a passenger in a car driven by Jacob Potter.[1] Spokane Sheriff's Deputy Mark Hause saw the auto driven by Mr. Potter 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,

---

[1] *State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089 (2006) involved the same stop.

third degree. CP 61. The deputy noticed that the defendant was not wearing a seat belt and asked him to step from the car. CP 61.

The defendant consented to a search of his person. CP 61. A baggie with white powder was discovered in the defendant's sock. CP 61. The material from the defendant's sock field-tested positive for methamphetamine. CP 62.

The defendant brought a motion to suppress. At the motion, defense counsel agreed that the stop for infractions was "appropriate." RP 4. The motion was argued on the basis that the detention of the defendant was improper. RP 6-8. The trial court ruled the stop and detention were proper. CP 24-26.

Following conviction at a bench trial, the defendant filed a direct appeal to the Court of Appeals, Division Three. CP 41-54. The Court of Appeals confirmed his conviction. The defendant then filed a petition for review.

III.

ARGUMENT

A. THERE WAS NO EVIDENCE OF A PRETEXT STOP AND THEREFORE NO SUPPORT FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

When reduced to its essence, the defendant is arguing that the defense counsel was ineffective for failing to raise a pretext stop argument during his motion to suppress.

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*, 138 Wn.2d 343, 979 P.2d 833 (1999). The defendant is trying to forge 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.

"Pretext is, by definition, a false reason used to disguise a real motive." *Ladson, supra* at 359 n11, *citing* Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to

Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 TEMP. L. REV. 1007, 1038 (1996).

The defendant does not state a pretextual reason for the stop. Rather, the defendant conflates the officer's observations of the driving of the car, the actual legality of the actions taken by the car and the final stop. The defendant jumps to the conclusion that the stop was pretextual. There was no testimony from the officer that he stopped the car because it was acting suspiciously. The attention of the officer was drawn to the car by its unusual actions. As the officer watched the car, the driver of the car committed multiple driving violations. The car was stopped. The defendant does not claim any errors in the happenings after the stop.

There was no prextext argument to make. The officer's attention was drawn to the car because of its actions, not because it came from a drug house, was loaded with known suspects or any other fact that would support a pretextual reason for the stop. "To establish ineffective assistance, [the defendant] must show deficient performance and actual prejudice, i.e., that a motion to suppress would likely have been granted." *State v. Nordlund*, 113 Wn. App. 171, 178, 53 P.3d 520 (2002).

In State *v. Chapin*, 75 Wn. App. 460, 879 P.2d 300 (1994) (overruled in part by *State v. Ladson, Id.*) the court found no pretext because there was no evidence that the officer was other than on a routine patrol and there was

nothing to indicate that the officer had departed from established procedures. The trial court in the case at bar made a finding that the officer was on "routine patrol".

There was no reason for trial counsel to raise an argument that was certain to fail.

The defendant raises the pretext issue for the first time on appeal. There is nothing presented by the defendant that shows that he was actually prejudiced by a pretext stop. There being no actual prejudice, there is no manifest claim of constitutional error. Therefore, the defendant's claims of pretext are not reviewable. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). From either the ineffective assistance of counsel approach or a direct claim of a constitutional violation, the defendant must show that the alleged error is "manifest" by showing that the trial court would have granted the pretext motion. *McFarland*, 127 Wn.2d at 333-34. This has not been done.

Since this issue was not raised at the trial level, there is nothing in the record that addresses the subjective thoughts of the officer. The trial court should be the entity deciding such factual matters. Yet, the defendant is trying to have this Court decide factual issues.

The conflation mentioned earlier makes it nearly impossible for an officer to stop anyone. The officer would have to see the violation

immediately upon seeing the car. Further, there could be no reason for looking at the car prior to the stop. Obviously, this is not how the real world works. Officers' attentions are drawn to a particular automobile for any number of reasons occurring out in the field.

B. FAILURE TO CONTEST THE MULTIPLE TRAFFIC VIOLATIONS DOES NOT SUPPORT AN INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT.

As for the traffic violations committed by the driver of the car, the defendant cites to the wrong statute in his arguments. The defendant cites to RCW 46.61.130 which is applicable to "no passing zones." In this case, the officer's reports indicate a "double yellow line" not a "no passing zone." It is clear from the context of the statute that the "double yellow lines" referred to in RCW 46.61.130 are of the sort used to delineate those stretches of highway where passing other vehicles is prohibited. This interpretation can be determined from RCW 46.61.130(2) which prohibits a driver from driving on the left side of the roadway in a "no-passing zone." RCW 46.61.130(2).

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

> Whenever any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section or by a median

> island not less than eighteen inches wide formed either by solid yellow pavement or markings or by a yellow cross-hatching between two solid yellow lines so installed as to control vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. 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.[2]

The fact that the vehicle crossed the lines in violation of the law, the officer was acting correctly in stopping the vehicle. The trial court did not err in finding a violation.

In addition to crossing a double yellow line, the driver proceeded from the driveway directly to the outside lane. This was a traffic infraction. In a set of facts with some similarities to those in this case, Division Three held that the driver of a vehicle violates the law if a left turn is made to the outside lane of a four lane road. "[W]henever practicable the driver shall exit the intersection and enter the roadway the driver is turning onto in the left lane closest to the center dividing line that is lawfully available. RCW 46.61.290(2)." *State v. DeSantiago*, 97 Wn. App. 446, 450, 983 P.2d 1173 (1999).

---

[2] RCW 46.04.197 defines "highway" as: "Highway means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." RCW 46.04.197.

The driver of the vehicle in this case also violated the statutes regarding the use of turn signals. 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 driver 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.

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 also 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 driver countered that he 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. 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 wraps his arguments into an overarching claim that his trial counsel was ineffective. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d at 335.

> 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).

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

The trial court thought the traffic violations existed, the officer thought the violations existed, and the prosecutor thought the violations existed. Even assuming that the defendant's trial counsel should have contested the traffic violations, he cannot show that he would have prevailed.

He has not shown that the result of the proceeding would have been different. His arguments have no merit.

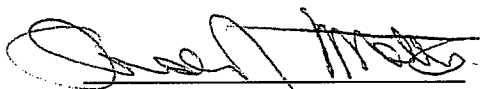
V.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Dated this 1 day of January, 2007.

STEVEN J. TUCKER
Prosecuting Attorney



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