

No. 78497-3

IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CALEB GEORGE NICHOLS,
Petitioner.

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STATE OF WASHINGTON

**SUPPLEMENTAL BRIEF OF PETITIONER
CALEB GEORGE NICHOLS**

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A. ASSIGNMENTS OF ERROR

Assignments of Error The Assignments of Error are set forth at pages 1-2 of Appellant's Brief filed in Division Three.

Issue The issue before this Court is set forth at pages 1-2 of the Petition for Review filed with this Court.

Standard of Review This Court reviews a claim of ineffective assistance of counsel *de novo*. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

B. STATEMENT OF THE CASE

Introduction

Mr. Nichols was the passenger in a vehicle stopped by a patrol officer. In his report and affidavit of probable cause, the arresting officer gave two reasons for the stop: "It appeared to me that the vehicle (driver) was trying to avoid driving in front of me," CP 11, and the vehicle made "an improper turn," CP 17. However, the officer's narrative of the vehicle's movements does not refer to any infraction. CP 11-12.

Trial counsel filed a motion to suppress, but conceded the validity of the traffic stop. On appeal, Mr. Nichols argues that counsel's concession amounts to ineffective assistance of counsel because the record reveals the stop to have been pretextual.

Division Three disagreed with Mr. Nichols's argument, declining, in fact, to consider his argument with regard to the pretextual stop. Accordingly, its decision is contrary to *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006).

In support of his position, Mr. Nichols relies on this Supplemental Brief and the Petition for Review filed in this Court, as well as on Appellant's Brief and Appellant's Reply Brief filed in Division Three.

Procedural History

The Procedural History is set forth at pages 2-4 of the Petition for Review. In addition, this Court accepted review on December 5, 2006.

Substantive Facts

Facts Relevant to Traffic Stop

The arresting officer in this case, Officer Hause, was parked in the parking lot of a retail store shortly after midnight on the night in question. He observed the vehicle in which Mr. Nichols was a passenger pull into the lot, drive slowly around the lot, turn around, and exit the parking lot the same way it had entered. As it exited the lot, it apparently made a left turn, crossing the westbound traffic lane: "[I]t crossed a double yellow line and pulled immediately into the far right lane," heading east. CP 11.

From his observations, the officer concluded that "the vehicle (driver) was trying to avoid driving in front of me." CP 11. Accordingly, the officer began to follow the truck in his patrol car. As he pulled out of the parking lot, he saw the vehicle make a right turn, to head south. CP 11.

When Hause caught up with the vehicle, he activated his lights. The vehicle continued to drive

slowly for a time, ultimately stopping in a parking lot. CP 11-12.

The portion of the police report leading up to the stop is brief enough to be quoted in full:

On 11-17-03 at about 0026 hours, I was parked in a parking lot just west of Hollywood Video - at about Francis/Haven. I observed the listed vehicle WB on Francis from Market. The vehicle pulled into the parking lot of Hollywood Video/Schuck's. The vehicle drove slowly around the parking lot, turned around and went back out the way it entered. As it exited the parking lot it crossed a double yellow line and pulled immediately into the far right land in the EB lane. It appeared to me that the vehicle (driver) was trying to avoid driving in front of me.

I pulled out and the vehicle turned SB on Market. I caught up to the vehicle and activated my lights north of Central.

CP 11. In addition, in his affidavit of probable cause the officer stated that the vehicle made "an improper turn." CP 17.

A detective who summarized Hause's police report stated that the officer made the traffic stop "after observing this vehicle avoid his marked patrol car in a suspicious manner and also for crossing a double yellow

line and not turning into the immediate travel lane while making a turn." CP 61.

After stopping the car, police conducted a search of Mr. Nichols which revealed the methamphetamine providing the evidence of conviction. See Appellant's Brief at 7-8.

The facts regarding the suppression hearing and the trial court's ruling are set forth in pages 7-8 of the Petition for Review filed with this Court.

The facts regarding Division Three's decision are set forth in pages 8-9 of the Petition for Review filed with this Court. The decision is attached as Appendix to that document (Appendix).

C. ARGUMENT

Trial Counsel Was Ineffective in Conceding the Legality of the Traffic Stop when her Concession was Unsupported by the Record and a Challenge to the Stop Would Likely Have Resulted in the Suppression of the Evidence Against Mr. Nichols

Mr. Nichols's constitutional rights to effective counsel were violated when counsel conceded the key fact that required suppression of the evidence against him: The validity of the traffic stop that led to the

discovery of the methamphetamine. Counsel's concession amounted to deficient performance when both the subjective and objective reasons for the stop, as described in the police report, revealed that the stop was pretextual. The deficient performance prejudiced Mr. Nichols when a challenge to the stop likely would have resulted in suppression of the evidence against him. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The totality of the circumstances in this case compel the conclusion that the stop was pretextual. In resolving this issue, the Court considers both the subjective intent of the officer and the objective reasonableness of the stop. *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). Thus, the necessary inquiry is: Was the officer's stop solely for the traffic violation he referenced, "an improper turn," or was the officer's actual purpose to look for evidence of another crime? See *Ladson*, 138 Wn.2d at 351.

Considering the totality of the circumstances here, the stop was pretextual because a) the

subjective, insufficient basis for the stop was clear from the record and b) the objective facts in the record do not support a finding that the officer stopped the vehicle because of a traffic violation. Under these circumstances, counsel was ineffective in conceding the validity of the stop.

A. The patrol officer's vague suspicion which caused him to follow and stop the vehicle was plain from the record, making counsel ineffective in failing to challenge the legality of the stop.

The record reveals that the primary reason for the stop in this case was the officer's inchoate suspicion that the driver had something to hide something. When the pretextual nature of the stop was plain, counsel's performance was deficient for conceding the validity of the stop.

While Division Three declined to address this aspect of Mr. Nichols's appeal, it recently found ineffective assistance of counsel under similar circumstances. *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006). The facts in *Meckelson* are strikingly similar to those here. There, a patrol

officer pulled alongside a car, observed that the driver looked alarmed to see him, became suspicious, and followed the car. After the vehicle failed properly to signal a turn, the officer stopped it. 133 Wn. App. at 434.

Trial counsel in *Meckelson* initially challenged the legality of a traffic stop on the grounds that it was pretextual. *Id.* at 435. However, counsel also apparently conceded to the officer's stated reason for stopping the car, the failure to signal a turn. As Division Three described it, counsel "walked away from the inquiry" regarding the pretextual stop. *Id.* at 435-37. Noting, "we will conclude that counsel's representation is ineffective if we can find no legitimate strategic or tactical reason for a particular trial decision," *id.* at 436, the court found counsel's performance deficient.

Division Three explained counsel's role in these matters:

Defense counsel's job here was to represent Mr. Meckelson's interests, and that included challenging the officer's subjective reason for the stop. Sergeant Thoma was never given

the opportunity to testify whether he would have stopped this car but for his inchoate and legally unsupportable suspicions. And, even if the officer had testified that he would have stopped the car for failure to signal, it would have been up to the judge to believe or disbelieve that testimony.

133 Wn. App. at 438. Finding ineffective assistance of counsel, the court reversed and remanded for a suppression hearing on whether the stop was pretextual.

Nothing distinguishes *Meckelson* from the instant case. If counsel who challenged the pretextual basis for a stop in a colorable case -- but did not pursue it with enough vigor -- provides deficient representation, Mr. Nichols's trial counsel was certainly deficient here. Here, as in *Meckelson*, the pretextual nature of the stop was plain from the record. The officer included the real reason for the stop in his narrative of his observations of the vehicle's movements.

In the seven sentences comprising the officer's largely-straightforward narration, the officer gave only one subjective interpretation: "It appeared to me that the vehicle (driver) was trying to avoid driving in front of me." CP 11. Significantly, the officer's

single subjective conclusion had nothing to do with a perceived traffic violation. He did not conclude that a turn, lane change, or crossing of double yellow lines was improper. While he made a bald reference to "an improper turn" in his affidavit, CP 17, unlike the officer in *Meckelson*, he provided no explanation for which turn was improper or why. Thus, that the stop was based on his vague suspicion is even clearer in this case than it was in *Meckelson*. Just as the officer in that case was alerted because the driver of a vehicle looked alarmed to see him, the officer here was similarly alerted because the occupants of the car appeared to be avoiding him.

This conclusion is supported by the Summary of Facts of the incident later prepared by a detective. The first reason the detective offered for the stop was that the police officer "observ[ed] this vehicle avoid his marked patrol car in a suspicious manner." CP 61. When the officer's vague suspicion providing the underlying reason for the stop was plain from the record, trial counsel had no reason to concede the

stop's validity. Thus, as was true in *Meckelson*, Mr. Nichols's counsel's performance was also deficient.

Further, Mr. Nichols was prejudiced by counsel's deficient performance. To show prejudice, an appellant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case," but need only demonstrate "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-94.

Confidence in the outcome of this case was undermined by counsel's performance as surely as it was undermined in *Meckelson*. In *Meckelson*, the court did not find that the police officer stopped the car on a pretext, or that the trial court necessarily would have reached that conclusion had the issue been fully litigated. Instead, it found prejudice when counsel's concession removed a potentially viable issue from consideration for no tactical or strategic reason. 133 Wn. App. at 436-38. For the same reasons, prejudice should be found here.

Here, as in *Meckelson*, counsel's concession removed a potentially viable issue from the judge's consideration. As in *Meckelson*, that concession had no tactical or strategic reason. When success on that issue would have precluded any of the evidence against Mr. Nichols from being admitted at trial, counsel's performance was both deficient and prejudicial, requiring reversal.

B. The lack of an objective basis for the stop supports Mr. Nichols's contention that the stop was pretextual.

The inquiry into a pretextual stop also requires examination of the objective facts underpinning the stop. Here, in contrast to the situation in *Meckelson*, where the officer noted an actual traffic infraction, the lack of facts pointing to any improper driving buttress the conclusion that the stop was pretextual.

Trial counsel should have challenged the existence of a traffic violation when even the trial court could not identify an appropriate traffic infraction from the record. In its findings of fact, the court stated that the stop "was valid because the vehicle improperly

crossed a double yellow line and made an improper lane change." CP 23. In its conclusions of law, the court observed that failure to drive within one lane is a traffic infraction. It stated, "the officer's observation . . . justified a detention for purposes of identifying [the driver] and running a warrants check and potentially issuing a notice of infraction." CP 24.

The problem with the trial court's findings and conclusions is they are not supported by the facts. Because no evidence was adduced at the suppression hearing, the officer's report and his affidavit of probable cause contain his entire explanation for the stop. In those documents, the only possible infraction the officer mentioned is "an improper turn." CP 17. The officer stated nothing about an improper lane change, improperly crossing a double yellow line or failing to drive within one lane. See CP 11-18.

The trial court's legal extrapolations no doubt arose from the officer's failure to identify the traffic violation in his report. Nowhere in the report

does he cite a traffic law violated or explain how he believed a traffic violation occurred. Thus the State, the superior court, and Division Three all were left inferring the existence of traffic infractions never mentioned by the police officer. But the officer's factual recitation does not support even an improper turn, let alone improperly crossed double yellow lines, an improper lane change, or the failure to stay within one lane.

First, crossing a double yellow line could not have been the basis for the stop because doing so to make a left turn is perfectly legal. See Appellant's Brief at 13-14 and Appellant's Reply Brief at 5-6 (both filed in Division Three). Indeed, the trial court did not even attempt to support this alleged basis for the stop with a provision from the RCW. See CP 22-26.

Next, an "improper lane change" also could not have provided a basis for the stop. See CP 24. The impropriety of the lane change is simply not supported by the officer's report. The officer wrote merely that the vehicle "pulled immediately into the far right

lane." CP 11. Nothing from this observations denotes a violation of law; there is no observation of failure to use a turn signal or failure to change lanes safely.

In fact, pulling into the far right lane was the driver's only option if he intended to make a right turn. See Appellant's Brief at 14-15. And that is exactly what the pick up next did: After the vehicle turned left from the parking lot, the officer next observed it to turn right (southbound from its eastbound direction). CP 11. Thus, there is no evidence of an improper lane change.

Third, the actions described in the police report do not support the court's conclusion that the driver was guilty of "a failure to drive 'as nearly as practicable entirely within a single lane.'" CP 24. The officer did not observe the vehicle swerving in its lane, veering from one lane to another, or even driving on the lines marking the lanes. Similarly, there was no indication that the lane change was not made safely. Instead, the officer merely observed that the vehicle "pulled immediately into the far right lane." CP 11.

This controlled action, in preparation for a right-hand turn, was not a violation of RCW 46.61.140.¹

Finally, the narrative description of the vehicle's actions also provides no indication of an improper turn. The police officer described three turns made by the targeted vehicle. His report contains no hint that he was interested in one particular turn above the rest. Instead, the officer relates all of the vehicle's movements in the same objectively descriptive narrative. See CP 11. That a police detective inferred from the officer's report that violations occurred during one of these turns, see CP 61, is no indication that the officer himself witnessed such violations. Thus, when the trial court chose the turn in which the vehicle crossed yellow lines and changed lanes as creating the traffic

¹ In its opinion, Division Three states that the trial court entered a finding of fact on this matter that Appellant did not challenge. Appendix at 5. Counsel believes that the trial court entered a conclusion of law on this point, not a finding of fact. See CP 23-24. Conclusion or finding, Mr. Nichols challenged this point in his third Assignment of Error. Appellant's Brief at 1. Further, Mr. Nichols believes Division Three erred in finding that the trial court concluded that the driver had violated any particular provision of the RCW. Appendix at 5. It appears that the trial court did not reference the violation of a single traffic statute. See CP 22-26.

violations in this case, it engaged in mere speculation.

Once speculation on the existence of traffic violations concealed within the officer's report begins, there is virtually no end. Perhaps any of myriad traffic infractions occurred, but unless the officer put them in his report, there is no basis to believe he stopped the vehicle for one of them.

For these reasons, Division Three's finding that "the officer concluded that the driver's action violated several traffic laws," Appendix at 4, is unsupported by the record. See also Appendix at 5 ("the officer on the scene . . . disagreed with Mr. Nichols' reading of [the traffic] statutes"); Appendix at 6 ("a police officer, the court, a prosecutor, and defense counsel apparently believed the validity of the violation").

Notably, and in contrast to the court of appeals' findings, the trial court avoided claiming outright that the officer stopped the car because he witnessed particular traffic infractions. Indeed, the trial

court made no findings as to the officer's reasons for the stop. In its findings of fact, the court stated merely that the stop "was valid because the vehicle improperly crossed a double yellow line and made an improper lane change." CP 23. While its conclusions of law specify that failure to drive within one lane is a traffic infraction, the court did not find (and the police report did not state) that the vehicle failed to stay in one lane. See CP 23-24. The trial court merely held that "the officer's observation . . . justified a detention for purposes of identifying [the driver] and running a warrants check and potentially issuing a notice of infraction." CP 24. Under these circumstances, the appellate court's repeated assertions that the officer himself based the stop on traffic violations are not supported by the record.

Further, contrary to Division Three's decision, deficient representation does not rest on whether trial counsel analyzed the traffic statutes before deciding not to challenge the basis for the stop. See Appendix at 5 (representation not deficient because trial

counsel likely "looked at the same statutes and also" concluded a traffic infraction had occurred). The legality of the stop rests on the reasons the officer had for the stop. Thus, the deficient representation occurred when counsel conceded the validity of the stop on this record, whether or not the vehicle's actions could be interpreted after the fact to constitute traffic infractions.

For all of these reasons, there is no objective evidence that the police officer stopped the vehicle for traffic violations or, indeed, that any traffic violations occurred. When, in addition, the record reveals the officer's subjective and insufficient reason for stopping the vehicle - the belief that the driver had something to hide, the record shows that the stop was pretextual. Under these circumstances, trial counsel was ineffective in conceding the validity of the traffic stop.

D. CONCLUSION

For all of these reasons, Caleb George Nichols respectfully requests this Court to reverse the

superior court's denial of his suppression motion and reverse Mr. Nichols's conviction.

Dated this 4th day of January, 2007.

Respectfully submitted,



Carol Elewski, WSBA # 33647

CERTIFICATE OF SERVICE

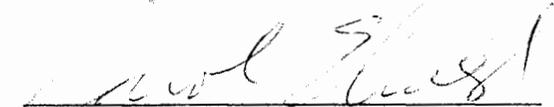
I certify that on this 4th day of January, 2007, I mailed the original and one copy of the attached brief, postage prepaid, to:

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