

NO. 80948-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

TYLER SHERWOOD KING

Petitioner

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ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT FOR CLARK COUNTY

Clark County District Cause No. 63660
Clark County Superior Court No. 06-1-02322-6
Court of Appeals No. 36606-1-II
(RALJ APPEAL)

PETITIONER'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. Petitioner was denied his constitutional right to a fair trial when the arresting officer gave opinion testimony that Mr. King was guilty of reckless driving.

2. Petitioner was denied effective assistance of counsel by his lawyer's failure to object to opinion testimony by Officer Starks and failure to object during closing to the prosecutor's use of that opinion testimony.

3. Petitioner assigns error to the denial of his pretrial motion to dismiss for lack of jurisdiction.

4. Petitioner assigns error to the trial court's finding that reckless driving was an emergency situation allowing a stop under RCW 10.93.070 (2).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Officer Starks invade the province of the jury by testifying that in his opinion, the driving behavior exhibited by appellant constituted reckless driving? (Assignment of Error 1)

2. Did appellant receive effective assistance of counsel when his lawyer failed to object to Officer Stark's opinion testimony? (Assignment of Error 2)

3. When the trial court found that there was no valid inter-local agreement allowing the officer to make an arrest outside of his jurisdictional boundaries, did the court err in denying the motion to dismiss for lack of jurisdiction? (Assignment of Error 3,4)

4. Did the court err in finding that the arrest was valid under RCW 10.93.070 (2) for incidents involving emergencies? (Assignment of Error 3, 4)

III. STATEMENT OF THE CASE

A. Procedural History

Appellant Tyler King was charged with reckless driving in violation of RCW 46.61.500 by a citation filed by Vancouver Officer Jeff Starks.

Mr. King filed a motion to dismiss the charge, based chiefly on the fact that Starks, a Vancouver Police officer, made the arrest in this case outside of his territorial jurisdiction,¹ in the absence of a valid inter-local agreement allowing him to do so. The hearing on the motion commenced on September 22 and then was continued to October 5, 2006. CP _____. The trial court found that there was no valid inter-local agreement in effect which would allow the extra-territorial arrest, but upheld the arrest on the alternate theory that Mr. King's driving constituted an emergency involving an immediate threat to human life or property, under RCW 10.93.070. RP 71,² CP _____.

The case proceeded to trial before the Honorable Darwin Zimmerman and a jury on November 21, 2006. The jury returned a verdict of guilty on November 21, 2006. CP _____. Petitioner filed a timely notice of appeal and posted bail as required by the court. CP _____.

Mr. King appealed to the Clark County Superior Court. That court upheld the conviction, ruling that an arrest for reckless driving was justified under RCW 10.93.070(2) as a response to an "emergency" situation. The court also ruled that Officer Starks' opinion testimony did

¹ The stop was made on Interstate 5, near milepost 14, well north of the City of Vancouver's boundaries.

² The report of proceedings is in two volumes. Volume I covers the hearings held September 22, 2006 and October 5, 2006 on appellant's motion to dismiss, the *voir dire* and preliminary matters at trial held on November 21, 2006, the 3.5 hearing, and opening statements by both parties and the beginning of direct examination of Officer Starks, who was the state's only witness.

Volume II covers the remainder of the trial, closing arguments, the verdict, and the sentencing hearing. They are page numbered continuously.

not deny Mr. King a fair trial, and that his lawyer was not ineffective for failing to object to this testimony.

Mr. King then moved for discretionary review in Division II of the Court of Appeals. The commissioner of that court denied the motion. The commissioner held that Mr. King's trial counsel's failure to object to Stark's opinion testimony meant that the claim could not be considered for the first time on appeal. The commissioner also ruled that the extra-territorial stop was permitted under the authority of *Tacoma v Durham*, 95 Wn. App. 876, 978 P.2d 514 (1999). Mr. King's motion to modify the commissioner's ruling was denied, with one judge dissenting. Following Mr. King's motion to this court, review was granted.

B. Trial Court Hearing on Motion to Dismiss

Defense counsel argued that Officer Starks' arrest of Mr. King was unlawful because he was not on duty, was well outside of his territorial limits, and was not authorized to make an arrest by any valid existing inter-local agreement between Vancouver Police and the Clark County Sheriff. RP 2-5, 11-12. The state argued that the arrest could be justified under RCW 10.93.070 (2), on the theory that reckless driving would trigger an emergency involving an immediate threat to human life or property. RP 53. Defense counsel argued that there was no testimony that would support a finding that there was an immediate threat to life or property to invoke this subsection. RP 56. The court ruled that the officer's arrest was valid under RCW 10.93.070 (2), based on an

emergency involving an immediate threat to human life or property. RP 69, 71; CP ____ (Findings of Fact and Conclusions of Law). The court rejected the state's argument that a valid inter-local agreement existed that would allow the stop under RCW 10.93.070 (1). RP 75, CP ____ (Findings of Fact, Conclusions of Law).

C. Trial Testimony

Officer Jeff Starks was employed by the Vancouver Police Department. On April 5, 2006 he entered Interstate 5 at the La Center on-ramp, milepost 16, going southbound in the middle lane on his way into work. RP 161, 163. He saw Mr. King on a motorcycle, apparently standing up on his foot pegs, for a period of 3-4 seconds. He had never seen a rider do this on the freeway. RP 164, 167. There was a Dodge Durango truck to King's left, and another car in the right hand lane. Traffic was a little congested. RP 164.

Starks believed that standing up on the foot pegs at freeway speed was dangerous. RP 165. He observed King looking to his left at the passenger door of the Durango, and concluded he was somehow "taunting the driver of the vehicle." RP 165. King was not looking ahead of him during this period of time. RP 168. King then sat down on his motorcycle's seat, changed lanes into the slow lane (the right lane), and then accelerated away at a high rate of speed. Stark's estimate, based on his training and experience, was that King was going 100 mph. However, he did not have his radar on, and did not even attempt to document his

observation with a reading. RP 166. He indicated later on cross-examination that radar and laser were merely used to confirm his visual observations of speed. RP 176. He could not recall if his department had a policy that he confirm a speed estimate with a speed measurement device before writing a ticket. RP 179.

Starks did not feel he would be able to catch the motorcycle but accelerated to try to do so. RP 167. The motorcycle slowed up when it reached other traffic, and Starks was able to get close enough to signal it to stop. RP 169. As King pulled over, Starks overshot and passed him and had to back up on the shoulder to get to where Mr. King had stopped. RP 169.

Starks asked Mr. King why he stood up on his pegs while driving, and King told him his butt was sore from riding a long time that day. King said the people in the Durango were bothering him and that he did not know how fast he was going because his speedometer was broken. RP 169-170.

The prosecutor then asked Starks his opinion regarding Mr. King's driving, and Starks replied that "the entire act of what he had done was reckless [sic]." RP 171. The prosecutor asked if he had training in the elements of reckless driving. Starks said he had, and the prosecutor elicited his further opinion that "this [petitioner's driving] was within those elements." Defense counsel made no objection to any of this testimony. RP 170-71.

Officer Starks had a video camera in his car and did activate it, but by the time he did so, it only showed him driving past Mr. King and his motorcycle and then backing up to his position. RP 174. Consequently, his observation that Mr. King was “standing up” on his motorcycle was not corroborated by the video.

After the state rested, Mr. King’s trial counsel moved to dismiss the case because the charging document was defective. RP 195, 196-200. The court denied the motion. RP 211. Defense counsel then moved to dismiss for insufficient evidence, and that motion was denied. RP 214-215. The state filed an amended complaint after it had rested its case, and after the challenge to the charging document. RP 213, CP ____.

Tyler King had been riding his motorcycle for a week on the day he was stopped by Starks. It was the first bike he had owned. He had taken a three day safety class, which cost one hundred dollars. RP 217-218. On April 5, he rode to Longview from Vancouver. He was taking the motorcycle to the Pro Caliber store there to see if he could get the speedometer repaired. RP 219. He did not have enough for the repair, so he rode it home. RP 219. As he was going southbound on Interstate 5 in the middle lane, there was a Dodge Durango next to him. He stood up to stretch, standing on his foot pegs for 3-5 seconds. RP 219-20. He wanted to make sure the truck next to him saw him, because he had been in situations where cars in an adjacent lane changed lanes suddenly and he had to swerve or brake abruptly. RP 220, 238. So he kept tabs on the

Durango, because it was really big. RP 221. Because of his helmet, he had to turn his head slightly to the left to see the truck well. RP 237-238. As he felt the driver of the Durango was unaware of his presence in the lane next to them, and that he might be in the truck's blind spot, he sped up to get beyond them, then moved into the right lane. RP 222, 226. After he sped up to pass the truck, he slowed back down to the speed of the traffic in front of him. RP 227.

He then noticed a black Crown Victoria coming up from behind him rapidly. When he saw the police car turn on its lights he pulled over to wait for him. The car went past him, and then went into reverse and backed up to where he was. RP 229. Officer Starks asked why he stood up on the bike's pegs. He told him he was stretching out because his buttocks were numb. Starks asked why he was going so fast. He said the other car bugged him and he was getting away from it. RP 230. He felt getting away from the truck was the safest thing he could do. RP 231. He did not cut in front of the Durango, or any other traffic. He slowed as he approached the traffic which was further down the road ahead of him. RP 239.

D. Closing argument

During his closing argument, the prosecutor emphasized the officer's opinion testimony:

Officer Starks wrote him a ticket. Officer Starks said here today "I thought it was dangerous, and I felt it was reckless to me." Therefore I would ask that you convict the defendant of reckless driving. RP 273.

Defense counsel did not object to this argument.

IV. ARGUMENT

A. Mr. King was denied his constitutional right to a fair trial by the admission of Officer Starks' opinion testimony about reckless driving.

At the conclusion of his testimony, the prosecutor asked for Officer Starks' opinion concerning whether the driving he had described was reckless, and Starks indicated it was. To drive home the point, the prosecutor then asked whether Starks had training in what the elements of reckless driving were, and Starks replied that he had. He then offered his opinion that the driving was "within these elements." RP 170-71. At the end of his summation, the prosecutor reminded the jury that it was Stark's opinion that Mr. King had driven recklessly. The admission of this testimony and its reiteration by the prosecutor in his closing, denied Mr. King a fair trial.

A witness' testimony which either directly or by inference gives his opinion that the person on trial is guilty is inadmissible. This is because the determination of guilt or innocence is strictly a question for the jury. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967), *State v. Christopher*, 114 Wn. App. 858, 60 P.3d 677 (2003); *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999); *State v. Sargent*, 40 Wn. App. 340, 351, 698 P.2d 598 (1985); *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985); *State v. Oughton*, 26 Wn. App. 74, 77, 612 P.2d 812, *rev. den.* 94 Wn. 2d 1005 (1980); *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973).

“No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987). Particularly when given by a law enforcement officer, opinions on the ultimate issue of guilt deprive a defendant of a fair trial. *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), *Carlin, supra*, at 703; *Haga, supra*, at 492. This is because testimony by the police may carry a special aura of trustworthiness. *Demery, supra* at 763, citing *United States v. Espinosa*, 827 F.2d. 604, 613 (9th Cir. 1987). The expression of personal opinion by the arresting officer violated the constitutional right to a jury trial under the Sixth Amendment and Const. art. I, §22. *State v. Carlin, supra*. Because this issue affects the constitutional right to jury trial, it can be raised despite defense counsel’s failure to make an objection. *State v. Demery*, at 759; *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 1194 (2004); *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004); RAP 2.5(a).

The jury in this case had to determine whether Mr. King committed reckless driving when he momentarily stood on his motorcycle’s foot pegs to stretch, and then accelerated to get away from the blind spot of another vehicle, going over the speed limit in the process. But it was entitled to make this determination for itself, without the imposition of an opinion by the state’s only witness, a police officer. Officer Starks’ testimony violated the well-established Washington rule against such opinion testimony enumerated above.

The Superior Court relied on *State v Heatley*, 70 Wn. App. 573, 854 P.2d 658(1993), to support its conclusion that the opinion testimony elicited by the prosecutor here was not improper. In *Heatley*, the arresting officer was allowed to testify, without objection, that Heatley was “obviously intoxicated” and “could not drive in a safe manner” in a prosecution for DUI. The *Heatley* court recognized the line of cases prohibiting opinion testimony in criminal cases on the question of guilt or innocence, such as *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967), *State v. Black*, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987), and *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), but ruled that in its case, the testimony was allowable. It concluded that the testimony contained no “direct opinion” of Heatley’s guilt, was based on the officer’s conclusion following roadside “sobriety” testing and his observations of Heatley’s physical appearance. The court also observed that Washington has a long tradition of allowing any witness who has a sufficient opportunity to observe to offer an opinion about a person’s degree of intoxication. *Heatley, supra*, at 580. Finally, the court noted that the opinion was not framed in conclusory terms, nor did it “parrot” the elements of the crime.

Heatley thus stands as an exception to the long line of Washington cases prohibiting police officers from giving an opinion, direct or indirect, on the guilt or innocence of the accused in a criminal case. But the exception it carves out for an officer’s opinion on intoxication in a

prosecution for DUI is certainly not controlling here. Officer Starks was not offering observations about an intoxicated driver to a jury presumably familiar with the effects of alcohol, who could judge the validity of his opinion based on their life experience. He was specifically asked whether in his opinion Mr. King's driving was reckless, and answered in the affirmative. And unlike the police testimony in *Heatley*, which was *not* tied to the elements of the offense, the officer here was specifically asked if he knew what the elements were, and whether Mr. King's driving fit the elements. This testimony went well beyond the narrow exception that was allowed by the *Heatley* court. Also, unlike a case involving intoxication, there was a real danger here that the jury's verdict was swayed by the officer's assurance to them that what he saw constituted reckless driving, since he *knew* what the elements of that crime were.

B. Review of error under RAP 2.5(a)

Recently, in *State v. Kirkman*, 159 Wn. 2d 918, 155 P.3d 125 (2007), this court considered whether testimony by an examining physician in a child sex case constituted manifest error affecting a constitutional right which could be raised for the first time on appeal under RAP 2.5 (a). The court concluded that the testimony in that case could not be reviewed for error absent a contemporaneous objection. The testimony that was attacked in *Kirkman*, however, was quite different in kind from the testimony elicited from Officer Starks. The physician in *Kirkman* testified that the complaining child witness was "clear and consistent" in

her account. This court held that this was not giving improper opinion testimony about the witness's credibility and was therefore not an indirect opinion by the physician regarding Kirkman's guilt. *Kirkman, supra*, at 930. The court reached a similar conclusion regarding a detective's testimony about his interview with the child witness. *Kirkman*, at 931.

While concluding that this testimony did not constitute manifest constitutional error which could be raised for the first time on appeal, the court reiterated that it remains improper for a witness to give a direct opinion regarding a defendant's guilt. *Kirkman* at 937. This latter type of opinion testimony was the kind which was elicited in Mr. King's case. Officer Starks was not asked to give his opinion about another witness's credibility. He was asked for his opinion about whether Mr. King's driving was reckless, given his knowledge of the elements of reckless driving. This is the type of explicit witness opinion that the *Kirkman* court said would be a manifest constitutional error. *Kirkman* at 936-937.

In *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004), the court considered whether a police officer's testimony about his interrogation with the defendant constituted manifest error which could be raised for the first time on appeal in the absence of an objection. The court utilized a four step process:

(1) We first determine whether the alleged error is in fact a constitutional issue; (2) next we determine whether the error is manifest, that is whether it had "practical and identifiable consequences"; (3) we then address the merits of the constitutional issue; and (4) finally we pass upon whether the error was harmless.

State v Barr, 123 Wn. App. at 380.

The *Barr* court concluded that the error was constitutional in nature, since it impacted the right to trial by jury. It was “manifest” because the officer’s comments concerning Barr’s credibility were “a crucial part of the state’s case.” The state argued that the opinion testimony by the police consisted merely of the officer’s observations of Barr’s demeanor during the interrogation. The court rejected this argument, primarily because the observations were based on the so-called Reid theory of interrogation, and there was no scientific basis to support the opinion that the defendant’s body movements gave inferences about whether he was being deceptive during interrogation. The court held that the officer’s testimony invaded the province of the jury, and was not harmless error, particularly because of the possibly disproportionate impact a police witness may have with a jury. *Barr* at 380-82. This court should follow the reasoning of *Barr*, hold that the error here was “manifest” and not harmless, reverse the conviction and remand for a new trial.

C. Review of error as ineffective assistance of counsel

Defense counsel at trial did not make an objection when the prosecutor asked the arresting officer for his opinion about whether or not the elements of reckless driving were satisfied by the conduct the officer said he had witnessed. She also did not object during the prosecutor’s closing argument when reiterated and emphasized the officer’s opinion. Both failures deprived Mr. King of the effective assistance of counsel.

Assuming the court does not hold that the issue regarding Officer Starks' testimony is reviewable under RAP 2.5 (a), the court should do so because of ineffective assistance of counsel.

Assuming these were conscious tactical decisions by counsel, as opposed to inadvertence, it is settled in Washington that a defendant in a criminal case is deprived of the effective assistance of counsel where no legitimate tactical or strategic explanation can be found for a particular trial decision. *State v. McFarland*, 127 Wn. 2d 322, 336, 899 P.2d 1251 (1995); *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006); *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

The standard for ineffectiveness of counsel is found in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S. Ct. 2052 (1984).

To establish ineffective assistance, a defendant must first demonstrate that his lawyer's performance was deficient. Secondly, he must show he was prejudiced by the deficient performance. To meet the showing on the first prong, a defendant must show that the representation fell below an objective standard of reasonableness based on the circumstances.

Regarding the second prong, a defendant does *not* have to show "that the counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland, supra*, at 693. Rather, he need only show

there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, supra at 694.

As argued above in Section A, it is well settled in Washington that a police officer may not give opinion testimony which either directly or by inference gives his opinion that the person on trial is guilty. Defense counsel had interviewed Officer Starks before trial, and was aware that he would attempt to offer such opinion testimony. See Recorded testimony of Jeff Starks, attached to Motion to Dismiss, CP _____. Counsel could have litigated a pretrial motion in limine to exclude such testimony.

“The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.” *State v. Evans*, 96 Wn.2d 119, 123, 634 P.2d 845 (1981); *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). Had a motion in limine been filed on this topic, the matter would have been taken up outside the presence of the jury. There was no sound tactical reason not to litigate this motion. Counsel was deficient in failing to do so. Failing to bring a plausible motion to suppress evidence constitutes ineffective assistance of counsel. *McFarland, supra*, *Meckelson, supra*, *Rainey, supra*.

Even absent a motion in limine, an objection should have been made at the time of trial. The prosecutor wound up the direct examination of Officer Starks by asking for his opinion of Mr. King’s driving. The format of the question should have been sufficient warning that a potentially inadmissible answer was forthcoming. The prosecutor then followed up with a question designed to convince the jury that the

officer's opinion had great weight because he had been trained in what the elements of the crime were. This question should also have rung alarm bells for counsel given the well-established rule against such opinion testimony. This court should hold that Mr. King did not receive effective assistance of counsel, reverse his conviction, and remand for a new trial.

D. Officer Starks did not have authority to make an extra-territorial arrest.

The trial court found that the arrest in this case took place outside the City of Vancouver, at approximately milepost 14 on Interstate 5 in Clark County. The court also found that at the time of the arrest, there was no valid inter-local agreement under RCW 10.93 which would allow an extraterritorial arrest under RCW 10.93.070 (1). The court upheld the stop and arrest under RCW 10.93.070 (2). CP ___ (Findings of Fact and Conclusions of Law (Nov. 21, 2006).

At common law, a law enforcement officer generally did not have authority to arrest outside his or her jurisdiction. *Irwin v. Dep't of Motor Vehicles*, 10 Wn. App. 369, 371, 517 P.2d (1974); Accord *State v. Barker*, 143 Wn. 2d 915, 921, 25 P.3d 423 (2001). An exception to this rule existed where the officer was in "fresh pursuit" of one who had committed a felony, *State v. Rasmussen*, 70 Wn. App. 853, 855 P.2d 1206 (1993). The state has not argued at any point below that the stop was justified as a fresh pursuit, and there is certainly nothing in the record to suggest that the officer considered the

driving conduct he said he observed to rise to the level of a felony.

Consequently, the issue for this court is whether the trial court was correct in its conclusion of law that the stop was justified under the “emergency” clause of RCW 10.93.070 (2).

RCW 10.93.070 provides:

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

- (1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs;
- (2) In response to an emergency involving an immediate threat to human life or property;
- (3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority;
- (4) When the officer is transporting a prisoner;
- (5) When the officer is executing an arrest warrant or search warrant;
or
- (6) When the officer is in fresh pursuit, as defined in RCW 10.93.120.

Petitioner submits that momentarily standing on the pegs of a moving motorcycle, even one moving at 70 MPH, does not constitute an “emergency involving an immediate threat to human life or property.” Nor would even the officer’s uncorroborated³ observation that Mr. King drove at a speed approaching 100 MPH on the freeway, in the absence of

³ Starks did not obtain any radar or laser reading of Mr. King’s motorcycle.

any indication in the record that any other traffic was affected or even inconvenienced, constitute such an emergency. This court should therefore hold that the stop was unjustified under subsection (2), reverse the trial court, and dismiss the prosecution.

Washington decisions have construed the “fresh pursuit” subsection⁴ of RCW 10.93.070 (6). In *Vance v. Department of Licensing*, 116 Wn. App. 412, 65 P.3d 668 (2003), one of the issues considered by the court was a challenge to Vance’s original detention. The court did not discuss the “emergency” clause of subsection (2), but held that the stop of Mr. Vance was allowed under the “fresh pursuit” clause, subsection (6). In *Vance*, the police pursued the suspected drunk driver across the King County/Snohomish County line after observing him speeding. Citing *City of Tacoma v. Durham*, 95 Wn. App. 876, 978 P.2d 514 (1999), the *Vance* court stated that courts were not *limited* to the common law definition of fresh pursuit when interpreting RCW 10.93.070 and .120. The *Tacoma v. Durham* court noted but distinguished *City of Wenatchee v. Durham*, 43 Wn. App. 547, 550-52, 718 P.2d 819 (1986), which had held an arrest was illegal under the “fresh pursuit” doctrine under common law where

⁴ RCW 10.93.120, the fresh pursuit statute, reads as follows:

(1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.

(2) The term "fresh pursuit," as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

there was no evidence that suspect was attempting to flee the jurisdiction to avoid arrest or that he knew he was being pursued.

Vance and *Tacoma v. Durham* do not support the trial court's decision for several reasons. First, the trial court made no finding that the "fresh pursuit" doctrine applied. Second, "fresh pursuit" requires that the officer have authority under Washington law to make an arrest. Since he was out of his jurisdiction, Officer Starks had no such authority. Third, another division of the Court of Appeals has required the common law test for fresh pursuit even after the enactment of the statute in *State v. Waters*, 93 Wn. App. 969, 971 P.2d 538 (1999)⁵. Finally, in both *Vance* and *Tacoma v. Durham*, the targets of the police pursuit were both suspected to be driving under the influence. Durham was seen running a red light, nearly hitting another vehicle, crossing over a lane line, and rolling backward at a stop light. The "pursuit" went from the City of Tacoma to the City of Lakewood.⁶ Fifth, unlike the "pursuits" in *Tacoma v. Durham* and *Vance*, both of which began where the officers actually had jurisdiction, the pursuit here began where the officer had *none*. Here, Officer Starks was never originally within the territorial limits of his jurisdiction, and the "pursuit" never crossed any jurisdictional lines. This

⁵ An arrest is lawful under the fresh pursuit statute if: (1) a felony is committed within the arresting officer's jurisdiction; (2) the suspect attempts to flee, or at least knows he is being pursued; (3) pursuit is commenced with no unnecessary delay; (4) pursuit is continuous and uninterrupted; and (5) there is a relationship in time between the commission of the offense, commencement of the pursuit, and the apprehension of the suspect. The felony in *Waters* which allowed the stop was attempting to elude, RCW 46.61.024.

⁶ From the opinion, it appears that there was no pursuit in the usual sense of the term. Rather the opinion says that Tacoma police "caught up" with Durham's car in Lakewood.

court should hold that the stop was not justified under any provision of RCW 10.93.070, reverse the trial court, and remand for entry of an order of dismissal.

The *Tacoma v. Durham* court opined at the end of its decision that the stop could also be justified under the emergency prong of RCW 10.93.070. The driving behavior exhibited there was obviously dangerous, unlike Mr. King's. The driver in *Durham* was not on a limited access highway, and crossed over the centerline. He also ran a red light, nearly striking another vehicle. The potential for a collision, with the attendant danger to lives or property was significant. In contrast, the only traffic law Mr. King violated was the speeding statute, and only for a short period of time. He did not violate any lane travel statute, and had no near collisions with any vehicle. His driving is completely distinguishable from that of the driver in *Durham*. This court should hold that under the facts of this case, the extra- territorial traffic stop was not justified as an "emergency" to prevent an immediate threat to lives or property.

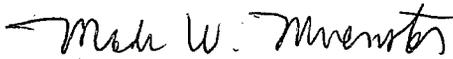
V. CONCLUSION

The arrest in this case was made by a police officer operating outside the limits of his territorial jurisdiction in a non-felony, non-emergency traffic situation. The trial court erred in denying appellant's pretrial motion to dismiss the charge. This court should reverse the conviction, and dismiss the prosecution.

The trial itself was marred by the presentation of opinion testimony by a police officer who was the state's only witness on the very topic the jury was assembled to answer: guilt or innocence. Such testimony has long been condemned in Washington as an invasion of the province of the jury. This court should hold that this is manifest error which is reviewable under RAP 2.5, or is reviewable because it was ineffective assistance of counsel not to object. In either event, the court should reverse and remand for a new trial.

Dated this 27 day of March, 2008

LAW OFFICE OF MARK W. MUENSTER

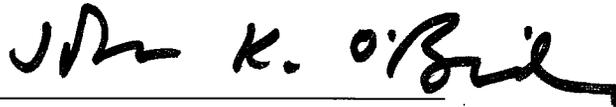


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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Petitioner's opening brief upon the following attorney of record and to petitioner at the addresses shown below by first class mail.

DATED this 27 day of March, 2008

A handwritten signature in black ink, appearing to read "John K. O'Brien", written over a horizontal line.

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