

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)

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PETITIONER'S REPLY BRIEF

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## I. ISSUES RAISED BY RESPONDENT'S BRIEF

1. In light of the State's concession that the opinion testimony in this case was improper, can the issue be raised for the first time on appeal pursuant to RAP 2.5 (a) (3)?

2. Does the improper admission of the officer's opinion testimony constitute constitutionally harmless error?

3. Was trial counsel's failure to object to the improper officer opinion testimony, or to litigate a motion in limine to exclude it, a conscious and legitimate tactical decision?

4. Was there "overwhelming evidence" of guilt, such that Mr. King cannot demonstrate he was prejudiced by his trial counsel's performance ?

5. Does evidence of speed in excess of the posted limit necessarily give rise to an "emergency involving an immediate threat to human life or property", thus allowing a police officer to make an arrest outside of his jurisdiction?

## II. ARGUMENT IN RESPONSE

A. The court should hold that the constitutional issue raised in this case is "manifest" under RAP 2.5 (a)(3) and reverse Mr. King's conviction.

The state argues that this court should not reverse Mr. King's conviction because his trial lawyer did not object to what the state concedes<sup>1</sup> is improper opinion testimony. The state argues that the constitutional error in this testimony is not "manifest" and therefore should not be considered under RAP 2.5 (a)(3). This argument should be rejected.

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<sup>1</sup> "As in *Montgomery*, Officer Starks' testimony would be considered improper under current case law because it is an expression by a police officer that goes to the guilt of the Defendant." State's brief at 12.

The state relies chiefly on this court's recent decision in *State v. Montgomery*, \_\_\_ Wn. 2d \_\_\_, 183 P.3d 267 (2008). The *Montgomery* opinion cites *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) for the proposition that the exception created by RAP 2.5 (a)(3) is narrow and will only be found where the error caused actual prejudice or practical and identifiable consequences. The *Montgomery* court went on to say that in *Kirkman*, the court relied in part on the fact that the jury received the standard introductory instruction (WPIC 1.02) telling jury members that they were the sole judges of the credibility of witnesses. The *Kirkman* court also pointed out that the record was clear that both trial counsel had determined as a tactical matter not to object to the opinion testimony. This was based on the court's observation that in one of the two companion cases other testimony given by Dr. Stirling was favorable to the defense and in the other because trial counsel introduced other evidence of the complaining witness' credibility. The opinion concluded that:

There was no explicit statement of opinion on the credibility of the defendants or victims by these witnesses and no objections at trial (for tactical reasons). Thus, there were no manifest constitutional errors in either *Kirkman's* or *Candia's* case.

*Kirkman*, supra at 939

Notably, however, the *Kirkman* court observed that manifest constitutional error *is* shown when the witness makes an explicit or almost explicit statement on the ultimate issue in the case:

Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for

any witness to express a personal opinion on the defendant's guilt.

*Kirkman*, supra at 936, citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Trombley*, 132 Wash. 514, 518, 232 P. 326 (1925).

The *Kirkman* court denied relief under RAP 2.5 (a)(3) for two reasons. First, the testimony given by Dr. Stirling and the police did not explicitly give an opinion about the truthfulness of the complaining witness's testimony and hence there was no indirect or direct opinion given concerning the guilt or innocence of the defendant. Secondly, the court determined, in essence, that the defendants had either waived or invited the error by making a conscious tactical decision not to object to the testimony.

The facts of Mr. King's case stand in stark contrast. The testimony given here was a naked opinion, by the arresting police officer and sole government witness, that Mr. King's driving fit within the elements of reckless driving. It was "an explicit or almost explicit statement" regarding the arresting officer's opinion of guilt. Moreover, his opinion was tied directly to the elements of the crime by the prosecutor's followup questions. (See RP 170-71, set forth in state's brief at 12). This correlation was echoed in the prosecutor's closing argument. RP 273.

The state suggests that like the apparent decisions of trial counsel in *Kirkman* not to raise objections to Dr. Stirling's testimony, a similar tactical decision was made by Mr. King's trial counsel not to make an objection. State's brief at 14-15. This suggestion is based on the fact that

trial counsel cross-examined Stark concerning various aspects of his credibility. The suggestion is not well taken, however. In *Kirkman*, trial counsel were deemed not to have objected, at least in one the two cases, because some aspects of Dr. Stirling's testimony were *favorable* to the defense, in that Stirling opined it was unlikely that the defendant could have penetrated the complaining witness. Here there was nothing favorable about Stark's opinion that Mr. King's total driving pattern was reckless which would have justified a tactical decision<sup>2</sup> to forego an objection. If counsel had been concerned about making such an objection in front of the jury, the admissibility of such opinion testimony could have been litigated outside the jury's presence by making a motion in limine before jury selection had even begun.

The test enunciated in *Kirkman* for identifying manifest constitutional error is thus satisfied in Mr. King's case, because there was an explicit statement of opinion on guilt by the state's sole witness, and no basis for this court to conclude that trial counsel had made a conscious decision to forego an objection as a hedge against an unsuccessful trial

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<sup>2</sup> The frequency with which the issue of improper opinion testimony is associated with failures to object suggests it is more likely that trial counsel are unfamiliar with Washington precedents on this subject that make such testimony questionable at the very least, or alternatively, that the plaintiff's counsel elicit such testimony in a way that gives little warning that an opinion is on the way. Justice Chambers recognized this in *Montgomery* when he suggested a procedure for introducing such testimony in a way that would put opposing counsel on notice in time to make an objection. As the prosecutor now representing the state observes, the format of the questioning in this case was similar to the format recommended by Justice Chambers' opinion. See Resp. Brief at 12, fn 2.

outcome or for some other tactical reason.

Finally, the prosecutor suggests that even if the testimony from Officer Starks is reviewable as manifest constitutional error, it is nevertheless harmless.<sup>3</sup> Central to this contention is the prosecutor's argument that there was overwhelming evidence of reckless driving. A close review of the evidence reveals this argument is without merit.

Mr. King stood on the footpegs of his motorcycle for approximately 3-5 seconds. He testified he did so merely to stretch his legs after a fairly long period of time on the motorcycle. There was no testimony by Officer Starks that standing on the pegs affected his ability to control the movement of his motorcycle in the slightest.

The prosecutor states that Mr. King was "staring at, and possibly taunting another vehicle." State's brief at 19. The testimony reflected that Mr. King was wearing a helmet, which restricted his vision to the side to some degree. To note the position of the vehicle next to him, he had to turn his head to one side. RP 237-38. Starks' testimony was that Mr. King's head was turned for 3-4 seconds. RP 168. Starks never explained his comment that Mr. King was "taunting" the driver of the other vehicle. RP 165. There is no testimony that Mr. King made any gesture, hostile or

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<sup>3</sup> The harmless error review is suggested by *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004) and *State v Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

otherwise, toward the other vehicle.<sup>4</sup> In fact, after pulling abreast of it, he moved one lane to the right and accelerated away from the other vehicle.

The prosecutor states that Mr. King drove away from the Dodge Durango at “around one hundred miles per hour” as if that were an established fact on this record. Officer Starks had to acknowledge, however, that he made this estimate without the benefit of his radar unit, or any other speed measurement device and could not even recall if his own department had a policy to confirm a visual estimate of speed with a measurement device before even writing a speeding ticket. RP 166, 179. Moreover, he did not activate the video camera in his patrol car in time to document any of the driving he described.

Officer Starks did testify that traffic was “a little congested” at the time of his observations. Notably, however, he never testified that Mr. King was tailgating other traffic, made any unsafe or unsignalled lane changes, or failed to slow down when he caught up to traffic after his acceleration away from the Dodge Durango in the left lane. Starks himself was going so fast in his attempt to catch Mr. King that when King pulled over in obedience to Starks’ signal, Starks shot past him and had to back up on the shoulder to where King had parked his motorcycle. In short, other than Starks’ uncorroborated estimation that Mr. King drove in excess of the speed limit, there was no evidence of recklessness at all.<sup>5</sup>

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<sup>4</sup> Eye protection, along with his helmet, makes any facial gesture unlikely.

<sup>5</sup> As the prosecutor points out, RCW 46.61.465 provides that driving in excess of the posted limit is *prima facie* evidence of reckless driving. That

This court should hold that under the facts of this case, RAP 2.5 (a)(3) allows the review of the manifest constitutional error caused by the admission of improper opinion testimony by Officer Starks, and should reverse his conviction on this ground.

B. The court should hold that counsel's failure to object or move to exclude Stark's testimony was ineffective assistance of counsel and not a conscious and deliberate trial tactic.

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 trial counsel's failure to either object to the testimony, or attempt to exclude it constitutes ineffective assistance of counsel.

The state argues that trial counsel made a conscious tactical decision to forego making an objection to Officer Starks' improper opinion testimony. In essence, the prosecutor argues that trial counsel could *either* cross-examine Starks to expose weaknesses in his testimony, which she did, *or* object to his opinion, which she did not. These are posed as mutually exclusive possibilities, which clearly they were not. It was effective assistance to cross-examine Starks in the way trial counsel did. It was not effective assistance when counsel failed to either object to his improper opinion testimony at the time it was made, or to exclude it ahead of trial by means of a motion in limine. The prosecutor posits no tactical

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observation would allow the state's case to survive a motion to dismiss for insufficient evidence, but speed alone hardly makes a case for "overwhelming" evidence such that a constitutional error could be deemed harmless.

reason why either an objection or a pretrial motion in limine was inconsistent with the trial strategy that was pursued.

The failure to bring a plausible motion to suppress evidence constitutes ineffective assistance of counsel. *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). In this situation, the motion in limine is analogous to a motion to suppress evidence. Such a motion clearly was plausible, since the state concedes the opinion testimony was improper. Consequently, counsel was ineffective in failing either to object to the opinion testimony, or to litigate the exclusion of the testimony ahead of time.

The state argues that even if trial counsel's performance was deficient, the second prong of the test in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S. Ct. 2052 (1984) was not met, i.e. that there was no reasonable probability that but for counsel's deficient performance, the outcome would have been different. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at 694. The prosecutor bases this argument chiefly on his assertion that the evidence of guilt was "overwhelming." As argued above, while the evidence would withstand a motion to dismiss for insufficiency, given the statute which makes speeding prima facie evidence in a reckless driving prosecution, it was far from "overwhelming."

Because opinion testimony by the police has an “aura of reliability”, see *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), there was a reasonable probability that the outcome of this trial would have been different without the improper opinion testimony. The opinion was the capstone of the state’s case and came at the climax of the officer’s direct testimony. The prosecutor re-emphasized the officer’s opinion in his closing argument. Had it been excluded, as the state concedes it should have been under this court’s precedents, Mr. King may well have been acquitted. This court should hold that Mr. King received ineffective assistance of counsel when his trial lawyer failed to attempt to exclude opinion testimony that the state concedes was improper, reverse his conviction, and remand for a new trial.

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

The state argues here, as it did to the trial court, that Officer Starks could make an arrest out of his jurisdiction based on RCW 10.93.070 (2). This statute empowers an officer to make an arrest outside of his territorial jurisdiction if he is doing so “in response to an emergency involving an immediate threat to human life or property.” This court must determine whether the defendant’s driving created an “emergency involving an immediate threat to human life or property.”

Mr. King was driving a motorcycle in the middle lane of a three lane freeway. When initially observed, he was driving at the posted limit

of 70 mile per hour. The police officer claims to have first observed him while following at a distance of three car lengths. RP 163-165. He was standing on the footpegs of his motorcycle for a period of about 3-5 seconds. RP 167, 220. During that period of time, his head was turned toward the Dodge Durango in the lane toward his left. RP 165. He then sat down, made a lane change to his right, and accelerated away from the Dodge, at a speed the officer estimated to be 100 miles per hour. He slowed down to the speed of the traffic ahead of him, and obeyed the officer's signal to stop when it was given. The officer testified he actually overshot Mr. King's position on the road where he had come to a halt. RP 166, 168-69.

The officer did not testify that Mr. King was unable to control his motorcycle while momentarily standing on the footpegs. The officer did not testify that Mr. King made any unsignaled lane changes. The officer did not testify that any other traffic was cut off, or that Mr. King made any unsafe lane changes. The officer did not testify that Mr. King was following at an unsafe distance from any of the traffic on the freeway. In fact, there was no testimony whatsoever which indicated that other traffic on the freeway was inconvenienced in the slightest. Mr. King submits that there is no evidence from which it could be concluded that his driving created an "emergency involving an immediate threat to human life or property."

The state argues that wherever an officer has probable cause to arrest for reckless driving, there is also a basis for an extraterritorial stop under RCW 10.93.070 (2). Resp. Br. at 31-32. The state argues that probable cause existed to arrest in this case for reckless driving because of RCW 46.61.465.<sup>6</sup> In essence, the state argues that any time an officer sees a violation of the basic speed rule of RCW 46.61.400, an officer may conduct a full custodial arrest for reckless driving, and officers out of their territorial jurisdiction could make a stop based on an “emergency involving an immediate threat to human life or property.” The state’s proposed conversion of every speeding violation into an “emergency involving immediate threat to human life or property” should be rejected by this court. Instead, this court should hold that under the facts of this case, the extraterritorial stop was not justified under the emergency prong of RCW 10.93.070, since the officer’s observations did not indicate an emergency with an immediate threat existed.

### III. CONCLUSION

This court should hold that the admission of improper opinion testimony by a police officer on the ultimate issue in the case is a “manifest constitutional error” allowing review under RAP 2.5 (a)(3).

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The unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this chapter at the point of operation and under the circumstances described shall be prima facie evidence of the operation of a motor vehicle in a reckless manner by the operator thereof.

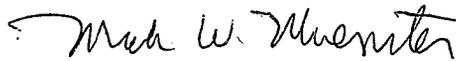
Alternatively, the court should review the error because Mr. King's trial counsel was ineffective in failing to take steps to exclude this testimony, and there was at least a reasonable probability that the result would have been different absent this evidence and the prosecutor's argument based on it.

Finally, the court should hold that under the facts of this case, the officer did not have grounds under RCW 10.93.070 (2) to make an extra-territorial arrest.

Petitioner respectfully requests that his conviction for reckless driving be reversed and remanded to the District Court of Clark County for a new trial, or alternatively reversed and dismissed on the basis of the unlawful stop. Petitioner also requests an order granting him statutory attorney's fees and costs for this matter pursuant to RAP 18.1(a) and RAP 14.3.

Dated this 14 day of July, 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 reply brief upon the following attorney of record and to petitioner at the addresses shown below by first class mail.

DATED this 14<sup>th</sup> day of July, 2008



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