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NO. 70620-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DONALD JONES,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The State concocts a theory to justify Mr. Jones's detention that was not testified to at trial or part of the court's ruling**

The State misrepresents the justification for stopping Mr. Jones's car premised on information not part of the record. This argument should be disregarded on appeal.

In its brief, the prosecution asserts the officer stopped Mr. Jones "to further investigate the crime of driving under the influence of intoxicants. 6/12/12RP 7." Response Brief at 6. But neither "6/12/12RP 7" nor any other page of the CrR 3.6 hearing refers to stopping Mr. Jones due to suspicion of driving under the influence of intoxicants. This claim is contrary to the record.

The State further asserts the officer believed "based on her training in experience" that "the driver could be impaired," but cites no part of the record. Response Brief at 12. The police officer did not say she believed Mr. Jones' driving indicated impairment. And the State never presented such an allegation during the CrR 3.6 hearing at a time when Mr. Jones could have cross-examined the officer about this purported basis of the stop.

The officer also never said she had training and experience in detecting alcohol-impaired driving, contrary to the State's brief. Response Brief at 12. The only experience she testified about was being "employed" by the Anacortes Police Department for "approximately two and a half years." 6/12/12RP 5-6. She never said what that employment consisted of or what training she had. *Id.* She said that she was currently a patrol officer but did not say how long she served this role. *Id.*

The court never found suspicion of intoxication justified the stop, and rightly so, because there was no evidence that such suspicion was the reason for the stop. CP 20-21. "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The State bears the burden of proof at a suppression hearing. *Id.* It did not elicit evidence and the court did not find the basis of the stop was the alleged criminal activity asserted in the State's Response Brief.

The incorrect and misleading portion of the State's argument claiming the car was stopped to investigate criminal activity premised

on drunk driving was not presented to the trial court and should be disregarded.

**2. The sole basis of the stop was the one-inch incursion over a traffic line**

The reason the State creates a new “criminal activity investigation” claim in its Response Brief is because stopping a car for minimally crossing a lane line is improper. *State v. Prado*, 145 Wn.App. 646, 186 P.3d 1186 (2008) explained this impropriety.

On appeal, the State pretends that *State v. McNeal*, 178 Wn. App. 236, 240, 313 P.3d 1181 (2013), *rev. denied*, 179 Wn.2d 1026 (2014), renders *Prado* inapposite. But there is a critical distinction between *McNeal* and this case. Although the driver’s behavior in *McNeal* included weaving “from side to side” and crossing the fog line three times by an unspecified amount, the *McNeal* Court held the stop lawful due to the trooper’s suspicion of driving under the influence of intoxicants, not line-crossing. *Id.* at 240. The Court of Appeals emphasized:

Trooper Thompson had training and experience in identifying impaired drivers. Through this training and experience, he knew that (1) alcohol causes, delayed reactions that can result in a driver's drifting through the lane of travel and (2) alcohol impairs a person's ability to simultaneously perform multiple tasks such as

maintaining the speed limit, staying within a lane, and using turn signals. Trooper Thompson estimated that in 2010 he stopped about 400 drivers for lane travel violations and he made over 200 arrests for driving under the influence.

*Id.* Not only did Trooper Thompson's experience lead him to suspect McLean was too impaired to drive legally, he also saw McLean commit several driving infractions: "driving in the left lane without passing, weaving through the lane, and discarding a lit cigarette after Trooper Thompson activated his emergency lights." *Id.* at 241.

In a footnote, the *McNeal* Court dismissed any notion that *Prado* applied to the circumstances of the case given the multitude of other reasons for stopping McNeal's car. 178 Wn.App. at 245 n.3. It deemed *Prado* irrelevant. *Id.*

In Mr. Jones' case, the State did not offer any similar testimony demonstrating the stop occurred due to suspected alcohol impairment. The officer did not claim she had training and experience in detecting how alcohol affects a driver, did not say she had made numerous arrests due to suspicion of impaired driving, and did not contend that Mr. Jones' driving demonstrated a basis to believe he was under the influence of alcohol or drugs. 6/12/12RP 5-7.

Officer Jacqueline Richter’s testimony spans less than three pages of the record. *Id.* The only reason she said she stopped Mr. Jones was “inconsistent” lane travel. *Id.* at 6. When asked to explain what she meant in more detail, she said the car “passed over the fog line approximately an inch” then went back to its lane of travel “in a general straight line, but more of a consistent angle, and it did that three times.” *Id.* at 6-7. At that point, she stopped him. *Id.* at 7. The State’s portrayal of the officer’s testimony in its Response Brief is inaccurate.

The trial court in *McNeal* “concluded that Trooper Thompson stopped McLean on the basis of a reasonable suspicion that McLean was driving under the influence of alcohol.” 178 Wn.App. at 244. In the case at bar, the court made no similar finding and instead denied the motion to suppress on the basis that Mr. Jones crossed the fog line more than once, even though no traffic was in the area.

As explained in Appellant’s Opening Brief, the minimum, one-inch, incursion over the fog-line is less of an incursion than the 16-inch incursion in *Prado* and there was no testimony anyone else was driving on the road or in any danger when this action occurred. *Prado*, 145 Wn.App. at 648-49. The State did not meet its burden of proving the

lawfulness of stopping Mr. Jones's car and it cannot rectify this deficiency by changing the facts on appeal.

**3. An out-of-state conviction that may rest on conduct that would not be a crime in Washington is broader, not narrower, as the State mistakenly claims in its Response Brief.**

The State acknowledges that Idaho criminalizes the possession of a controlled substance based in ingestion in one's body, which is a line Washington does not cross. *State v. Rudd*, 70 Wn.App. 871, 872-73, 856 P.2d 699 (1993). Yet the State asserts that this difference makes the Idaho offense narrower. Response Brief at 20. In fact, it is broader than Washington's possession law. When a person could be convicted of an out-of-state conviction based on conduct that would not be a crime in Washington, the offenses are not legally comparable. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256, 111 P.3d 837 (2005).

The State also mischaracterizes the degree of comparison undertaken by the trial court. Response Brief at 20. The trial court did not engage in research, case law review, or review of any factual information pertaining to Mr. Jones' prior conviction beyond noting the offense's name and the sentence imposed. 8/5/13RP 42-43. The prosecution did not submit any supporting documents other than

showing the sentence imposed. Ex. 3. This document did not establish the comparability of Mr. Jones' prior conviction for possession of a controlled substance because it did not show Mr. Jones' conviction was based on conduct that would constitute the same felony in Washington.

Finally, the State asserts that its burden of proof was merely a preponderance of evidence, citing a sentencing statute. Response Brief at 21. However, unlike the sentencing cases usually at issue when comparability is contested, Mr. Jones was charged with unlawful possession of a firearm in the second degree, which includes the essential element that he is prohibited from possessing a firearm due to a prior felony conviction. CP 1; RCW 9.41.040 (2). When the prior conviction is from another state, the prosecution must prove that the conviction is of an "out-of-state offense comparable to a felony offense under the laws of this state." RCW 9.41.010(6). As an essential element, the comparability must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The prosecution does not offer any case law diluting the State's burden of proving this essential element. The State's failure to meet its burden of proof requires reversal and dismissal of this conviction.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Jones' conviction should be reversed due to the illegal stop of his car and the insufficient evidence of an essential element of unlawful possession of a firearm.

DATED this 10<sup>th</sup> day of September 2004.

Respectfully submitted,



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DIVISION ONE**

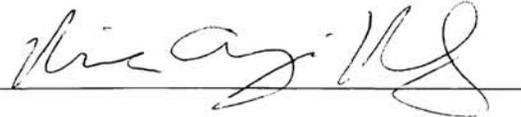
STATE OF WASHINGTON,	)	
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Respondent,	)	
	)	NO. 70620-9-I
v.	)	
	)	
DONALD JONES,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <p>[X] DONALD JONES<br/>(NO VALID ADDRESS)<br/>C/O COUNSEL FOR APPELLANT<br/>WASHINGTON APPELLATE PROJECT</p>                           | <p>( ) U.S. MAIL<br/>( ) HAND DELIVERY<br/>(X) RETAINED FOR<br/>MAILING ONCE<br/>ADDRESS OBTAINED</p> |

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF SEPTEMBER, 2014.

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