NO. 43522-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

CHARLES WAYNE MCLEAN,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

At about 12:30 am on August 18, 2010, Trooper Thompson of the Washington State Patrol was on routine patrol westbound on State Route 500 in the City of Vancouver. MT 3-15.[1] The highway has two lanes in each direction in this area. *Id.* While driving in the right lane, Trooper Thompson noticed the defendant a short distance in front of him traveling in the left lane. *Id.* As Trooper Thompson followed a couple of car lengths behind, he noted that the defendant was weaving within his lane and drove on the fog line twice while crossing a tire over it once. MT 23. Based upon these observations, Trooper Thompson suspected that the defendant might be driving while intoxicated. MT 12-15. As a result, he pulled behind the defendant and turned on his overhead lights. *Id.*

After the defendant stopped, Trooper Thompson contacted the defendant and noted that he had the odor of alcohol about his person, that his speech was slurred, that he had some difficulty producing requested documents, and that he appeared to have some difficulty responding to the Trooper's questions. TT 43-58 Based upon these observations, Trooper

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[1]The record before this court includes the verbatim reports of the suppression motion held before the Clark County District Court on November 18, 2010, and the jury trial held before the same court on June 22, 2011. They are appended to the Brief of Appellant filed as document 25 with the Clark County Superior Court and included in the record before this court as part of the state's supplemental index. The former is designated herein as "MT [page #]," and the latter is designated herein as "TT [page #]."

Thompson had the defendant get out of his vehicle to perform a "horizontal gaze nystagmus test." *Id.* Following this test, Trooper Thompson arrested the defendant on two charges: driving while intoxicated and driving while suspended. *Id.* Once at the jail, the defendant refused to submit to a breath test. TT 65.

Following his initial appearance in court, the defendant moved to suppress all of the evidence Trooper Thompson obtained, arguing that (1) the officer unlawfully stopped the defendant's vehicle based solely upon the defendant's weaving within his own lane and crossing the fog line once, and (2) any claim from the officer that he was justified in stopping the defendant based upon a traffic infraction (continuous driving in the left lane or crossing the fog line) was a pretext. *See* Motion to Suppress and Supporting Affirmation. The District Court later called this case for a hearing on the defendant's motion, during which the state called Trooper Thompson as its sole witness. MT 3-26. During that testimony, Trooper Thompson told the court about his observations of the defendant weaving in his own lane and running a tire on the fog line on three occasions. MT 3-15. Trooper Thompson also noted that the defendant had continually driven in the left lane. *Id.* However, on cross-examination, the Trooper admitted that when he stopped the defendant's vehicle, he had no intent to write any infraction citations. MT 20.

After Trooper Thompson's testimony, the parties presented argument. MT 23-35. The defense specifically claimed that the defendant's weaving in his own lane and crossing over the white line once did not legally justify the stop. *Id.* Following argument, the court denied the motion, stating as follows from the bench:

> Here we have the constant travel in the left hand lane for no apparent reason, because there's no other traffic on the road according to the trooper - just him and the defendant. He also then makes 3 incursions outside the lane. Once he describes it by, as by half a tire width and I think I understood that at first to be totally outside the lane he clarified that for you to indicate that over half the vehicle width of the tire had crossed outside, but there was still some of the tire on the white line itself. And then, there was at least one incursion where the vehicle was totally outside the line.
>
> I don't think Prado asks the trooper to sit and follow a vehicle that he feels may be operated by an impaired driver, and that's what Trooper Thompson was clearly looking for was an impaired driver. And he was looking for infractions that would lead him to believe that an infraction, the infractions were being committed because the driver was impaired. I don't think Prado is asking the troopers to, at count 3 and count 1 or count any specific number. If you crossed outside the line just once and side swiped the Jersey barrier, that may have been enough for PC. Here we've got 3 times where he went outside the line.

MT 36-37.

As far as counsel for Respondent can tell, the state never did prepare or present findings of fact and conclusions of law on the suppression motion and no findings of fact and conclusions of law on the suppression motion even though (1) the state had prevailed on the motion, (2) the defendant later

appealed, and (3) the defendant later argued on appeal that the trial court had erred when it denied the motion to suppress. *See* Record Accompanying State's Motion for Discretionary Review.

The case later came on for trial, with the state calling two witnesses: (1) a toxicologist to testify concerning the physical tests police administer to assess the possibility of alcohol intoxication, and (2) Trooper Thompson concerning his contacts with the defendant. TT. Among other things, the toxicologist testified that "[i]f an individual displays VGN or vertical gaze nystagmus, it's indicative of higher dose of that depressant for that individual." TT 25. Although the defense objected to this testimony, the court appeared to let the claim stand. *Id.*

During his testimony, Trooper Thompson made the following claims, all without objection from the defense:

> Trooper Thompson: One is whether or not they're appreciably affected. The other is whether or not they're over the per se level. So if you're appreciably affected, in other words whatever's in your system whether it's alcohol in this case, or some other type of drug that impairs driving, if you're not appreciably affected, if you're not impaired, you're not going to get arrested for DUI. So if I do the standardized field sobriety tests, the standard battery of tests with them; and determine that they're not impaired, they do not get arrested.

TT 33-34.

> Prosecutor: During your training and experience, have you learned what type of driving patterns might signify a driver who's impaired?

Trooper Thompson: Yes, Ma'am, I have.

TT 34.

Trooper Thompson: I tend to see impaired driving coming at, what I look for indicators of impaired driving is lane travel, following too close, speeding and improper signal. And I would probably put those in the order of lane travel, speeding, following too close and improper signal. So those are the indicators that, I had like 400 lane travel stops approximately last year. And 200 DUI arrests. So lane travel is a big one.

TT 34-35.

Trooper Thompson: But the standardized field sobriety tests will then tell you, the walk and turn and one-leg stand will then tell you if that person is in fact impaired or appreciably affected is what we like to call it.

TT 47.

Prosecutor: Based on your training and experience, was the defendant's performance on the horizontal gaze nystagmus consistent with the performance of someone under the influence of alcohol?

Trooper Thompson: Yes, Ma'am, it was.

TT 51.

Prosecutor: Okay. So overall, how did the defendant perform on this test?

Trooper Thompson: Consistent with being impaired.

TT 55.

Trooper Thompson: I was able to do the standard battery of tests with the individual and I did believe he was under the influence of intoxicating liquor.

Prosecutor; So your decision wasn't based on a single one of those

3 tests?

Trooper Thompson: No Ma'am.

Prosecutor: Okay. So what did you do once the field sobriety tests were completed?

Trooper Thompson: I arrested the subject for DUI.

Prosecutor: Can you describe the arrest procedure?

Trooper Thompson: Yes, Ma'am. So right there, as soon as we're done with the tests, I direct him to turn around. Advise them that they're under arrest for DUI, place my handcuffs on them, right there. Double lock them so that they don't get any tighter. Which that terminology may not mean anything to you. But there's a little lock on the handcuffs, if you push it in, it keeps the cuffs from getting tighter when they're in the back of the car, because it can hurt them. So you've set them to the appropriate spacing, you double-lock them. Escort him back to my vehicle. I read him his constitutional rights. Placed him in the vehicle, placed him in the car. And continue on.

Prosecutor: Okay. And you said you advised him of his constitutional rights?

Trooper Thompson: Yes, Ma'am.

Prosecutor: And did you use any form or card to advise him of those rights?

Trooper Thompson: Yes, Ma'am. . . .

Prosecutor: And can you please read that onto the record for the court?

Trooper Thompson: Yes Ma'am. . . .

Prosecutor: And did he indicate to you whether or not he under stood them?

Trooper Thompson: Yes, Ma'am. He said he understood his rights

> and he did not invoke his right to remain silent. Or to an attorney at that point.

TT 58-59.

> Prosecutor: And so at that point then, once the arrest was complete in the field, did you transport the defendant from the scene of that arrest?
>
> Trooper Thompson: Once the impound removed the vehicle, yes, Ma'am.
>
> Prosecutor: So you waited there until the tow came and then did you transport the defendant from the scene?
>
> Trooper Thompson: Yes, Ma'am, I did.
>
> Prosecutor: Where did you take him?
>
> Trooper Thompson: Clark County Jail.

TT 60.

Following this testimony, the state rested its case, and the defense rested without calling any witnesses. TT 89. The court then instructed the jury and counsel presented closing arguments, after which the jury retired for deliberation. TT 90-113. The jury later returned a verdict of guilty. TT 113-114.

After sentencing, the defendant filed a timely notice of appeal to the Clark County Superior Court. *See* Notice of Appeal. He presented two arguments on appeal: (1) that the trial court had erred when it denied the defendant's suppression motion, and (2) trial counsel's failure to object when

Trooper Thompson presented impermissible opinion evidence of guilt denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. *See* Brief of Appellant before the Superior Court. Following argument on appeal, the Superior Court reversed the defendant's conviction and remanded for dismissal with prejudice, holding as follows:

> 1. Pursuant to *State v. Prado*, 145 Wn.App. 646 (2008), Trooper Thompson's stop of Defendant for DUI was not supported by reasonable suspicion.
>
> 2. Although reasonable suspicion existed for an infraction (violation of RCW 46.61.100(2), "Keep right except when passing, etc."), to the extent that the stop was based on that infraction the stop was pretextual. The court concludes;: "How many cars do we see pulled over because they have been traveling in the left lane? How many times have we all driven down the road behind somebody who is in the left lane and won't pull over? That's, you know, that's a stop that doesn't make it at least in my mind, in terms of being anything other than a pretext so under the case law, the stop is no good. *State v. Ladson*, 138 Wn.2d 343 (1999).
>
> 3. Trooper Thompson gave improper opinion testimony on an ultimate issue to be decided by the jury, and the error was not harmless.
>
> As a result of the foregoing Conclusions of Law, insufficient evidence remains to prove the elements of DUI. The case is hereby remanded to District Court for dismissal with prejudice, consistent with this opinion.

See Opinion and Remand to District Court.

The state later sought Discretionary Review, arguing that (1) the Superior Court erred "when it held that the stop of the defendant's car was

pretextual and unlawful," and (2) that the Superior Court erred "when it held that Trooper Thompson gave improper opinion testimony and that such error was not harmless." *See* Motion for Discretionary Review. The Commissioner of this court has now granted review.

ARGUMENT

I. THE DISTRICT COURT'S FAILURE TO EFFECTIVELY ARTICULATE FINDINGS OF FACT AND CONCLUSIONS OF LAWS FOLLOWING DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE PRECLUDES EFFECTIVE DISCRETIONARY REVIEW.

Under CrRLJ 3.6(b), the trial court has the duty to at least state findings of fact and conclusions of law if it conducts an evidentiary hearing on a party's motion to suppress evidence. This rule states:

> **(b) Hearing.** The court shall state findings of fact and conclusions of law.

CrRLJ 3.6(b).

Although the rule does not state the form those findings should follow, an analogous Superior Court rule for determining the admissibility of a defendant's statement under CrR 3.5(c) does suggest the issues the court should address when stating findings and conclusions. This rule states:

> **(c) Duty of the Court to Make a Record.** After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statements if admissible and the reasons therefore.

CrR 3.5(c); *See also* CrR 6.1(d) (court's duty to prepare written findings of fact and conclusions of law following a bench trial) and JuCrR 7.11(d) (court's duty to prepare written findings of fact and conclusions of law following juvenile adjudication).

The purpose behind the requirement that the court state findings of fact and conclusions of law when it acts as a fact finder, whether in a motion or a trial, is to enable an appellate court to adequately review the questions raised on appeal. *State v. Stock*, 44 Wn.App. 467, 477, 722 P.2d 1330 (1986) (CrR 3.6); *City of Bremerton v. Fisk*, 4 Wn.App. 961, 962, 486 P.2d 294 (1971) (CrR 6.1(d); *State v. McGary*, 37 Wn.App. 856, 683 P.2d 1125 (1984) (JuCR 7.11). Unless the trial court's oral findings are sufficiently clear and extensive to allow for effective appellate review, the appropriate remedy upon the court's failure to enter the required findings of fact and conclusions of law is to remand the case with an order to enter findings in compliance with the rule. *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998).

For example, in *State v. Head, supra*, the court found the defendant guilty of eight counts of First Degree Theft following a trial to the bench. The defendant thereafter appealed. In spite of the appeal, the trial court never did enter written findings of fact as is required under CrR 6.1(d). The defendant then argued on appeal that the trial court's failure to comply with CrR 6.1(d) required vacation of the convictions and dismissal. The state argued that the error was harmless under the facts of the case. However, the Washington Supreme Court determined that the appropriate remedy was to vacate the conviction and remand for entry of the findings. The court stated:

> CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. . . .
>
> Remand for entry of written findings and conclusions is the proper course. A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. *State v. Mallory*, 69 Wash.2d 532, 533, 419 P.2d 324 (1966). An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *Id.* at 533-34, 419 P.2d 324; *accord State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

State v. Head, 136 Wn.2d at 621-22 (footnote omitted).

In the case at bar, neither the state as the prevailing party nor the trial court prepared written findings of fact and conclusions of law in spite of the fact that the defendant appealed from the denial of the motion and argued that the trial court erred when it refused the request to suppress evidence. Rather, the District Court only made cursory comments when denying the motion. While the applicable court rule did not require written findings, it did require the court to state its findings and conclusions with enough specificity to allow for effective appellate review. In this case, the trial court's statement denying the motion to suppress does not meet this requirement. This statement was as follows:

> Here we have the constant travel in the left hand lane for no apparent reason, because there's no other traffic on the road according to the trooper - just him and the defendant. He also then makes 3 incursions outside the lane. Once he describes it by, as by half a tire width and I think I understood that at first to be totally outside the lane he clarified that for you to indicate that over half the vehicle width of the tire had crossed outside, but there was still some

> of the tire on the white line itself. And then the, there was at least one incursion where the vehicle was totally outside the line.
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> I don't think Prado asks the trooper to sit and follow a vehicle that he feels may be operated by an impaired driver, and that's what Trooper Thompson was clearly looking for was an impaired driver. And he was looking for infractions that would lead him to believe that an infraction, the infractions were being committed because the driver was impaired. I don't think Prado is asking the troopers to, at count 3 and count 1 or count any specific number. If you crossed outside the line just once and side swiped the Jersey barrier, that may have been enough for PC. Here we've got 3 times where he went outside the line.

MT 36-37.

While this oral ruling did address a few of the facts at issue in the motion, it did not at all address the defendant's main claim that the Trooper's reliance on the observation of the defendant weaving within his own lane and crossing on the white line constituted a pretext. In addition, the District Court failed to address the legal sufficiency of the defendant's pretext stop argument. Thus, the trial court's findings were insufficient to allow for effective appellate review. As a result, this court should deny the states' appeal in this case.

II. THE SUPERIOR COURT DID NOT ERR WHEN IT HELD THAT THE STOP WAS PRETEXTUAL AND THAT DEFENDANT'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WHEN HE FAILED TO OBJECT TO IMPROPER OPINION TESTIMONY.

In the case at bar, the state argues that this court should reverse based upon the arguments that (1) the Superior Court erred when it ruled that the District Court should have granted the motion to suppress because the Trooper had stopped the defendant on a pretext, and (2) the Superior Court erred when it ruled that trial counsel's failure to object to improper opinion evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As the following explains, the state's arguments are incorrect. *See* Brief of Appellant. As the following explains, the State's argument is erroneous.

(1) The Superior Court Did Not Err When it Concluded That the Trooper Stopped the Defendant upon a Pretext.

In this case the Superior Court found the District Court had erred when it denied the defendant's motion to suppress because the evidence presented at the suppression motion had demonstrated that the Trooper's initial stop of the defendant was pretextual. The Superior Court's findings were as follows on this issue:

> 1. Pursuant to *State v. Prado*, 145 Wn.App. 646 (2008), Trooper Thompson's stop of Defendant for DUI was not supported by reasonable suspicion.

> 2. Although reasonable suspicion existed for an infraction (violation of RCW 46.61.100(2), "Keep right except when passing, etc."), to the extent that the stop was based on that infraction the stop was pretextual. The court concludes;: "How many cars do we see pulled over because they have been traveling in the left lane? How many times have we all driven down the road behind somebody who is in the left lane and won't pull over? That's, you know, that's a stop that doesn't make it at least in my mind, in terms of being anything other than a pretext so under the case law, the stop is no good. *State v. Ladson*, 138 Wn.2d 343 (1999).
>
> 3. Trooper Thompson gave improper opinion testimony on an ultimate issue to be decided by the jury, and the error was not harmless.
>
> As a result of the foregoing Conclusions of Law, insufficient evidence remains to prove the elements of DUI. The case is hereby remanded to District Court for dismissal with prejudice, consistent with this opinion.

See Opinion of the Clark County Superior Court.

As the following explains, the Superior Court did not err when it found that the District Court had erred when it failed to suppress based upon the Trooper's pretextual stop of the defendant.

A traffic stop made upon an observation of an infraction committed by the driver or a passenger violates a defendant's privacy rights under Washington Constitution, Article 1, § 7, if it is used as a pretext to investigate a police officer's suspicion of other criminal activity. *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962). For example, in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), a police officer saw the defendant riding with a person suspected of gang and drug activity. In order

to speak with the defendant and the driver about his suspicions, the officer followed the vehicle and eventually pulled it over for having license tabs that had expired five days previous. He then determined that the driver had a suspended license and arrested him. During a search of the vehicle incident to the arrest of the driver, the officers found a gun, several baggies of marijuana, and $600.00 cash in the defendant's jacket. The officer then arrested the defendant.

After being charged, the defendant moved to suppress all of the evidence seized on the basis that the police obtained it following a pretext stop of the vehicle in which he was riding. Following a hearing, the court granted the defendant's motion. The state appealed, and the Court of Appeals reversed. The defendant then obtained review from the Washington Supreme Court, arguing that his initial detention was pretextual, and as such violated his right to privacy under Washington Constitution, Article 1, § 7. The Supreme Court stated the following as to whether or not pretext stops violate the state constitution:

> We conclude the citizens of Washington have held, and are entitled to hold, a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement. We therefore hold pretextual traffic stops violate Article I, Section 7, because they are seizures absent the "authority of law" which a warrant would bring.

State v. Ladson, 138 Wn.2d at 842.

The court then went on to state the following concerning what constitutes a pretextual stop and what standard should be used in determining what constitutes a pretextual stop.

> When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. *Cf. State v. Angelos*, 86 Wn.App. 253, 256, 936 P.2d 52 (1997) ("When the use of the emergency exception is challenged on appeal, the reviewing court must satisfy itself that the claimed emergency was not simply a pretext for conducting an evidentiary search. To satisfy the exception, the State must show that the officer, both subjectively and objectively, 'is actually motivated by a perceived need to render aid or assistance.'") (citations omitted) (quoting *State v. Loewen*, 97 Wn.2d 562, 568, 647 P.2d 489 (1982)). We recognize the Court of Appeals has held that the test for pretext is objective only. *See State v. Chapin*, 75 Wn.App. 460, 464, 879 P.2d 300 (1994). But an objective test may not fully answer the critical inquiry: Was the officer conducting a pretextual traffic stop or not? (FN11) We cannot agree with *Chapin* and disapprove it to the extent it limits the query to objective factors alone.
>
> (FN11) "Pretext is, by definition, a false reason used to disguise a real motive. Thus, what is needed is a test that tests real motives. Motives are, by definition, subjective." 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).

State v. Ladson, 138 Wn.2d at 843.

Following its statement on the standard to apply for determining pretextual stops, the court reversed the Court of Appeals and reinstated the trial court's suppression order, holding as follows: "Here, the initial stop, which is a seizure for constitutional purposes, was without authority of law

because the reason for the stop (investigation) was not exempt from the warrant requirement." *State v. Ladson*, 138 Wn.2d at 843.

In the case at bar, the respondent argued before the trial court that the Trooper had acted upon a pretext when he stopped the defendant's vehicle based upon the infraction of continuous travel in the left lane. While the trial court did not properly address this argument, the evidence from the suppression motion was crystal clear that the officer had acted upon a pretext. In fact, the officer specifically testified on cross-examination that he had no intent of issuing an infraction when he stopped the defendant's vehicle. See MT 20. Rather, his purpose was to investigate his suspicion that the defendant might be driving while intoxicated. Thus, the Superior Court did not intrude upon the fact finder when it relied upon a fact which was undisputed at the suppression motion.

Neither did the Superior Court err when it found that the trial court should have granted the suppression motion based upon this fact. To paraphrase *Ladson*, in the case at bar "the initial stop, which [was] a seizure for constitutional purposes, was without authority of law because the reason for the stop" was a pretext for the officer's true intent.

(2) The Superior Court Did Not Err When it Found That Trial Counsel's Failure to Object to Improper Opinion Evidence of Guilty Denied the Defendant Effective Assistance of Counsel.

Under both United States Constitution, Sixth Amendment, and

Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981)

(counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claimed ineffective assistance before the trial court based upon trial counsel's failure to object when the Trooper gave improper opinion evidence of guilt. The state responded to this argument, and also argues in the Brief of Appellant, that a police officer, given proper foundation, may testify to his or her opinion that person is intoxicated. However, as the following references to the record reveal, the testimony to which trial counsel did not object in this case at bar went well beyond a simple opinion that a driver was intoxicated. This testimony was as follows:

> Trooper Thompson: One is whether or not they're appreciably affected. The other is whether or not they're over the per se level. So if you're appreciably affected, in other words whatever's in your system whether it's alcohol in this case, or some other type of drug that impairs driving, if you're not appreciably affected, if you're not impaired, you're not going to get arrested for DUI. So if I do the standardized field sobriety tests, the standard battery of tests with them; and determine that they're not impaired, they do not get arrested.

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Trooper Thompson: But the standardized field sobriety tests will then tell you, the walk and turn and one-leg stand will then tell you if that person is in fact impaired or appreciably affected is what we like to call it.

TT 47.

Prosecutor: Based on your training and experience, was the defendant's performance on the horizontal gaze nystagmus consistent with the performance of someone under the influence of alcohol?

Trooper Thompson: Yes, Ma'am, it was.

TT 51.

Prosecutor: Okay. So overall, how did the defendant perform on this test?

Trooper Thompson: Consistent with being impaired.

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Trooper Thompson: I was able to do the standard battery of tests with the individual and I did believe he was under the influence of intoxicating liquor.

Prosecutor; So your decision wasn't based on a single one of those 3 tests?

Trooper Thompson: No Ma'am.

Prosecutor: Okay. So what did you do once the field sobriety tests were completed?

Trooper Thompson: I arrested the subject for DUI.

Prosecutor: Can you describe the arrest procedure?

Trooper Thompson: Yes, Ma'am. So right there, as soon as we're done with the tests, I direct him to turn around. Advise them that they're under arrest for DUI, place my handcuffs on them, right there. Double lock them so that they don't get any tighter. Which that terminology may not mean anything to you. But there's a little lock on the handcuffs, if you push it in, it keeps the cuffs from getting tighter when they're in the back of the car, because it can hurt them. So you've set them to the appropriate spacing, you double-lock them. Escort him back to my vehicle. I read him his constitutional rights. Placed him in the vehicle, placed him in the car. And continue on.

Prosecutor: Okay. And you said you advised him of his constitutional rights?

Trooper Thompson: Yes, Ma'am.

Prosecutor: And did you use any form or card to advise him of those rights?

Trooper Thompson: Yes, Ma'am. . . .

Prosecutor: And can you please read that onto the record for the court?

Trooper Thompson: Yes Ma'am. . . .

Prosecutor: And did he indicate to you whether or not he under stood them?

Trooper Thompson: Yes, Ma'am. He said he understood his rights and he did not invoke his right to remain silent. Or to an attorney at that point.

TT 58-59.

Prosecutor: And so at that point then, once the arrest was complete in the field, did you transport the defendant from the scene of that

arrest?

Trooper Thompson: Once the impound removed the vehicle, yes, Ma'am.

Prosecutor: So you waited there until the tow came and then did you transport the defendant from the scene?

Trooper Thompson: Yes, Ma'am, I did.

Prosecutor: Where did you take him?

Trooper Thompson: Clark County Jail.

TT 60.

The substance of this testimony went well beyond a simply rendition of opinion that based upon his training and experience, the Trooper believed the defendant was intoxicated. Rather, this evidence also included testimony that (1) the jury could be assured that the defendant was guilty of the crime charged because the officer only arrests those who are guilty and he always lets the innocent go free, and (2) he arrested the defendant, handcuffed the defendant, *Mirandized* the defendant, and took him to jail. As the following explains, this evidence was inadmissible and highly prejudicial.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness whether a lay person or expert may give an opinion as to the defendant's

guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).
>
> The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking

dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact of an arrest is not evidence because it constitutes the arresting officer's opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967) the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

> While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent's negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury.

> The question of whether respondent was negligent in driving in too close proximity to appellant's vehicle falls into this category. Therefore, the witness' opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

Warren v. Hart, 71 Wn.2d at 514.

Although *Warren* was a civil case the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

In this case the Trooper presented similar improper testimony of guilt, both by testifying that he only arrests guilty defendants and by presenting evidence of arrest, handcuffing, *Miranda,* and booking into jail. It is true, as argued by the state, that a police officer's testimony that a defendant was "obviously intoxicated" and "could not drive a motor vehicle in a safe manner" does not violate that defendant's right to jury trial even though it constitutes an opinion on an ultimate factual issue. However, in the case at bar, the Trooper's testimony went well beyond proper opinion concerning facts for which he was qualified to testify. Rather, the substance of his testimony was that the best evidence of the defendant's guilt was the fact that the Trooper arrested him because he only arrests guilty people and lets the innocent people go. This went well beyond proper opinion allowed in driving while intoxicated cases.

In addition, implicit within the Superior Court's ruling is the finding that there was no possible tactical reason for trial counsel to refrain from objecting to this evidence, which was both inadmissible and highly prejudicial. Indeed, there is not possible tactical reason to refrain from objecting to such evidence. Thus, the Superior Court did not err when it found that trial counsel's failure to object fell below the standard of a reasonably prudent attorney and denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment

CONCLUSION

The Superior Court did not err when it found that the District Court had erred when it denied the defendant's motion to suppress.

DATED this 27th day of December, 2012.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Appellant. vs. CHARLES W. MCLEAN, Respondent.	NO. 43522-5-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On December 27th, 2012, I personally placed in the United States Mail and/or E-filed the following document with postage paid to the indicated parties:

1. BRIEF OF RESPONDENT

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LACENTER, WA 98629

Dated this 27TH day of December, 2012, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant