

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 65553-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
TIMOTHY P. GIDDENS,)	UNPUBLISHED
)	
Respondent.)	FILED: <u>June 4, 2012</u>
)	
)	

Cox, J. — A court acting in its appellate capacity may affirm a trial court’s decision on any basis that is adequately supported by the record. In this case, the district court granted Giddens’ suppression motion because the evidence was insufficient to establish reasonable articulable suspicion that a traffic violation occurred. The court also ruled there was insufficient evidence to stop for investigation of DUI. On RALJ review, the superior court affirmed the district court’s ruling on an alternative basis: that the traffic stop was pretextual. Because the superior court’s alternative basis for suppression is not factually supported by the record, we reverse. The effect is to leave standing the district court’s decision granting the suppression motion on the basis argued and

dismissing the case without prejudice.

At approximately 3:00 a.m. on July 2, 2008, Washington State Patrol Trooper Rocky Oliphant was on his way home at the end of his shift. The vehicle in front of him drifted over the fog line twice within the distance of one block. The trooper turned on his emergency lights, and the vehicle driven by Timothy Giddens pulled over. Upon approaching Giddens, the trooper observed obvious signs of his intoxication. Giddens performed poorly on field sobriety tests, and the trooper arrested him for driving under the influence (DUI). Later breath tests revealed Giddens' alcohol level to be .137 and .127.

Pretrial, Giddens moved to suppress the evidence, arguing that the trooper lacked a reasonable articulable suspicion to stop his vehicle to investigate a traffic infraction. The district court heard testimony and argument on the issue. During his testimony, Trooper Oliphant described the events leading to the arrest. He was not asked about his motivation for the traffic stop. He did not testify whether he stopped Giddens' vehicle solely to investigate a traffic infraction based on the incursions over the fog line, or whether he suspected that the driver was intoxicated before he stopped the vehicle.

Giddens argued that crossing the fog line, as described by Trooper Oliphant, did not violate RCW 46.61.140(1) ("Driving on roadways laned for traffic."). The statute provides that a "vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane

until the driver has first ascertained that such movement can be made with safety.” Giddens relied on State v. Prado.¹ In Prado, the driver crossed a lane line dividing an exit lane from an adjacent lane for one second by two tire widths. This court held that the legislature's use of the language “as nearly as practicable” demonstrated a recognition that “brief incursions over the lane lines” will occur and concluded that the evidence did not justify the traffic stop.² Giddens argued that the facts here were not meaningfully distinguishable from those in Prado, and accordingly, the stop was unlawful.

The district court agreed and granted the motion. As in Prado, the court found that the evidence did not establish that Giddens violated RCW 46.61.140(1). The court explained that it could not determine if a violation occurred because, for example, the testimony did not reveal how far or for what duration the car drifted over the fog line, or whether the driver's movements were otherwise erratic or created a safety hazard. The court also concluded that the trooper did not have a valid basis to stop Giddens' vehicle to investigate a potential DUI. Because the practical effect of this ruling prevented the State from prosecuting the charge, the court dismissed without prejudice the DUI charge.

The State moved for reconsideration, arguing that the trooper had reasonable articulable suspicion to stop Giddens' vehicle for a traffic violation

¹ 145 Wn. App. 646, 186 P.3d 1186 (2008).

² Id. at 649.

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under a different statute, RCW 46.61.670 (“Driving with wheels off roadway.”). This provision states that it is “unlawful to operate or drive any vehicle ... over or along any pavement or gravel or crushed rock surface on a public highway with one wheel or all of the wheels off the roadway. . . .” The State took the position that while RCW 46.61.140(1) governs when a vehicle crosses into an adjacent lane, incursions onto the shoulder fall under RCW 46.61.670. The State also pointed out that RCW 46.61.670 does not contain the “as nearly as practicable” language of RCW 46.61.140(1). Exercising its discretion, the district court denied the motion.

The State appealed. On RALJ review, the State declined to challenge the district court’s conclusion that that there was no justification to stop the vehicle either to investigate a lane travel violation under RCW 46.61.140(1) or to investigate a possible DUI violation. The State’s sole argument was that the district court erred in concluding that the facts did not give rise to reasonable articulable suspicion to stop the vehicle to investigate violation of RCW 46.61.670.

Following a hearing, the superior court concluded:

[G]iven the circumstances, the officer, in fact, stopped the vehicle on the basis that he suspected the defendant was driving under the influence of some substance. The claim that the officer intended to stop the vehicle for observed lane travel violations was a pretext for the officer’s intent to engage in a further DUI investigation. As a result, the lower court’s decision is affirmed.^[3]

The court further concluded:

[A]ny claim that the stop initiated by the Trooper [was] due to his belief in an observed violation of RCW 46.61.670—the “Driving with Wheels off the Roadway” statute is not supported by the record. While the officer testified he stopped the vehicle once he had observed it cross the fog-line two times, no mention was made of Driving with Wheels off the Roadway. The State did not argue defendant’s driving was in violation of 46.61.670 prior to the lower court’s ruling either. The only argument for the stop was crossing the fog line (46.61.140). The first mention made of 46.61.670 was in the State’s Motion to Reconsider days later. The later appearance of this statute further buttresses this court’s finding that the Trooper did not, in fact, stop the defendant for a lane travel or edge of roadway violation, but for suspicion of DUI.^[4]

The State sought discretionary review on three issues. First, whether the superior court exceeded the proper scope of RALJ review in the course of ruling that the officer performed a pretextual stop. Second, if the answer to the foregoing question is in the negative, did the superior court err in concluding that the officer performed a pretextual stop? Third, whether the superior court erred in declining to rule on the issue of whether RCW 46.61.670 provided a valid basis for the traffic stop. We granted review of the first two issues, but denied review of the third issue.

The only briefing before us is from the State. Giddens, whose whereabouts are unknown, is not represented by counsel in this appeal.

Scope of Appellate Review

³ Clerk’s Papers at 5.

⁴ Id. at 6.

RALJ 9.1 prescribes the scope of appellate review by a superior court of a decision of a district court.⁵ Under RALJ 9.1(a), the superior court reviews the lower court ruling to determine if there are any errors of law. In the course of its review, the superior court “shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.”⁶ The superior court does not consider the evidence de novo.⁷ These standards likewise apply to appellate courts that grant discretionary review of a superior court's RALJ decision.⁸

It is well established that a court acting in an appellate capacity may properly affirm a trial court judgment on any basis established by the pleadings and supported by the record, whether or not the trial court relied on that basis in reaching its decision.⁹

An officer may not use a traffic infraction as a pretext to stop a citizen and

⁵ State v. Ford, 110 Wn.2d 827, 829–30, 755 P.2d 806 (1988); State v. Brokman, 84 Wn. App. 848, 850, 930 P.2d 354 (1997).

⁶ RALJ 9.1(b).

⁷ State v. Basson, 105 Wn.2d 314, 317, 714 P.2d 1188 (1986).

⁸ Ford, 110 Wn.2d at 829.

⁹ In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (quoting Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002)); Backlund v. Univ. of Wash., 137 Wn.2d 651, 670, 975 P.2d 950 (1999); Amy v. Kmart of Wash. LLC, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009).

search for evidence of criminal wrongdoing that is unrelated to the reason for the stop.¹ In order to determine whether a law enforcement officer conducted a lawful traffic stop or an unlawful pretextual one, the court will consider the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of the officer's behavior.¹¹ In Ladson, the court specifically rejected a purely objective inquiry.¹² These inquiries are inherently fact intensive.¹³

Here, the district court found there was insufficient evidence presented to establish either that crossing the fog line violated RCW 46.61.140(1) or that a DUI violation occurred. Pretext was not raised or developed at trial. The trooper did not testify about his subjective motivations regarding the stop, and the district court made no findings addressing the trooper's motivations.

To reach the conclusion of pretext, the superior court necessarily found that Trooper Oliphant's subjective motivation for stopping Giddens was to investigate him for DUI. But there simply is nothing in the trial record to support this determination, made for the first time by the superior court on review. Accordingly, the superior court's alternative basis for affirming the district court's

¹ State v. Snapp, 2012 WL1134130 at *10 (April 5, 2012); State v. Ladson, 138 Wn.2d 343, 357–58, 979 P.2d 833 (1999).

¹¹ Id. at *10; Ladson 138 Wn.2d at 358-59.

¹² Ladson, 138 Wn.2d at 358-59.

¹³ State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006).

decision is not supported by the record and cannot stand. We reverse the decision of the superior court because it is founded on an improper basis.

We leave undisturbed the district court's decision dismissing the DUI charge without prejudice, following its grant of the suppression motion. We granted discretionary review on the limited issue of whether the superior court exceeded the proper scope of RALJ review, which we have ruled that it did. Because of our answer to this question, we need not reach the second question: whether the court properly concluded that the stop was pretextual. Given this posture of the case, the district court's ruling stands on the basis made.

We reverse the decision of the superior court. We leave standing the district court's decision granting the suppression motion on the basis argued and dismissing the case without prejudice.

Cox, J.

WE CONCUR:

Leach, C. J.

Schiveller, J