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Supreme Court No. 95636-7

Court of Appeals No. 35002-9-III
(consolidated with No. 35003-7-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JENA DALE BROOKS,
Defendant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. Identity of Respondent and Decision Below

The State of Washington, respondent, by and through its attorney, Andrew B. Van Winkle, Deputy Prosecutor for Chelan County, asks this Court to deny review of the opinion of the Court of Appeals in *State v. Brooks*, No. 35002-9-III, cons'd with No. 35003-7-III (filed February 1, 2018).

II. Counter-Statement of Issues Presented for Review

1. Has Ms. Brooks met her burden of showing that the Court of Appeals's decision conflicts with a Supreme Court decision?
2. Has Ms. Brooks met her burden of showing this case involves a significant question of law under the state or federal constitutions?
3. Has Ms. Brooks met her burden of showing that this case involves an issue of substantial public interest that should be determined by this Court?

III. Statement of the Case

On September 17, 2015, Washington State Patrol Trooper Brian Moore stopped and cited the defendant/petitioner, Jena Dale Brooks with the crimes of obstructing a law enforcement officer

(RCW 9A.76.020), driving while license suspended/revoked in the second degree (RCW 46.20.342(1)(b)), and refusal to give information to or cooperate with an officer (RCW 46.61.020). CP 51, 140.

Trooper Moore had stopped Ms. Brooks for crossing a gore area. CP 56-57; *see generally* Ex 1 (traffic stop video). In essence, a gore is the triangular area that separates traffic on a highway from traffic that is merging onto or off of the highway and tapers to a point as the two streams of traffic blend into one—where on-ramp vehicles then merge onto the highway.¹ A diagram of this traffic control device is reproduced on page 2 of the Court of Appeals’s slip opinion.

In this case, Trooper Moore was westbound on Highway 2 outside of Dryden when he observed Ms. Brooks cut through the triangular gore point while merging onto Highway 2. CP 54. In

¹ As defined by prior cases, “The ‘gore point’ is the triangular shaped area between the on-ramp and Interstate.” *State v. Nguyen*, 165 Wn.2d 428, 431 n. 1, 197 P.3d 673 (2008); *Caldwell v. Dep’t of Transp.*, 123 Wn. App. 693, 695, 96 P.3d 407 (2004) (“A gore point is a small, triangular section of road, usually marked with white lines, meant to facilitate the on-ramp traffic’s merger onto the highway.”)

other words, he stopped her for merging too early, before the gore had tapered into a single striped white line.

Prior to trial, Ms. Brooks sought suppression of the evidence in the case against her on the grounds that Trooper Moore did not have reasonable suspicion to conduct a traffic stop. At the hearing on the motion, the district court heard testimony from Trooper Moore and reviewed the video from the trooper's dashboard camera. CP 131. Based upon this evidence, the district court found that Ms. Brooks's act of cutting through the gore area provided Trooper Moore with reasonable suspicion under RCW 46.61.050 (failure to obey a traffic control device) and RCW 46.61.670 (wheels off roadway). CP 131-133 (District Court's written ruling); CP 79-82 (District Court's oral ruling).

Following this hearing, Ms. Brooks proceeded to a jury trial. The jury returned verdicts of guilty on all 3 counts (the State dismissed a 4th count of resisting arrest prior to trial). CP 140. These guilty verdicts also triggered probation violations on two past cases. After sentencing on the underlying case and the probation violations, Ms. Brooks appealed to superior court. She appealed the

underlying case under superior court cause number 16-1-00132-8 and the probation violations under superior court cause number 16-1-00158-1. All matters were consolidated into a single briefing schedule, hearing schedule, and decision at the superior court. CP 27.

Following briefing and argument from the parties, the superior court reversed the district court on grounds not argued below. CP 140-48. The State then sought discretionary review at the Court of Appeals. CP 160-61. Following briefing and oral argument, the Court of Appeals reversed the superior court, and agreed with the district court that Ms. Brooks's driving violated RCW 46.61.670 (wheels off roadway). Ms. Brooks now seeks review by this Court.

IV. Argument

Ms. Brooks seeks review of this traffic stop under RAP 13.4(b)(1), (3), and (4). Under RAP 13.4(b)(1) she argues review is appropriate because the Court of Appeals's interpretation of the statutory definition of "roadway" conflicts with a Supreme Court opinion. Under RAP 13.4(b)(3) she argues that because the Court of

Appeals's interpretation of a statute impacts the validity of a traffic stop that the question of statutory interpretation is automatically transformed into a question of constitutional law. Under RAP 13.4(b)(4) she argues for the first time, in any court, there is an issue of substantial public interest concerning whether a court in a CrR 3.6 hearing can uphold a traffic stop on grounds not stated by the citing officer at the date and time of the traffic stop. The State addresses each of these grounds in the order presented.

A. The Court of Appeals's decision does not merit review under RAP 13.4(b)(1) because it does not conflict with any Supreme Court decision.

Ms. Brooks argues that the Court of Appeals's decision conflicts with this Court's decision in *Simmons v. Cowlitz County*, 12 Wn.2d 84, 120 P.2d 479 (1941). Ms. Brooks is incorrect.

In *Simmons*, the Supreme Court held that a jury properly awarded damages against Cowlitz County due to its negligent failure to warn. Specifically, the plaintiffs drove onto a graded and graveled road shoulder, the shoulder collapsed, and the plaintiffs rolled downhill into a river. *Id.* at 86. The plaintiffs sued on the theory that the county should have placed "warning signs or

barriers” to show that the shoulder was not meant for driving. *Id.* In agreeing with the plaintiffs, the Supreme Court held that if a county improves a portion of land such that it looks like other portions of road, that “the county invite[s] its use by the traveling public.” *Id.* at 88.

For this general proposition, the Court did not cite to or even address the statutory definition of roadway. Rather, it appears the Court relied on an attractive nuisance or common sense understanding of humanity that if something that looks like a road is not supposed to be used like a road that you need to signal that.

This opinion does not conflict in any way with the Court of Appeals’s opinion because the Supreme Court in *Simmons* was not interpreting the statutory definition of roadway for purposes of the traffic code. The Supreme Court’s opinion was limited only to the duty to warn when something that looks like a road (in the colloquial sense) should not be used as a road. In other words, it was about a common law tort duty, not a statutory definition. Moreover, the solid white lines at issue in this case are exactly the type of traffic control device missing in *Simmons*. Accordingly, the *Simmons*

opinion does not conflict with or even intersect with the Court of Appeals' opinion in this case.

B. The Court of Appeals's decision does not merit review under RAP 13.4(b)(3) because statutory interpretation does not present a question of law under either the State or Federal Constitution.

Ms. Brooks also seeks review of the same issue under the guise that it presents a significant question of law under either the State or Federal Constitutions. This argument for review fails because RAP 13.4(b)(3) is limited to questions requiring interpretation of specific constitutional provisions or application of specific constitutional provisions to facts or other laws. E.g. *State v. Halstien*, 122 Wn.2d 109, 115, 857 P.2d 270 (1993) (granting review under RAP 13.4(b)(3) to address constitutional vagueness and overbreadth challenges); *Spokane v. Douglass*, 115 Wn.2d 171, 176, 795 P.2d 693 (1990) (granting review to address constitutional validity of municipal ordinance).

Unlike prior cases where review was granted under RAP 13.4(b)(3) or its related provision, RAP 2.3(d)(2), this case does not present any significant questions of constitutional law. This is because the law respecting the constitutional validity of traffic stops

is settled. Everyone agrees that if Trooper Moore had not observed a violation of the law that he could not have conducted a traffic stop in this case. The underlying question of whether Ms. Brooks violated a provision of the traffic code has nothing to do with the constitutions. Because there are no constitutional principles at issue, this case does not merit review under RAP 13.4(b)(3).

C. The Court of Appeals’s decision does not merit review under RAP 13.4(b)(4) because the statutory issue presented here does not require resolution by this Court.

Ms. Brooks’s final reason for review is that this case “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). She argues that this case presents an issue of substantial public interest regarding whether a traffic stop can be upheld in a CrRLJ 3.6 hearing when the arresting officer did not issue an infraction for the basis for the stop.

Ms. Brooks did not raise this issue in any prior forum. Accordingly, she has failed to preserve it for review. RAP 2.5(a).

Even if she had preserved it for review, it is a settled question of law that does not require review by this Court. In *Minh Hoang*,

the Court of Appeals held: “We find nothing in *Ladson* that limits prosecutorial discretion with respect to charging decisions, or that requires police to issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of a traffic stop” *State v. Minh Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000); *State v. Byrd*, 110 Wn. App. 259, 264, 39 P.3d 1010 (2002) (holding that a traffic stop can be affirmed on any valid basis, including a basis not relied upon by the trial court, if the facts in the record support it). Because Ms. Brooks has failed to even allege that these precedents are both incorrect and harmful—a prerequisite to overturning precedent—this issue does not merit review. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Because Ms. Brooks failed to raise this issue at the district court, at the superior court, and at the court of appeals, she has failed to preserve it for review. The Court should furthermore deny review because Ms. Brooks has failed to explain why pre-existing precedent governing this issue should be abandoned.

V. Conclusion

Based on the foregoing arguments and authorities, the State respectfully requests this Court to deny review of the issues raised by Ms. Brooks.

DATED this 25th day of April, 2018.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



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Deputy Prosecuting Attorney

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) (Consolidated with No. 35003-7-III)

) DECLARATION OF SERVICE

14
15 I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington,
16 declare that on the 26th day of April, 2018, I caused the original RESPONSE TO PETITION
17 FOR REVIEW to be filed via electronic transmission with the Supreme Court, and a true and
18 correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 26th day of April, 2018.

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