

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 02, 2014, 9:53 am
BY RONALD R. CARPENTER
CLERK

Supreme Court No. 90236-4
Court of Appeals No. 43059-2-II

E CDF
RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF OLYMPIA,
Respondent

v.

AARON HULET,
Petitioner.

ON APPEAL FROM THE COURT OF APPEALS
DIVISION II

ANSWER TO PETITION FOR REVIEW

Rocio D. Guerra, WSBA# 34082
Lee Creighton Justice Center
900 Plum Street SE
Olympia, WA 98501
360.753.8449
rguerra@ci.olympia.wa.us

 ORIGINAL

TABLE OF CONTENTS

I.	Party Seeking Relief	1
II.	Relief Sought	1
III.	Facts	1
IV.	Grounds for Relief and Argument	3
	(a) Standard of Review	3
	(b) The unpublished decision of the Court of Appeals does not conflict with any decision of the Supreme Court	5
	(c) The unpublished decision of the Court of Appeals does not conflict with any other decision of the Court of Appeals	6
	(d) The unpublished decision of the Court of Appeals does not present any significant question of law under the Constitution of the State of Washington or of the United States	6
	(e) The unpublished decision of the Court of Appeals does not present any issue of substantial public interest.....	7
V.	Conclusion	9
VI.	Declaration of Service	10

TABLE OF AUTHORITIES AND CITATIONS

Cases

<i>State v. Hunley</i> , 175 Wn. 2d 901, 287 P.3d 584 (2012).....	5, 6, 7, 8
<i>State v. Modica</i> , 136 Wn. App. 434, 455 n.9, 149 P.3d 446 (2006).....	5
<i>Orwick v. Seattle</i> , 103 Wn.2d 249, 256, 692 P.2d 793 (1984)	5
<i>State v. Osman</i> , 168 Wn. 2d 632, 638-39, 229 P.3d 729 (2010)	4
<i>In Re Rosier</i> , 105 Wn. 2d 606, 616, 717 P.2d 1353 (1986).....	7

Rules/Statutes

RCW 10.05	1
RCW 46.61.5055	4
RCW 46.61.5055(2)(b)(i)	2
RALJ 5.4.....	3, 4, 7, 8
RAP 13.4(b).....	4, 5

I. PARTY SEEKING RELIEF

The City of Olympia, the respondent herein, requests the relief set out in Section II.

II. RELIEF SOUGHT

The Petition for Review should be denied.

III. FACTS

On June 12, 2006, Aaron Hulet, the petitioner herein, was charged by citation in Olympia Municipal Court with the crime of Driving While Under the Influence (DUI). CP 5. On June 13, 2006, Hulet appeared in person and was arraigned. He entered a plea of 'not guilty.' CP 5. On June 28, 2006, attorney Leslie Ching filed a notice of appearance on Hulet's behalf. CP 5. On August 22, 2006, Mr. Ching appeared with Hulet and petitioned the court for a Deferred Prosecution pursuant to RCW 10.05. CP 6 and CP 106. The Olympia Municipal Court granted the petition for Deferred Prosecution. CP 7 and CP 147, CP 151.

On March 15, 2011, Hulet appeared in the Municipal Court with his attorney, Mr. Charles Clapperton, for a hearing on an allegation that Hulet had violated the terms and conditions of his deferred prosecution. CP 9. Specifically, it was alleged that Hulet had committed a new DUI offense on August 4, 2010 that resulted in a charge being filed in Thurston County District Court. CP 140. Hulet eventually pled guilty to that DUI

charge in District Court. The Municipal Court revoked the deferred prosecution and found Hulet guilty of the DUI as alleged in the citation. CP 9. On May 17, 2011, the Municipal Court held a sentencing hearing. Hulet appeared with counsel, Mr. Clapperton. CP 10. He submitted a lengthy sentencing statement (CP 50) with several attached statements of support. Hulet requested that he be relieved of the mandatory jail time required in DUI sentences, as allowed by RCW 46.61.5055(2)(b)(i), because the jail time would “impose a substantial risk to the offender’s physical or mental well-being.”

The Municipal Court imposed the mandatory minimum sentence based on Mr. Hulet’s alcohol concentration and number of prior DUI offenses. CP 10 and CP 119. This is the sentence requested by Hulet in his sentencing memorandum (CP 57), with the exception that the Municipal Court did not allow the jail time to be served as less than total confinement. (CP 119).

On June 7, 2011, Hulet filed a Notice of Appeal with the Thurston County Superior Court. CP 15. On July 1, 2011, while the case was pending on appeal, Hulet filed a Notice of Missing Record and Request for Ruling in the Olympia Municipal Court. CP 204. The Municipal Court found that the missing record, namely the audio recording for the arraignment and entry of deferred prosecution from 2006, was not material

and that the documentary record was sufficient. RP 5 and 12. The hearing on the RALJ appeal was heard before the Hon. Gary Tabor on February 12, 2012, at which time the decision of the Olympia Municipal Court was affirmed. RP 27-30.

On February 27, 2012, Hulet filed a Motion for Discretionary Review with Division II of the Court of Appeals. On April 2, 2012 review was denied. On May 3, 2012, Hulet filed a Motion to Modify Commissioner's ruling.

The Court of Appeals considered the motion without argument and affirmed the lower court on April 15, 2014.

IV. GROUNDS FOR RELIEF AND ARGUMENT

(a) Standard of Review

Hulet has filed a "Petition for Review" asking this court to review the Court of Appeals decision in *City of Olympia v. Hulet*, No. 43059-2-II (April 15, 2014). The Court of Appeals granted review on two specific issues: "(1) the denial of [Hulet's] RALJ 5.4 motion for a new trial, and (2) his sentencing." *City v. Hulet*, No 43059-2-II, at 2. Hulet's other alleged errors, including but not limited to, challenges to the arraignment, waiver of rights, and the entry of deferred prosecution were not before the Court of Appeals.

In regards to the RALJ 5.4 motion, the Court of Appeals held that the missing audio recording of Hulet's arraignment and entry of deferred prosecution from 2006 was not significant or material to the appeal. The Court of Appeals further noted that "[i]n *Osman*, our Supreme Court was clear that whether a lost or damaged record is significant or material does not warrant consideration of the merits of the appellate issue." *City v. Hulet*, at 3, FN4 citing *State v. Osman*, 168 Wn.2d 632, 638-39, 229 P.3d 729 (2010).

With respect to sentencing, the Court of Appeals held that the City was not required to provide certified documentation regarding defendant's prior conviction for DUI because defendant affirmatively acknowledge his criminal history. Furthermore, the Court of Appeals held that the trial court did not err in sentencing Hulet as a second time DUI offender and did not err in rejecting the medical exemption under RCW 46.61.5055.

Hulet must demonstrate that this case fits into one of the reviewability prerequisites under RAP 13.4(b).

Under RAP 13.4(b), "A petition for review will be accepted by the Supreme Court only" if one or more of the following conditions are met:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (emphasis added).

A considerable portion of Hulet’s petition is devoted to arguing the merits as if this court has accepted review. However, the City respectfully requests that this court determine the threshold issue of reviewability.

(b) The unpublished decision of the Court of Appeals does not conflict with any decision of the Supreme Court

Hulet states that “[t]he decision of the Court of Appeals is in conflict with decisions of the Supreme Court.” See Petition for Review, Part IV. Although Hulet makes a passing reference to *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012), there is no analysis of how the Court of Appeals decision in this case conflicts. *Id.*

Hulet had the opportunity to explain why this case merits review by the Supreme Court and has inexplicably failed to do so. It is not this court’s responsibility, nor is it the City’s responsibility, to do counsel’s thinking and briefing. *Orwick v. Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984).

Moreover, it should be noted that the Court of Appeals relied upon *Hunley*, provided an analysis of the holding, and properly distinguished this case on the facts. In *Hunley*, this court held that in presenting prior criminal history at sentencing, a “prosecutor’s summary, without more, is insufficient to satisfy due process.” *State v. Hunley*, 175 Wn.2d at 915. However, the Court of Appeals noted that the defendant acknowledged his prior DUI convictions in a letter to the court. CP at 46.

Hulet has failed to establish a conflict with this court’s prior decisions.

(c) The unpublished decision of the Court of Appeals does not conflict with any other decision of the Court of Appeals.

Hulet has not argued that the decision for which review is requested conflicts with other decisions of the Court of Appeals. Moreover, Hulet has not provided any decisions from the Court of Appeals. Therefore, this court should find that no conflicting Court of Appeals decision exists. At a minimum, Hulet has failed to establish a conflict with other Court of Appeals decisions.

(d) The unpublished decision of the Court of Appeals does not present any significant question of law under the Constitution of the State of Washington or the United States.

Hulet asserts that “the matter before the court constitutes a significant question of law under the Washington and U.S.

constitutions...” See Petition for Review, part IV. However, Hulet has provided no legal analysis to support this bold assertion.

“[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), *superseded by statute on other grounds* by Laws of 1987, ch. 403, § 1; See also *State v. Modica*, 136 Wn.App. 434, 455 n.9, 149 P.3d 446 (2006).

Hulet has failed to establish that the Court of Appeals decision raises a significant question of law under the state or federal constitution. Moreover, it should be noted that the Court of Appeals granted discretionary review on two limited issues: Hulet’s RALJ 5.4 motion and his sentencing. The Court of Appeals decisions on these issues do not present significant questions of law under the state or federal constitutions.

(e) The unpublished decision of the Court of Appeals does not present any issue of substantial public interest.

Hulet asserts that “the case involves an issue of substantial public interest that should be determined by this court...” See Petition for Review, part IV. Hulet has provided this court with no analysis in support of this conclusion.

In deciding if an issue involves a “substantial public interest,” this court will consider (1) the public or private nature of the question

presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. *State v. Hunley*, 175 Wn.2d at 907.

As stated previously, the Court of Appeals addressed two limited issues: the RALJ 5.4 motion and sentencing. As to the RALJ 5.4 motion, the likelihood of recurrence is very low and weighs against review because of the unique facts, the particular procedural history of this case and specific records at issue. Moreover, an authoritative determination for future guidance of public officers is not necessary because RALJ 5.4 very clearly sets out the standard for a new trial based on missing records. The application of this standard will only vary because of specific facts for a given case not because of any ambiguity in the standard.

As to the sentencing, the particular set of facts weighs against review. First, as to the medical exemption, the Court of Appeals decision in this case was based on the particular evidence presented at the sentencing hearing and the specific nature of Hulet's medical condition. This specific scenario with the same underlying condition is unlikely to recur. Moreover, an authoritative determination by the Supreme Court is not likely to provide much guidance to the trial court in the exercise of discretion in this regard. Second, as to Hulet's criminal history, the facts weigh against review. In light of the sentencing memorandum and Hulet's

own admissions, prior DUI history is not genuinely in dispute. CP 22-29; CP 45. The likelihood of recurrence is low and weighs against review. Moreover, an authoritative determination by the Supreme Court is unnecessary since, in this case, Hulet has acknowledged his prior history. Additionally, it is worth noting that for misdemeanor sentencing the trial court could impose a jail sentence up to the maximum of 364 days. In other words, even if the court did not find that the prior DUI was proven, the court's sentence was still legally permissible.

In sum, in light of the discretionary nature of misdemeanor sentencing, the admissions in the record to facts which are now being contested, and the unique procedural and substantive history of this case, there is no substantial public interest to merit Supreme Court review.

V. CONCLUSION

The City of Olympia requests that the Petition for Review be denied.

Respectfully submitted June 2, 2014.

/s/ Rocio D. Guerra
Rocio D. Guerra, WSBA# 34082
Attorney for Respondent, City of
Olympia

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

Christopher Bawn via U.S. Mail and email
Attorney at Law
1700 Cooper Point Rd SW Ste A3
Olympia, WA 98502-1109
cwbawn@justwashington.com

DATED at Olympia, Washington, this 2nd day of June, 2014.

/s/ Catherine Hitchman
Catherine Hitchman

OFFICE RECEPTIONIST, CLERK

To: Cathy Hitchman
Cc: Rocio Guerra; 'cwbawn@justwashington.com'
Subject: RE: Olympia v. Aaron Hulet, Supreme Court No. 90236-4

Received 6/2/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Cathy Hitchman [mailto:chitchma@ci.olympia.wa.us]
Sent: Monday, June 02, 2014 9:53 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Rocio Guerra; 'cwbawn@justwashington.com'
Subject: Olympia v. Aaron Hulet, Supreme Court No. 90236-4

Dear Clerk:

Attached for filing please find the *Answer to Petition for Review* of respondent, City of Olympia. Thank you very much.

Cathy Hitchman | City of Olympia Legal Department
601 4th Ave E | PO Box 1967 | Olympia, WA 98507
ph: 360.753.8243 | fax: 360.570.3791
Email: chitchma@ci.olympia.wa.us