Supreme Court No. 95210-8

SUPREME COURT OF THE STATE OF WASHINGTON

THE ESTATE OF JAMES CRAMPTON ROGERS, by and through PAUL CULLEN, Personal Representative of the Estate,

Petitioners-Appellants,

v.

STATE OF WASHINGTON, and RUSSELL SANDERS, in his capacity as a Washington State Trooper, and as an individual,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Considering the totality of circumstances, including the call from a concerned motorist reporting Mr. Rogers's erratic driving, the traffic stop at issue was supported by a reasonable, articulable suspicion that Mr. Rogers had committed a traffic infraction. Neither that nor the other two issues now raised by the Estate of Rogers warrant discretionary review.

First, the unpublished decision properly held that the transcript from Mr. Rogers's administrative license suspension hearing is not admissible under the "former testimony" hearsay exception because Mr. Rogers was not subject to cross-examination by a party with similar motives to develop his testimony. The Estate's arguments that, at the hearing, it filed a motion challenging the traffic stop and probable cause to arrest was a statutory issue do not alter the inapplicability of the exception.

Second, the unpublished decision properly upheld the traffic stop of Mr. Rogers's vehicle, finding it was based on a reasonable, articulable suspicion that Mr. Rogers had committed a traffic infraction. The decision applied a totality of the circumstances analysis and that test, as well as the result, are consistent with Washington law, including the two cases that the Estate contends are in conflict with it.

Third, the unpublished decision also properly upheld the arrest of Mr. Rogers, finding there was probable cause to believe that he had

committed a crime. The Estate's contention that there are genuine issues of fact to survive summary judgment is both incorrect and insufficient to warrant discretionary review.

For these reasons, discretionary review should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

If discretionary review were granted, the issues presented would be:

1. On summary judgment, the trial court and the Court of Appeals excluded the transcript from Mr. Rogers's DOL license suspension hearing as inadmissible hearsay. Does the DOL transcript fail to satisfy the hearsay exception for "former testimony" under ER 804(b)(1) because at the DOL hearing Mr. Rogers was not subject to examination by the party against whom the testimony is now offered, Trooper Sanders and the WSP, or a predecessor in interest with similar motive to develop the testimony?

2. On summary judgment, the trial court and the Court of Appeals dismissed the Estate's 42 U.S.C. § 1983 claim that the investigatory stop of Mr. Rogers's vehicle violated the Fourth Amendment, determining as a matter of law that Trooper Sanders had a reasonable articulable suspicion Mr. Rogers had committed a traffic infraction. Did Trooper Sanders have a reasonable articulable suspicion where a concerned motorist had reported Rogers "having problems [maintaining] lane travel" and Trooper Sanders made corroborating observations of Rogers having problems maintaining a direct line of travel, driving on the centerline twice, and drifting and jerking from right to left (CP at 38)?

3. On summary judgment, the trial court and the Court of Appeals dismissed the Estate's 42 U.S.C. § 1983 claim that Mr. Rogers's arrest violated the Fourth Amendment, determining as a matter of law that Trooper Sanders had probable cause to believe Mr. Rogers had committed a crime. Did Trooper Sanders have probable cause to arrest Mr. Rogers where he observed: Rogers's erratic driving before the stop; odors of alcohol and marijuana emitting from the vehicle and Rogers's person; Rogers had "[b]lood shot, droopy, dilated and watery eyes," "slurred speech," "attempted to hide" drug paraphernalia, "failed the field sobriety tests," and stated he had a drink earlier in that night (CP at 39, 95)?

The Estate's Petition for Review did not raise as issues the state law claims it pursued below: negligence, trespass, and conversion. Plaintiff-Appellant's Petition for Review (Pet.) at 1-2. Thus, if review were granted, those issues would not be before the Court.[1]

III. COUNTERSTATEMENT OF THE CASE

A. The Incident: Trooper Sanders Made an Investigatory Stop, Then Arrested Mr. Rogers on Suspicion of Driving Under the Influence

On a June 2008 evening, the Washington State Patrol's dispatcher advised WSP Trooper Russell Sanders that "'a small blue pick up [sic] with a top[p]er,'" was heading westbound from the Hood Canal Bridge and "was having problems maintaining lane travel." *Estate of Rogers v. State*, No. 49123-1, slip op. at 2 (Wash. Ct. App. Nov. 9, 2017) (unpublished) (quoting CP at 38). The WSP dispatcher also provided Trooper Sanders with the vehicle's license plate number. CP at 38.

"Trooper Sanders found the truck and observed it 'drive on to [sic] the centerline' twice, and 'drift[] to the right and quickly jerk[] the vehicle to the left.'" Slip op. at 2 (quoting CP at 38). Trooper Sanders initiated a traffic stop of the pickup. Slip op. at 2. Mr. Rogers was driving. *Id.*

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[1] *See State v. Collins*, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993) (petitioner's failure to concisely state the issues in the petition for review, as required by RAP 13.4(c)(5), precluded review of that issue under RAP 13.7(b)).

Upon making contact with Mr. Rogers, Trooper Sanders observed: "'[a]n odor of alcohol emitting from [Rogers's] vehicle, as well as the odor of alcohol and marijuana emitting from Rogers'[s] person.'" Slip op. at 2 (quoting CP at 95). "Rogers also had '[b]loodshot, droopy, dilated and watery eyes; he had slurred speech and unnecessarily repeated himself.'" *Id.* Mr. Rogers told Trooper Sanders "he had a drink earlier" in the night. Slip op. at 2-3; CP at 39. Mr. Rogers agreed to perform voluntary field sobriety tests, and as he exited the truck, he "'attempted to hide marijuana and drug paraphernalia from [Trooper Sanders].'" Slip op. at 2; CP at 39.

Trooper Sanders, commissioned as a WSP Trooper since August 2007 and trained to administer Standard Field Sobriety Tests, administered the tests to Mr. Rogers. Slip op. at 3; CP at 39-40, 95. Mr. Rogers failed the field sobriety tests. Slip op. at 3; CP at 39-40, 95. Based on Trooper Sanders's interactions with Mr. Rogers, "he determined that Rogers's conduct 'was consistent with someone under the influence of intoxicants.'" Slip op. at 3 (quoting CP at 95). Trooper Sanders placed Mr. Rogers "under arrest for suspicion of driving under the influence, and possession of marijuana and paraphernalia." *Id.* Mr. Rogers was transported to jail. *Id.*

Mr. Rogers's truck was impounded. *Id.* The towing company employee, while securing the truck to tow, found a small can that fell out of

a duffle bag in the rear of the truck. Slip op. at 3. "Inside the can was 'a pipe and what appeared to be marijuana.'" *Id.* (quoting CP at 52). The employee also smelled marijuana at the rear of the truck. *Id.*; CP at 57.

B. The Criminal Proceedings: Mr. Rogers Entered a Pretrial Diversion Agreement, Under Which He Waived His Right to Challenge Evidence Against Him and Admitted Probable Cause

Mr. Rogers was initially charged with driving under the influence, possession of marijuana and drug paraphernalia, and driving with an open container of alcohol. Slip op. at 3. Subsequently, he entered a pretrial diversion program. Slip op. at 3; CP at 88-93. The offenses that Mr. Rogers was charged with in the pretrial diversion agreement and order were (1) driving under the influence, (2) possession of marijuana, and (3) possession of drug paraphernalia. *Id.*

Under the pretrial diversion agreement and order, Mr. Rogers "waived his right to challenge the admissibility of his statements, as well as his right to challenge physical, oral, or identification evidence against him." Slip op. at 3; CP at 89. The Pretrial Diversion Agreement and Order "'ORDERED that probable cause exists to believe that the Defendant committed the offense(s) charged herein,' and that Rogers entered into the Pretrial Diversion Agreement and Order 'freely, voluntarily and knowingly.'" Slip op. at 3 (quoting CP at 93).

The pretrial diversion agreement and order, entered in January 2009,

has not been reversed or otherwise invalidated. Slip op. at 4. Mr. Rogers completed his diversion conditions and the charges were dismissed. *Id.*

C. The Administrative Hearing: Mr. Rogers Successfully Challenged the Revocation of His Driving Privileges Based on His Confusion Regarding the Blood Test

Prior to entering the pretrial diversion agreement and order, Mr. Rogers "challenged the Department of Licensing's (DOL) revocation of his driving privileges in an administrative hearing." Slip op. at 4. The hearing was conducted telephonically, with a DOL hearing officer, Mr. Rogers, and his attorney participating. *Id.*

At the hearing, the issue was "whether Rogers's driving privileges should be reinstated." *Id.* at 7. The Hearing Officer ruled in Mr. Rogers's favor, dismissing the proposed revocation because Mr. Rogers "'expressed confusion regarding the blood test after submitting to a BAC test'" and "'[t]hat confusion was not clarified.'" Slip op. at 4 (quoting CP at 180).

D. The Civil Suit: Mr. Rogers Brought Federal Civil Rights and State Tort Claims Against Trooper Sanders and the WSP

More than two years after entering into the pretrial diversion and agreement order, Mr. Rogers filed a civil suit against Trooper Sanders, the State of Washington, and the towing company.[2] The complaint alleged (1) a Fourth Amendment violation as a result of the traffic stop, (2) a Fourth

[2] The towing company was dismissed from the suit on summary judgment in 2014, and that dismissal has not been appealed. Slip op. at 4, n.1.

Amendment violation as a result of the arrest, (3) 42 U.S.C. § 1983 liability as a result of the unlawful stop and arrest, (4) trespass and conversion, and (5) negligence.[3] Slip op. at 4; CP at 1-11.

Mr. Rogers died on March 13, 2012, before the suit was resolved, and his estate pursued the claims. Slip op. at 4.

The State and Trooper Sanders (collectively the State) moved for summary judgment in February 2016. Slip op. at 4. The State argued that the federal constitutional claims should be dismissed because (1) probable cause existed for the stop and arrest of Mr. Rogers, and (2) collateral estoppel barred Mr. Rogers from challenging the findings of probable cause based on his plea agreement. CP at 60-70. The State also sought dismissal of the state law claims based on WSP's statutory authority to tow, impound, and search Mr. Rogers's vehicle subsequent to his arrest. CP at 60-70.

In its response, the Estate cited portions of what it claimed was part of the transcript of the DOL administrative hearing. CP at 98-115. The superior court granted the State's motion for summary judgment, dismissing all claims with prejudice. CP at 167-68, 230, 235.

The Estate moved for reconsideration (CP at 169-225) "alleg[ing] that the superior court refused to consider the alleged partial transcript of

[3] The complaint also alleged municipal liability under 42 U.S.C. § 1983 and malicious prosecution, claims that the Estate later voluntarily dismissed. Slip op. at 5.

the DOL administrative hearing because it was not certified by a court reporter and the State was not a party to the proceeding." Slip op. at 5. The Estate attached to its motion to reconsider a transcript from the DOL hearing, transcribed by a certified court reporter. *Id.*; CP at 176-225. The superior court denied the motion for reconsideration. CP at 231.

On appeal, the Court of Appeals, in a unanimous unpublished decision, held that "the superior court did not err in not considering the transcript from the DOL hearing, and did not err in granting summary judgment or in denying the motion for reconsideration." Slip op. at 5.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Review Should Be Denied Because, Consistent with ER 804(b)(1), the DOL Transcript Was Excluded as Inadmissible Hearsay as It Does Not Constitute "Former Testimony"

In its unpublished decision, the Court of Appeals held that the DOL transcript does not satisfy the "former testimony" exception to the bar against hearsay. The "former testimony" exception makes admissible:

> *Testimony* given as a witness at . . . a different proceeding . . . *if* the *party against whom* the testimony is *now offered*, or, in a civil action or proceeding, a *predecessor in interest*, had an opportunity and *similar motive* to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1) (emphasis added). The Court of Appeals correctly determined that the exception was not satisfied because at the DOL hearing "Rogers

was not subject to cross-examination by a party with similar motives to develop his testimony." Slip op. at 7. In fact, no cross-examination occurred and neither the WSP nor Trooper Sanders were a party to or present at Mr. Rogers's administrative challenge to his driver's license suspension.

The Estate contends the Court of Appeals erred, arguing that "whether the trooper had probable cause to arrest" was a statutory issue at the DOL hearing, and that Mr. Rogers had filed a motion challenging the investigatory stop. Pet. at 11-12. But these facts do not refute the basis of the Court of Appeals' holding: the lack of cross-examination by a party with similar motives. Thus, contrary to the Estate's urging, this case does not "give[] the Court the opportunity to hold that prior sworn testimony in DOL license suspension hearings is admissible under ER 804(b)(1)." Pet. at 13. Petition for Review should be denied.

First, the "former testimony" hearsay exception is not concerned with—nor satisfied by—the fact that probable cause to arrest is a statutory issue at a DOL license suspension hearing conducted under RCW 46.20.308.[4] The mere existence of probable cause as a statutory issue does not fulfill the "former testimony" exception's requirement for

[4] The Estate is correct that probable cause to arrest is a statutory issue at an implied consent hearing conducted pursuant to RCW 46.20.308. That statute specifies, as one of the preconditions for a driver's implied consent to a breath alcohol test, that the arresting officer have "reasonable grounds" for the arrest. RCW 46.04.455 defines "[r]easonable grounds" in this context to mean "probable cause."

Mr. Rogers to have been examined by a party with a "similar motive to develop [his] testimony." ER 804(b)(1).

Nor is the exception's requirement for "similar motive" satisfied by Mr. Rogers having "filed a motion to dismiss [at the hearing,] challenging the unlawful stop." Pet. at 12 (citing DOL Hearing Transcript at 4-5).[5] Mr. Rogers's motive—to challenge the stop—was not similar to the motive of "the party *against whom* the testimony is *now* offered." ER 804(b)(1) (emphasis added). It is antithetical. The motive of Trooper Sanders and the WSP is to uphold the stop by showing that Trooper Sanders had "reasonable suspicion to stop, and probable cause to arrest, Rogers." Slip op. at 7.

Second, also unsatisfied is the "former testimony" exception's requirement that either "the party against whom the testimony is now offered" or that party's "predecessor in interest" have had the opportunity to develop the testimony at the earlier proceeding. ER 804(b)(1). At the DOL hearing, the only attendees were the Hearing Officer, Mr. Rogers, and his counsel. CP at 184. The parties against whom the Estate seeks to offer the testimony now—Trooper Sanders and WSP—were neither present at, nor party to, the hearing.

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[5] In the DOL transcript, the Hearing Officer makes reference to receiving from Mr. Rogers's counsel a "motion to dismiss for unlawful stop, and the memorandum of legal authorities for confusion, lack of probable cause to take blood." CP at 185. The Estate has not made these materials part of the record in this case. But even if the briefing were part of the record, the exception's requirement for "similar motive" would not be met.

Moreover, although DOL could have participated as a party in its prosecutorial capacity, DOL is not a predecessor in interest to Trooper Sanders or to the WSP. DOL and WSP are two separate, distinct government agencies.[6] And DOL had no motive to develop Mr. Rogers's testimony regarding his stop and arrest by Trooper Sanders because the arresting officer's report is "admissible without further evidentiary foundation" and is "prima facie evidence that the officer had reasonable grounds to believe the person had been driving . . . under the influence." RCW 46.20.308(7).

Finally, the Court of Appeals determined that even if the DOL transcript were admissible, nothing in Mr. Rogers's self-serving testimony "created an issue of material fact that would allow this case to survive summary judgment." Slip op. at 7; *see, e.g.*, CP at 200 ("I [Rogers] clean my truck once a year. . . . I don't believe [the trooper] could have smelled any beer."), CP at 201 ("I would have thought I passed that [field sobriety] test."). Moreover, in his testimony Mr. Rogers actually admits facts that support the validity of the stop. *See, e.g.*, CP at 194-95 (explaining that earlier in the evening he had shared "a quart of some microbrew" with a fellow traveler), CP at 196-97 (explaining that just prior to Trooper Sanders

[6] Each agency is independently established by the Legislature. *Cf.* RCW 43.24 (DOL), RCW 43.43 (WSP). Each has its own set of Washington Administrative Code regulations. *Cf.* WAC 36, 98, 196, 308 (DOL), WAC 204, 212, 446 (WSP).

stopping him, he was "hand-rolling a cigarette," which "occup[ied] both of [his] hands," and therefore was "us[ing] his knee to steer.").

The Court of Appeals' unpublished decision correctly holds that the DOL transcript does not constitute "former testimony" under ER 804(b)(1). Discretionary review should be denied.

B. Review Should Be Denied Because the Trooper Had a Reasonable Articulable Suspicion That Mr. Rogers Committed a Traffic Infraction

In its decision, the Court of Appeals held "the Estate's § 1983 challenge fails on the merits as a matter of law [because] the traffic stop was based on a reasonable articulable suspicion that Rogers had committed a traffic infraction." Slip op. at 9. The Estate contends discretionary review is warranted because the unpublished decision's "description of the driving . . . does not show a violation of the statute [RCW 46.61.100(1) or 140(1)]," it "expands the scope of motorist liability beyond that authorized by the Legislature," and it conflicts with *State v. Prado*, 145 Wn. App. 646, 186 P.3d 1186 (2008), and *State v. Jones*, 186 Wn. App. 786, 347 P.3d 483 (2015). Pet. at 6, 8. Because the Estate's contentions are either inapposite or incorrect, discretionary review should be denied.

First, whether the decision's description of Mr. Rogers's driving shows a violation of the statute is inapposite to the actual issue before the Court: the lawfulness of the investigative stop. Showing a violation of

RCW 46.61.140(1), which requires drivers to maintain lane travel, or RCW 46.61.100(1), which requires drivers to keep right except when passing, is *not dispositive* of whether Mr. Rogers was lawfully stopped on suspicion that he was driving under the influence. CP at 38. "An officer may make a warrantless investigative stop based on a *reasonable, articulable suspicion* of *unlawful conduct* by a driver. When reviewing the validity of an investigative stop, courts evaluate the *totality of the circumstances*." *Jones*, 186 Wn. App. at 790 (emphasis added).

Here, the unpublished decision's evaluation of the stop properly considered the totality of the circumstances, not merely whether Mr. Rogers's driving violated RCW 46.61.100(1) or .140(1). Specifically, the unpublished decision considered that:

> [O]thers had reported Rogers "having problems [maintaining] lane travel," and Trooper Sanders's corroborating observations of Rogers having problems maintaining a direct line of travel, driving on the centerline twice, and drifting and jerking from right to left.

Slip op. at 9 (quoting CP at 38) (second alteration in original). The totality of the circumstances—Trooper Sanders first being advised that a concerned motorist had reported "Rogers 'having problems [maintaining] lane travel,'" followed by Trooper Sanders making corroborating observations regarding Mr. Rogers's driving—established that "the traffic stop was based on a reasonable articulable suspicion that Rogers had committed a traffic

infraction."[7] Slip op. at 9 (quoting CP at 38).

Second, the unpublished decision does not—indeed, cannot—"expand[] the scope of motorist liability beyond that authorized by the Legislature," as the Estate erroneously contends. Pet. at 6, 8. "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court." GR 14.1(a). Furthermore, the unpublished decision does not address the scope of RCW 46.61.100(1) or .140(1). Thus, even if cited solely for its persuasive value, the decision would not impact the scope of motorist liability as defined by the Legislature.

Third, the unpublished decision is fully consistent with *Prado*, 145 Wn. App. 646, and *Jones*, 186 Wn. App. 786. The Estate's attempts to manufacture the appearance of conflict are misguided. The Estate accurately, *but incompletely*, portrays *Prado* and *Jones* as finding no violation of RCW 46.61.140(1) and concluding that the traffic stops in question were unlawful. Pet. at 4-6. But this portrayal studiously ignores that *Prado* and *Jones*, like the unpublished decision, actually "used a totality of the circumstances analysis" to evaluate the lawfulness of those traffic stops. *Jones*, 186 Wn. App. at 791-92 (following *Prado* court's use of totality of circumstances analysis). Considering their analyses in full,

[7] This reasoning likewise counters the relevance of the Estate's claim that "[o]n this record, the trier of fact could conclude that the trooper did not observe a traffic violation." Pet. at 3.

Prado, *Jones*, and the unpublished decision are entirely consistent.[8]

The *Prado* court held that "[a] vehicle crossing over a lane [line] once for one second by two tire widths does not, *without more*, constitute a traffic violation justifying a stop by a police officer." *Prado*, 145 Wn. App. at 647 (emphasis added). Where there was "nothing other than this brief incursion over the lane line," and "the officer testified that there was no other traffic present and no danger posed to other vehicles[,]" the *Prado* court affirmed that "the totality of the circumstances here do not create a traffic violation under the statute [RCW 46.61.140(1)]." *Prado*, 145 Wn. App. at 649. Accordingly the investigatory traffic stop was unlawful. *Id.*

The *Jones* court reached the same result on very similar facts, holding, based on *Prado*, that the officer observing Jones's vehicle crossing the fog line three times, *without more*, did not provide reasonable suspicion to make an investigatory stop. *Jones*, 186 Wn. App. at 791-93. The *Jones* court explained the officer did not testify she suspected Jones was impaired or that she stopped him for that reason; the State presented no evidence about the officer's training and experience in identifying impaired drivers; and there was no evidence of dangerous driving or any other traffic

[8] Notably, the traffic stop challenges in *Prado* and *Jones* serve a very different purpose than that of the Estate in this matter. In *Prado* and *Jones*, criminal defendants used the Fourth Amendment as a shield in motions to suppress evidence in criminal proceedings. *Prado*, 145 Wn. App. at 647; *Jones*, 186 Wn. App. at 788-89. By contrast, here the Estate is using the Fourth Amendment as a sword in its § 1983 and tort claims.

infraction. *Id.* at 793. Accordingly "the State failed to justify its warrantless seizure." *Id.* at 794.

By contrast, the record here established that Trooper Sanders was a commissioned law enforcement officer trained in detecting impaired drivers. CP at 38, 9. The record established that Trooper Sanders had evidence beyond just his own observations of Mr. Rogers "having problems maintaining a direct line of travel, driving on the centerline twice, and drifting and jerking from right to left." Slip op. at 9. Specifically, Trooper Sanders had been notified by the WSP dispatcher that a concerned motorist had reported a vehicle matching the description of Mr. Rogers's truck was having trouble maintaining lane travel on the highway. Thus, prior to Trooper Sanders locating Mr. Rogers's truck, another motorist was concerned enough to report Mr. Rogers's driving to the WSP. Thus, the facts of this case are readily distinguishable from those in *Prado* and *Jones*, where the evidence was nothing more than a few brief incursions over the lane line and the court deemed the traffic stops unlawful. *Prado*, 145 Wn. App. at 649; *Jones*, 186 Wn. App. at 791-93.

The unpublished decision properly held that on the totality of the circumstances, Trooper Sanders had a reasonable articulable suspicion that Mr. Rogers had committed a traffic infraction. That determination does not warrant review. Discretionary review should be denied.

C. Review Should Be Denied Because the Trooper Had Probable Cause to Believe That Mr. Rogers Had Committed a Crime

The Court of Appeals also held that the Estate's § 1983 challenge to Mr. Rogers's arrest fails on the merits as a matter of law because "the arrest was based on probable cause that Rogers had committed a crime." Slip op. at 9. The Estate contends discretionary review is warranted, arguing there are genuine issues of material fact regarding probable cause for Mr. Rogers's arrest. Pet. at 8-10. Mere error correction does not justify discretionary review. RAP 13.4(b). But even if it did, the Estate fails to demonstrate an issue of fact sufficient to survive summary judgment, for at least three reasons. Discretionary review should be denied.

First, the unpublished decision found there was probable cause to arrest Mr. Rogers, based on the evidence provided by Trooper Sanders's contemporaneous arrest report, confirmed by his sworn declaration in this case, that he observed:

> [E]rratic driving before the stop; "a mild odor of alcohol emitting from [Rogers's] vehicle"; "the odor of alcohol and marijuana emitting from Rogers'[s] person"; Rogers had [b]lood shot, droopy, dilated and watery eyes"; Rogers "had slurred speech, and unnecessarily repeated him self [sic]"; Rogers "attempted to hide marijuana and drug paraphernalia from [Trooper Sanders]"; Rogers "failed the field sobriety tests"; and Rogers stated that he had a drink earlier in that night.

Slip op. at 9 (citing CP at 39, 95). The Estate contends that the "Estate's

evidence conflicts with the trooper's claim of probable cause to arrest." Pet. at 8. But nowhere does the Estate's petition identify this "Estate's evidence" that allegedly conflicts with Trooper Sanders's "claim." In fact, the Estate's argument on the issue of probable cause is devoid of record cites.[9] *See* Pet. at 8-11.

Second, the Estate contends that a "jury is entitled to disregard [Trooper Sanders's] claims" and argues that if it would do so, it "could find that Mr. Rogers was arrested without probable cause." Pet. at 9-10. To reach that result, the Estate would have the jury completely reject Trooper Sanders's arrest report and sworn testimony and, instead, "infer" that Trooper Sanders did not smell alcohol or marijuana on Mr. Rogers's truck or person. Pet. at 9.

In addition, the Estate would have the jury reject Trooper Sanders's testimony that Mr. Rogers failed the field sobriety tests, and infer that "Mr. Rogers'[s] statement that he passed the field [sobriety] tests deserves credence." Pet. at 9. Notably, there is no such statement by Mr. Rogers in the record.[10] But the summary judgment standard entitles the Estate to facts

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[9] The Estate does not cite to Mr. Rogers's testimony in the DOL transcript that it contends should be admitted under the "former testimony" exception to the bar on hearsay. Pet. at 8-11. As explained above, the DOL transcript is inadmissible hearsay. *See supra*, Section IV.A; *see also* slip op. at 6-8. However, even if the DOL transcript were admitted, "nothing within the testimony created an issue of material fact that would allow this case to survive summary judgment." Slip op. at 8.

[10] The Estate does not identify the source of this alleged statement by Mr. Rogers. Pet. at 9. At best, in the contested DOL transcript, Mr. Rogers made the equivocal

and *reasonable inferences* taken in its favor—it does not require the wholesale rejection of the moving parties' evidence.

Third, the Estate ignores that in the underlying criminal proceeding, Mr. Rogers admitted that there was probable cause for his arrest and waived his right to challenge the evidence against him in return for entering a pretrial diversion program. CP at 88-93. "The pretrial diversion agreement and order 'ORDERED *that probable cause exists to believe* that the Defendant [Mr. Rogers] *committed the offense(s) charged* herein,' and that Rogers entered into the Pretrial Diversion Agreement and Order 'freely, voluntarily and knowingly.'"[11] Slip op. at 3 (quoting CP at 93).

As the unpublished decision noted, the pretrial diversion agreement and order "has not been reversed or otherwise invalidated. Rogers completed his diversion conditions and the charges were dismissed." Slip op. at 4. Mr. Rogers accepted the benefits of the agreement, and the Estate should not now be allowed to dispute it. Indeed, as Trooper Sanders and the WSP argued below, the Estate is collaterally estopped from challenging probable cause in this case because it was definitively

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statement: "I would have thought I had passed [the field sobriety tests]." CP at 201. As argued above, the DOL transcript is inadmissible hearsay. *See* Section IV.A.

[11] Mr. Rogers was charged with "(1) driving under the influence, (2) possession of marijuana, and (3) possession of drug paraphernalia." Slip op. at 3-4.

established in the criminal adjudication proceeding.[12] State Respondents' Br. at 9-14.

Discretionary review of this issue is not warranted.

V. CONCLUSION

The Court of Appeals' unpublished decision correctly held that the DOL transcript "does not satisfy the exception to hearsay under ER 804(b)(1) because Rogers was not subject to cross-examination by a party with similar motives to develop his testimony." Slip op. at 7. The decision also correctly held that "[o]n the facts of this case, Trooper Sanders's warrantless stop and arrest of Rogers were constitutionally justified as a matter of law." Slip op. at 10.

The Estate has failed to establish any basis on which discretionary review of the Court of Appeals' unpublished decision is warranted. Therefore, for the reasons discussed above, the Court should deny Petitioners-Appellants' Petition for Review.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

ROBERT W. FERGUSON
Attorney General

/s/ Allyson S. Zipp
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[12] On appeal the Estate failed to assign error or present argument concerning collateral estoppel as a basis for dismissing its claims. *See* Respondents' Br. at 10-12.

CERTIFICATE OF FILING AND SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the undersigned date the original of the preceding document was filed in the Supreme Court of the State of Washington according to the Court's Protocols for Electronic filing.

That a copy of the preceding document was served on Respondent and his counsel via the Court's Electronic filing system at the following e-mail address:

John R. Muenster (jmkk1613@aol.com)

DATED this 10th day of January, 2018 at Olympia, Washington.

/s/ Cynthia A. Meyer
CYNTHIA A. MEYER, Legal Assistant

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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