Supreme Court No. 95210-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE ESTATE OF JAMES CRAMPTON ROGERS, by and through PAUL CULLEN, Personal Representative of the Estate, et.al, Plaintiff/Appellant,

v.

STATE OF WASHINGTON, and RUSSELL SANDERS, in his capacity as a Washington state trooper, and as an individual, Defendants-Appellants.

APPEAL FROM THE JEFFERSON COUNTY SUPERIOR COURT
The Honorable Keith C. Harper, Trial Judge

THE ESTATE'S REPLY TO STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The Estate of Jim Rogers[1] (hereinafter "the Estate") asks this Court to grant review of the appellate panel opinion below. We filed a thirteen-page petition for review. The state countered with a twenty-page answer, using smaller fonts.

RAP 13.4(d) provides in pertinent part:

> A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing the new issues raised in the answer.

The state's "counterstatement of the issues" contains rather lengthy paragraphs which appear to rely on the state's version of the incident. We disagree with that approach. On *de novo* review of the trial court's summary judgment order, this Court views the facts and reasonable inferences in the light most favorable to Mr. Rogers' Estate. The State did not meet its burden of proving that there is no issue of

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[1] Mr. Rogers passed away on March 13, 2012, after this lawsuit was filed. We have his sworn testimony about the incident given at his formal Department of Licensing administrative hearing, wherein he prevailed.

material fact. *See Kim v. Lakeside Adult Family Home,* 185 Wash.2d. 532, 547, 374 P. 3d 121 (2016). The "issues" in the state's answer sound more like argument on the merits. They are addressed below.

B. THE TRAFFIC STOP ISSUES

The Estate seeks review of the following issues:

1. Is RCW 46.61.140(1) violated by a motorist who merely drives "onto the centerline" of a highway?

2. Is RCW 46.61.100(1) violated by a motorist who merely drives "onto the centerline" of a highway but does not drive on the left half of the highway?

3. Does the Court of Appeals decision on the legality of the traffic stop conflict with *State v. Prado*, 145 Wash. App. 646, 186 P.3d 1186 (2008) and *State v. Jones*, 186 Wash.App. 786, 347 P. 3d 483 (2015)?

See Petition for Review, pp. 1-8. These issues are straightforward, important, and worthy of review by this Court.

By contrast, the traffic stop "issue" the state lists in its answer misstates the Fourth Amendment standard. *See Answer*, page 2.

This is the correct standard: An officer who stops a

motorist without having observed a traffic violation violates the Fourth Amendment's prohibition against unreasonable seizures. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 946 (9th Cir. 2003) ("If, as Bingham [the driver] alleges, Schreiber [the officer] pulled him over without having observed any traffic violation, Schreiber's conduct did violate a constitutional right.").

In the trial court, the state cited RCW 46.61.140(1) and RCW 46.61.100(1) as the traffic statutes allegedly violated. CP 62. On this record, the trier of fact could conclude that the trooper did not observe a traffic violation.

The appellate panel's description of the driving ("problems maintaining a direct line of travel, driving on the centerline twice, and drifting and jerking from right to left", *Opinion*, page 9) does not show a violation of either statute. *See Petition for Review*, pp. 3-8. On appeal, the state retreated. Neither the state nor the appellate panel identify any specific statute violated by the alleged driving.

In its answer, the state appears to claim that police can stop motorists without *any* specific law in mind. *See Answer*, pp. 12-16. The state's position is incorrect. Claiming "I stopped you for a traffic violation, but I don't know which one" is arbitrary. It is not an excuse to violate the Fourth Amendment.

C. THE ARREST ISSUE.

The Estate seeks review of the following issue: Does evidence which conflicts with the trooper's claim of probable cause to arrest create a genuine issue of material fact on summary judgment? *See Petition for Review*, pp. 2, 8-11. The panel below seems to have taken the trooper's claims as a given. Factual disputes seemingly were resolved in favor of the State.

In its answer, the state urges that probable cause exists based upon its interpretation of the record. *See Answer*, pp. 2. That is not the correct standard. The facts and reasonable inferences therefrom should be viewed in the light most favorable to Mr. Rogers' Estate. *See Appellant's Opening Brief*, Summary of the Factual Record, pp. 3-11.

D. ADMISSIBILITY OF MR. ROGERS' SWORN TESTIMONY ISSUE.

The Estate seeks review of the following issue: Is prior sworn testimony, given at a DOL hearing where probable cause to arrest is an issue, admissible on summary judgment where probable cause is also at issue?

This case gives the Court the opportunity to hold that prior sworn testimony in DOL license suspension hearings is admissible under ER 804(b)(1). A number of such hearings (as well as other types of administrative hearings) take place around the state each year. The admissibility of sworn testimony given at such hearings is an important issue worthy of this Court's consideration.

The state's answer shows that review should be granted by this court. The state raises three issues. No cases are cited. An authoritative decision by this Court would be beneficial.

First, the state claims that even though the same issue—probable cause—is present in both proceedings, the state somehow did not have a similar motive to cross-examine. *See Answer*, pp.9-10. We disagree. This Court should grant review and hold that the identity of issues does satisfy the "similar motive" element of ER 804(b)(1).

Second, the state says the "WSP" was not a party to or present at the license hearing but is a party now. *See Answer*, pp. 10. This claim is incorrect. The "WSP" is not a party to this lawsuit. The state is the defendant. The state has various subsidiary agencies, just like a private company can have subsidiary departments. There is no requirement that all subsidiaries be named as parties in a lawsuit for ER

804(b)(1) to apply. A decision from this Court could make this clear.

Third, the state claims that even if the testimony is admissible, it does not create an issue of material fact. We disagree. The state's claim goes to the weight, not the admissibility. Drawing all inferences in favor of Mr. Rogers, the trier of fact could conclude from his testimony that his driving was adequate, no traffic violation occurred, he was not intoxicated, and there was no probable cause to arrest.

E. CORRECTION OF ERROR IN THE STATE'S ANSWER.

The state claims that the Estate did not raise its state law claims in the Petition for Review. *See Answer*, p. 3. That is incorrect. Our state law claims are raised in the petition. *See Petition*, pp.10-11, fn. 3.

F. CONCLUSION

Review by this Court should be granted. Important issues are presented. The appellate panel was incorrect in its decision. This case should be reversed and remanded to the Superior Court for further proceedings.

DATED this the 23rd day of January, 2018.

Respectfully submitted,
MUENSTER & KOENIG

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CERTIFICATE OF SERVICE

I certify that on or about the 23rd day of January, 2018, I caused a true and correct copy of this document to be filed electronically, with service on counsel of record. Dated this the 23rd day of January, 2018.

S/ John R. Muenster
Attorney at Law

MUENSTER & KOENIG

January 23, 2018 - 3:35 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95210-8
Appellate Court Case Title:	Estate of James Crampton Rogers v. State of Washington, et al.
Superior Court Case Number:	11-2-00078-7

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