

No. 69359-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JOHN F. KLINKERT,

Appellant

v.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent

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On Appeal from The Superior Court of Washington
for Snohomish County

The Honorable Ellen J. Fair, Judge

APPELLANT'S OPENING BRIEF

John F. Klinkert
Appellant pro se

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The Internet address, on the U.S. government’s SAMSHA website, for the state’s annual Synar Report (Website for Washington’s annual Synar Report) is :

http://www.samhsa.gov/grants/blockgrant/SAPT_BG_FY_2012%20Annual%20Report_V1.2_2011.pdf

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A. INTRODUCTION

This is my appeal from a judgment against me in Snohomish County Superior Court in a judicial review of administrative action. The administrative action reviewed was a final order of the Washington State Liquor Control Board (LCB) affirming the ruling of an Administrative Law Judge (ALJ) in a hearing by the Office of Administrative Hearings (OAH) under the Washington Administrative Procedure Act (APA). The result of the hearing was that the ALJ ruled that I had violated RCW 26.28.080 by selling tobacco to a minor and was therefore liable for a \$100 penalty under RCW 70.155.100 (3) and RCW 70.155.100 (4).

RCW 26.28.080, a tobacco-related criminal statute, states as follows:

“RCW 26.28.080
Selling or giving tobacco to minor – Belief of
Representative capacity, no defense – Penalty.

Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor.

It shall be no defense to a prosecution for a violation of this section that the person acted, or was believed by the defendant to act, as agent or representative of another.”
[Emphasis added]

RCW 70.155.100 (3) and RCW 70.155.100 (4) read as follows:

“RCW 70.155.100
Penalties, sanctions, and actions against licensees.

.....
.....

(3) The liquor control board may imposed a monetary penalty upon any person other than a licensed cigarette retailer if the liquor control board finds that the person has violated RCW 26.28.080, 70.155.030, 70.155.040. 70.155.050, 70.155.070, or 70.155.090.

(4) The monetary penalty that the liquor control board may impose based upon one or more findings under subsection (3) of this section may not exceed the following:

(a) For violation of RCW 26.28.080 or 70.155.020, fifty dollars for the first violation and one hundred dollars for subsequent violation;

.....
.....”

The Snohomish County Superior Court trial judge, the Honorable Ellen J. Fair, in her Findings of Fact, Conclusions of Law and Order for Judgment, filed on August 8, 2012, ruled against me, so I have appealed to this Court of Appeal.

The tobacco sting. On March 16, 2011 around 4:15 p.m. the King County Health Department ran a tobacco compliance check (a “tobacco sting”) at Walgreens drugstore No. 4157 in Seattle where I was working as a cashier. A minor woman, a decoy for the sting, came to my cash register

and asked to buy a pack of cigarettes. Because she looked young, I asked for her ID. She presented her driver's license and I keyed her birth date into my cash register. Because I inadvertently keyed in "02-22-1984" as her birth date instead of "02-22-1994", the correct birth date on her license (an error of one digit out of eight), my cash register allowed the sale. The Washington State Liquor Control Board (LCB) issued me a pink Notice of Board Action on Tobacco Violation and filed a complaint against me with the Office of Administrative Hearings (OAH) charging me with a violation of a tobacco statute, RCW 26.28.080 (a gross misdemeanor), and claiming monetary penalties of \$100 under tobacco statutes RCW 70.155.100 (3) and RCW 70.155.100 (4).

In this brief I argue that RCW 70.155.100 (3) and RCW 70.155.100 (4) are unconstitutional on their face because their wording, when read together with the wording of RCW 70.155.100 (8), purport to allow alleged violations of RCW 26.28.080, which violations are gross misdemeanors, to be adjudicated under the Washington Administrative Procedure Act (APA).

RCW 70.155.100 (8) reads as follows:

"RCW 70.155.100
Penalties, sanctions, and actions against licensees.

.....

.....

(8) All proceedings under subsections (1) through (6) of
This section shall be conducted in accordance with Chapter
34.05 RCW....."

This purported grant of authority to adjudicate alleged violations of RCW 26.28.080 under the APA usurps a person's rights under the Sixth Amendment of the U. S. Constitution which, as interpreted by the U. S. Supreme Court and made applicable to the states via the 14th Amendment under the doctrine of selective incorporation, guarantees a jury trial to all persons charged with crimes where the maximum possible punishment exceeds six months. The purported grant of authority to adjudicate alleged violations of a criminal statute under the APA also violates Article I, Section 22 of the Washington Constitution, which the Washington Supreme Court has interpreted to guarantee jury trials to all persons charged with crimes classified at least as low as misdemeanors.

In the administrative proceedings I argued the merits of my case, because I was not allowed to make constitutional arguments. However, in the Superior Court judicial review of administrative agency action, I did not argue the merits; instead I focused solely on constitutional arguments, as I do here.

B. ASSIGNMENTS OF ERROR

1. The trial court failed to find RCW 70.155.100 (3) and RCW 70.155.100 (4) unconstitutional on their face.

2. The trial court failed to award costs to me under RCW 4.84.350 as the prevailing party.

Issues Pertaining to Assignments of Error

1. Did the trial court improperly fail to find that RCW 70.155.100 (3) and RCW 70.155.100 (4), when read together with RCW 70.155.100 (8), conflict on their face with the Sixth Amendment of the U. S. Constitution and with Article I, Section 22 of the Washington Constitution?

2. Did the trial court improperly fail to award costs to me under RCW 4.84.350 as the prevailing party?

C. STATEMENT OF THE CASE

[Note: I discovered too late that the Snohomish County Superior Court Clerk's office seems to have erred when they prepared the "Index to Petitioner's Clerk's Papers." They mistakenly counted the number of pages in the "Certified Appeal Board Record." Their Index indicates that the Record contains 302 pages (CP 94-396) but it actually should contain only 202 pages. This creates uncertainty. Therefore, when I refer to documents contained in the "Certified Appeal Board Record" I will not use the designation "CP", as I do everywhere else in this opening brief, but I will call it "WSLCB Record", and I will refer to page numbers

within the WSLCB Record rather than using the possibly incorrect CP page numbers.]

1. Factual Background

The tobacco sting. On March 16, 2011 around 4:15 p.m. the King County Health Department ran a tobacco compliance check (a “tobacco sting”) at Walgreens drugstore No. 4157 in Seattle where I was working as a cashier. A minor woman, a decoy for the sting, came to my cash register and asked to buy a pack of cigarettes. Because she looked young, I asked for her ID. She presented her driver’s license and I keyed her birth date into my cash register. Because I inadvertently keyed in “02-22-1984” as her birth date instead of “02-22-1994”, the correct birth date on her license, my cash register allowed the sale. (WSLCB Record, pp. 173-174, paragraphs 3.3 - 3.7)

2. Procedural History

The WSLCB’s citation. On March 24, 2011 the Washington State Liquor Control Board issued me a “Notice of Administrative Violation” alleging that I had violated RCW 26.28.080, selling tobacco to a minor, which is a crime, a gross misdemeanor. (WSLCB Record, p. 173, paragraph 3.1) The WSLCB in its Notice also requested a statutory penalty of \$100 under RCW 70.155.100 because I had paid a \$50 fine for

a prior purported tobacco violation, my first, in January, 2011. (WSLCB Record, pp. 145-146; p. 174, paragraph 3.9; p. 175, paragraph 4.5)

My request for a hearing. Using one of the options in checkboxes on the Notice, I requested an administrative hearing. (WSLCB Record, p. 146)

The WSLCB Complaint and request for an administrative law judge. In response to my request for a hearing, on May 20, 2011 the WSLCB filed a Complaint with the Office of Administrative Hearings (OAH) charging me with a violation of RCW 26.28.080; claiming penalties under RCW 70.155.100 (3) and RCW 70.155.100 (4); and requesting OAH to assign an administrative law judge (ALJ) for the hearing. (WSLCB Record, pp. 94-96)

Requirements of the APA for Petitions for Judicial Review. Washington's Administrative Procedure Act (APA), RCW 34.05 et seq., allow a superior court to grant relief from a final order of the WSLCB if the court determines that

“[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face...”. [Emphasis added] RCW 34.05.570(3)(a).

The APA also allows a superior court to grant relief from a final order of the WSLCB if

“[t]he order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law...”.
[Emphasis added] RCW 34.05.570(b).

However, RCW 34.05.554 (Limitations on new issues) says that a petitioner may not raise issues on appeal which he didn't raise before the agency below:

“RCW 34.05.554 (Limitations on new issues)

“(1) Issues not raised before the agency may not be raised on appeal except to the extent that ...”

I raised the constitutional issue before the administrative law judge over the telephone at the June 29, 2011 pre-hearing telephone conference and by submitting motions and a brief for the August 25, 2011 telephone hearing. Thus, I was able to argue the constitutional issue in the superior court.

My attempted constitutional argument at the pre-hearing conference. At the June 29, 2011 pre-hearing telephone conference conducted by ALJ Steven C. Smith of the OAH, I orally requested ALJ Smith to declare RCW 70.155.100 unconstitutional because violation of RCW 26.80.080 is a crime and I am entitled to a jury trial for the alleged crime rather than an administrative hearing. ALJ Smith denied my request, saying that Administrative Law Judges in Washington don't have

jurisdiction to declare state statutes like RCW 70.155.100 unconstitutional. (WSLCB Record, p. 171, paragraph 2.1)

Constitutional arguments in my motions submitted for the hearing.

In preparation for the August 25, 2011 telephone hearing I submitted motions and an accompanying brief which explained the basis of my constitutional attack on RCW 70.155.100 and also argued that the OAH had no jurisdiction to adjudicate alleged violations of RCW 26.28.080 because it is a criminal statute. (WSLCB Record, pp. 126-132; p. 171, paragraph 2.1)

The hearing. My hearing was held by telephone on August 25, 2011 and was again conducted by ALJ Smith. At the hearing, purportedly authorized under RCW 70.155.100 (8) for alleged violations of RCW 26.28.080 and other tobacco statutes in RCW Chapter 70.155, the WSLCB was represented by Assistant Attorney General Brian Considine of the Washington State Attorney General's Office. I represented myself. (WSLCB Record, pp. 32-33)

The ALJ's decision. After the hearing, ALJ Smith issued his decision in his "Findings of Fact, Conclusions of Law, and Initial Order" dated October 24, 2011. He denied my motion that challenged the WSLCB's jurisdiction but merely stated without argument that my case

was a civil enforcement matter, not a criminal matter, and that OAH jurisdiction was clear. (WSLCB Record, p. 172, paragraph 2.3)

My petition to the WSLCB. In my November 10, 2011 Petition for Review of Initial Order submitted to the WSLCB I argued again that RCW 70.155.100 (3) and RCW 70.155.100 (4) were unconstitutional. I also argued that the OAH has no jurisdiction to decide any cases, including mine, in which a violation of RCW 26.28.080 is alleged, because a violation of that statute is a crime, a gross misdemeanor, and requires a jury trial under both Article I, Section 22 of the Washington Constitution and the Sixth Amendment of the U. S. Constitution. (WSLCB Record, pp. 179-186)

The WSLCB's Final Order. On December 27, 2011 the WSLCB issued its short Final Order, which simply adopted ALJ Smith's "Findings of Fact, Conclusions of Law, and Initial Order" in its entirety and said nothing about my constitutional arguments. (WSLCB Record, p. 198) The WSLCB signed its Final Order on December 27, 2011 and mailed it to me on December 28, 2011. (WSLCB Record, pp. 198-202)

My Petition for Judicial Review. I filed my Petition for Judicial Review of Agency Action in Snohomish County Superior Court on January 23, 2012; mailed a copy to opposing counsel on January 24, 2012;

and had a copy of the petition personally served on WSLCB Commissioner Sharon Foster on January 25, 2012.

Payment of penalty under protest. I paid the \$100 penalty under protest on January 25, 2012. (CP 61)

The hearing on my Petition for Judicial Review of Agency Action was held on August 8, 2012, in Snohomish County Superior Court, the Honorable Ellen J. Fair presiding. I appeared pro se, and the WSLCB was represented by Assistant Attorney General Stephanie Happold. There was no court reporter, and no audio recording was made of the hearing. Both parties presented to the judge a short oral summary of their previously briefed arguments. At the conclusion of oral argument, the judge said she had read all the briefs and she announced her ruling, finding in favor of Respondent WSLCB. The judge directed the attorney for the prevailing party, Ms. Happold, to prepare findings of fact and conclusions of law for the judge's signature. Judge Fair signed the "Findings of Fact, Conclusions of Law and Order for Judgment" (CP 8-13) on August 30, 2012, and filed them the same day. I filed my Notice of Appeal for this appeal on September 28, 2012. (CP 1)

D. ARGUMENTS

1. THE COURT SHOULD HAVE FOUND THAT RCW 70.155.100 (3) AND RCW 70.155.100 (4) ARE UNCONSTITUTIONAL ON THEIR FACE

Standard of review: The proceeding in superior court for the judicial review of administrative agency action focused on the interpretation and alleged unconstitutionality of several Washington tobacco statutes. Statutory interpretation presents a question of law over which this court exercises de novo review. Jackson v. Fenix Underground, Inc., 142 Wn.App. 141, 145, 173 P.3d 977 (2007). Likewise, appellate courts also review de novo a challenge to the constitutionality of a statute. State v. Schultz, 138 Wn.2d 638, 643, 980 P.2d 1265 (1999).

- a. The court improperly failed to find that RCW 70.155.100 (3) and RCW 70.155.100 (4), when read together with RCSW 70.155.100 (8), conflict on their face with the Sixth Amendment of the U. S. Constitution and with Article I, Section 22 of the Washington Constitution

According to RCW 9A.20.010, Washington has five classifications of crimes: Class A felony, Class B felony, Class C felony, gross misdemeanor and misdemeanor:

“RCW 9A.20.010
Classification and designations of crimes.

(5) Classified Felonies. (a) The particular classification of each felony defined in Title 9A RCW is expressly designated in the section defining it.

(b) For purposes of sentencing, classified felonies are designated as one of three classes, as follows:

- (i) Class A felony; or
- (ii) Class B felony; or
- (iii) Class C felony.

(6) Misdemeanors and Gross Misdemeanors. (a) Any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor. whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor.

(b) All crimes other than felonies and misdemeanors are gross misdemeanors.” [Emphasis added]

RCW 26.28.080, a tobacco-related criminal statute, states

as follows:

“RCW 26.28.080
Selling or giving tobacco to minor – Belief of
Representative capacity, no defense – Penalty.

Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor.

It shall be no defense to a prosecution for a violation of this section that the person acted, or was believed by the defendant to act, as agent or representative of another.”
[Emphasis added]

The U. S. Constitution, and therefore also the Sixth Amendment where relevant, is the supreme law of the land, i.e., its authority outranks

any other legal authority. McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 9, 4 L.Ed. 579 (1819). This principle is acknowledged in the Washington Constitution, Article I, Section 2:

“The Constitution of the United States is the supreme law of the land.”

The Sixth Amendment of the U. S. Constitution, requires a jury trial in criminal cases. The relevant portion of the Sixth Amendment states:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...”

In Duncan v. Louisiana, 391 U.S. 145, 161, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968), the U. S. Supreme Court used the doctrine of selective incorporation to impose part of the U. S. Constitution’s Sixth Amendment on the states. See Justice Black’s discussion, in Duncan, 391 U.S. at 162, of the doctrine of selective incorporation. In particular, the Supreme Court made the Sixth Amendment’s requirement of a jury trial in criminal cases applicable to the states when the maximum potential imprisonment is more than six months. Ibid. at 159, reaffirmed in Baldwin v. New York, 399 U.S. 66, 74, 90 S. Ct. 1886, 26 L.Ed.2d 437 (1970).

RCW 9.92.020, cited immediately below, fixes the maximum possible punishment for gross misdemeanors like RCW 26.28.080 (i.e., a criminal statute which contains no statement of the punishment that can be

imposed for the gross misdemeanor) at a maximum potential imprisonment of 364 days, or a maximum fine of \$5,000, or both:

“RCW 9.92.020
Punishment of gross misdemeanor when not fixed by statute.

Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.”

Thus the Sixth Amendment of the U. S. Constitution requires a jury trial in Washington for gross misdemeanors, because gross misdemeanors have a maximum potential punishment of 364 days, which is more than six months.

The Washington Constitution in Article I, Section 22 states that all persons charged with a crime are entitled to a jury trial:

“SECTION 22 RIGHTS OF THE ACCUSED. In criminal Prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases....” [Emphasis added.]

The Washington Constitution outranks any other Washington legal authority, including statutes enacted by the legislature. As the Washington Supreme Court has said,

“...the power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions. Where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment, unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt.” [Citations omitted] [Emphasis added] Clark v. Dwyer, 56 Wash.2d 425, 431, 353 P.2d 941, 945 (1960)

In particular the Washington Constitution outranks any statute such as RCW 70.155.100 (8), which tries to place adjudication of RCW 70.155.100 (3), RCW 70.155.100 (4), and RCW 26.28.080 under Washington’s Administrative Procedure Act, Chapter 34.05 RCW.

“RCW 70.155.100
Penalties, sanctions, and actions against licensees.
.....
.....

(3) The liquor control board may imposed a monetary penalty upon any person other than a licensed cigarette retailer if the liquor control board finds that the person has violated RCW 26.28.080, 70.155.030, 70.155.040. 70.155.050, 70.155.070, or 70.155.090.

(4) The monetary penalty that the liquor control board may impose based upon one or more findings under subsection (3) of this section may not exceed the following:

(b) For violation of RCW 26.28.080 or 70.155.020, fifty

dollars for the first violation and one hundred dollars for subsequent violation;

.....
.....

(8) All proceedings under subsections (1) through (6) of this section shall be conducted in accordance with Chapter 34.05 RCW.

.....
.....”

Chapter 34.05 RCW is Washington’s Administrative Procedure Act.

I will demonstrate “beyond a reasonable doubt”, as required by Clark v. Dwyer, supra, that RCW 70.155.100 (3) and RCW 70.155.100 (4) when read together with RCW 70.155.100 (8) are “repugnant” to, i.e., conflict with, the U. S. Constitution and the Washington Constitution, also required by Clark v. Dwyer.

The Washington Supreme Court case that has interpreted Article I, Section 22 of the Washington Constitution ruled that in Washington, jury trials in criminal cases are required even for misdemeanors. City of Pasco v. Mace, 98 Wash.2d 87, 101, 653 P.2d 618, 625 (1982). Although the U. S. Supreme Court’s interpretation of the Sixth Amendment, made applicable to the states via the 14th Amendment by Duncan, supra, 391 U.S. 145, 162, and Baldwin, supra, 399 U.S. 66, 74, establishes the

minimum protection under the Bill of Rights which a state must respect, state courts are at liberty to find in their own constitutions greater protection than is afforded by the federal constitution, according to the U. S. Supreme Court. Oregon v. Hass, 420 U.S. 713, 719, 95 S. Ct. 1215, 43 L.Ed.2d 570 (1975). And the Washington Supreme Court has done so in regard to the right to a jury trial in criminal cases, as I pointed out above. That is, in interpreting Article I, Section 22 of the Washington Constitution, the Washington Supreme Court has stated that persons charged with misdemeanors in Washington have a right to a jury trial for misdemeanors. City of Pasco, supra, 98 Wash.2d 87 at 101, citing Oregon v. Hass, supra.

Because a violation of RCW 26.28.080 is a gross misdemeanor, anyone charged with a violation of that tobacco statute is entitled to a jury trial, and any other tobacco statutes such as RCW 70.155.100 (3) and RCW 70.155.100 (4) when read together with RCW 70.155.100 (8) (which purport to grant jurisdiction to the Office of Administrative Hearings (OAH) under the Administrative Procedure Act to adjudicate an alleged violation of RCW 26.28.080), are unconstitutional on their face.

To determine whether a statute is unconstitutional “on its face” or is “facially invalid” means that the

“[c]onstitutional analysis is made upon the language of the ...statute itself.” City of Seattle v. Webster, 115 Wash.2d 635, 640, 802 P.2d 1333, 1337 (1990).

If a statute is unconstitutional on its face, a reasonable interpretation of the statute’s wording conflicts openly with the relevant constitutional provisions to which one is comparing the statute. Parmalee v. O’Neel, 145 Wash.App. 223, 235, 186 P.3d 1094, 1100 (2010). The rights granted to persons by the Washington Constitution and the U. S. Constitution make any purported infringements of those rights by Washington statutes, in particular by any statutes such as RCW 70.155.100(3), RCW 70.155.100 (4) and RCW 70.155.100 (8), when read together, unconstitutional. Because the unconstitutionality of these statutes is obvious from a reasonable reading of their words alone, the statutes are unconstitutional on their face.

Consequently, because the trial court failed to find that RCW 70.155.100 (3) and RCW 70.155.100 (4) are unconstitutional on their face, some of the trial court’s Conclusions of Law (CP 10-13) are in error. The second sentence of Conclusion of Law No. 10 says

“The Board has authority pursuant to RCW 70.155.100 to impose civil sanctions against employees of tobacco licensees who violate RCW 26.28.080.”

I have shown above that this is not so. Conclusion of Law No. 13 says

“13. The Board pursued a constitutionally valid civil action against Mr. Klinkert based on the same set of facts that could also lead to criminal charges. The Board can prosecute misdemeanors in Chapter 70.155. RCW and RCW 26.28.080, as well as impose RCW 70.155.100 civil sanctions for the same acts. The Board acted within its statutory authority bestowed upon it by the Washington State Legislature when it pursued an administrative action against Mr. Klinkert for selling tobacco to a minor.”

Again, I showed above that none of this is true. The Board cannot do any of these things under the statutes which I have shown are unconstitutional.

Conclusion of Law No. 14 says in its second sentence:

“14. the Office of Administrative Hearings and its Administrative Law Judges have statutory authority to conduct civil administrative hearings and adjudicate Mr. Klinkert’s alleged tobacco violation.”

I also showed that claim to be false, because it is unconstitutional for the state to use the Administrative Procedure Act to adjudicate alleged violations of criminal statutes.

2. THE COURT SHOULD HAVE AWARDED COSTS TO ME UNDER RCW 4.84.350 AS THE PREVAILING PARTY

The superior court did not rule on this issue below, because I was not the prevailing party.

Washington statute RCW 4.84.350 (Judicial review of agency action – Awards of fees and expenses) authorizes reimbursement of expenses and attorney fees to

“a qualified party that prevails in a judicial review of an agency action ...”.

I have incurred no attorney fees because I am pro se, acting as my own attorney. However, I have incurred costs in this litigation, and if I prevail in this court I am entitled to be reimbursed for them.

In the superior court, the Attorney General in Respondent’s Brief, p. 11, footnote 7 (CP 55), cites Silverstreak, Inc. v. State Dept. of Labor, 159 Wn.2d 868, 892, 154 P.3d 891 (2007), in support of the Attorney General’s claim that the LCB’s actions against me were “substantially justified”. The Attorney General quotes this passage from Silverstreak:

“To establish that its action was substantially justified, the Board must show that ‘its position has a reasonable basis in law and fact.’”

Then the Attorney General mentions the LCB’s duties to enforce the state’s tobacco laws. I agree that the Attorney General has a duty to enforce the state’s tobacco laws. However, the LCB’s actions in my particular case have little basis either in law or fact.

Before the LCB issued me the pink Notice of Board Action on Tobacco Violation (WSLCB Record, pp. 145-6), the LCB knew or should

have known that RCW 70.155.090 (2) provides a complete defense to sellers of tobacco (such as cashiers like me) who ask for a customer's ID:

“(2) It is a defense to a prosecution under RCW 25.28.080 that the person making a sale reasonably relied on any of the officially issued identification as defined in subsection (1) of this section....”

It is obvious that the purpose of the statute is to get the sellers of tobacco to ask young prospective purchasers of tobacco for their ID. The LCB knew I had asked for the minor's ID because the LCD knew I had keypunched in the wrong birth date, yet the LCB unreasonably issued a citation to me.

At the time the LCB issued me the citation (the pink Notice of Board Action on Tobacco Violation), the LCB knew not only that I had asked the minor for her ID. The LCB knew also that I had keyed the minor's birth date into my cash register and knew that I had mispunched only one digit out of eight. WSLCB Record, p. 124, contains a government form which the Department of Health's escort for the minor, Mr. Fel Pajimula, sent to the LCB requesting that they issue a pink Notice of Board Action on Tobacco Violation, i.e., serve me with a citation. The government form shows the minor's full birth date at the bottom right. Note also that it states only that “Mr. Klinkert entered ‘1984’”, a four-digit number, whereas at the administrative hearing the Attorney General and I

stipulated that I had entered an eight-digit number. (WSLCB Record, p. 174). So Fel Pajimula knew when he filled out the form that the mispunch was for only one digit out of eight. not for one digit out of four.

The Synar Amendment (1992 Synar Amendment to the Prevention and Treatment of Substance Abuse Block Grant Act) which the Attorney General discusses in Respondent's Brief, page 9 (CP 56), requires the state of Washington to make a certification in its annual application for the federal block grant authorized by the Synar Amendment. (CP 41, Exhibit 4 to Petitioner's Reply Brief).

I ask this court to take judicial notice, under ER 201(b), of the website and web documents I will mention below. The relevant Washington Court Rule on judicial notice, ER 201(b), states:

“(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

The website and web documents, some of which I included as Exhibits (CP 38-46) to Petitioner's Reply Brief in the superior court judicial review proceeding below, are public knowledge, easily verified by this court, and are therefore a valid subject for judicial notice pursuant to Rodriguez v. Loudeye Corp., 144 Wn.App. 709, 189 P.3d 166 (2008).

This court can view a copy of Washington's block grant application for FY 2011 at CP 38-43, Exhibit 4 to Petitioner's Reply Brief. The Internet address, on the Washington DSHS website, for "Washington Uniform Application FY2011 Substance Abuse Prevention and Treatment Block Grant" is:

http://www.dshs.wa.gov/pdf/dbhr/Final_Washington_BLOCK_GRANT_APPLICATION_-_2011%5B1%5D.pdf Notice the requirement on pages 6 and 129 of the annual block grant application form (CP 41-42, Exhibit 4 to Petitioner's Reply Brief) used by the state, to certify that Washington has a law in effect making it illegal to sell or distribute tobacco products to minors. Such a certification would reasonably require, it seems to me, an annual examination of Washington's tobacco laws to insure that the state's laws relating to sale of tobacco to minors are valid and constitutional on their face. Otherwise those laws would not comply with the block grant act's requirement to have effective laws in place in order for a state to receive federal money. Yet RCW 70.155.100 (3) and RCW 70.155.100 (4), the central punitive code sections of Washington's tobacco laws regarding sellers of tobacco who are, like me, not tobacco licensees, are visibly unconstitutional on their face because, when read together with RCW 70.155.100 (8), they purport to allow an administrative agency to adjudicate alleged violations of a criminal statute, RCW 26.28.080. They

thereby conflict with the well-known right to a jury trial in criminal cases, and anyone performing an annual review of Washington's tobacco statutes should have realized that.

Also, the state's annual Synar Report (for example the state's Synar Report for FFY 2012) is required to be included with its annual application (CP 38-43, Exhibit 4 to Petitioner's Reply Brief) for the federal block grant. The Internet address, on the Washington DSHS website, for Washington's FFY 2012 fiscal Synar Report, is: http://www.dshs.wa.gov/pdf/dbhr/FFY_2012_ASR_FINAL.pdf. CP 43-46, Exhibit 5 to Petitioner's Reply Brief, includes a few relevant pages from the FFY 2012 Synar Report. Note crucially the two unmarked check boxes on page 10 of that report. [Judging by the clerk's page count, the Snohomish County Superior Court's Clerk seems to have accidentally omitted the crucial last page of Exhibit 5 to Petitioner's Reply Brief, the page containing the two unmarked check boxes. Therefore, I have included that last page as an Appendix to this opening brief pursuant to RAP 10.3(a)(8), because that page should have been in the record on review.] As I have shown earlier in this opening brief, at least the first box ("Limitations in the State youth tobacco laws") should have been checked because RCW 70.155.100 (3) and RCW 70.155.100 (4) (the central punitive code sections of Washington's tobacco laws regarding

sellers of tobacco who, like me are not tobacco licensees), when read together with RCW 70.155.100 (8), are visibly unconstitutional on their face, because they purport to allow an administrative agency to adjudicate alleged violations of a criminal statute, RCW 26.28.080.

E. CONCLUSION

I request an order which

(a) requires dismissal of the Washington State Liquor Control Board's Complaint filed against me in LCB Case No. T-537;

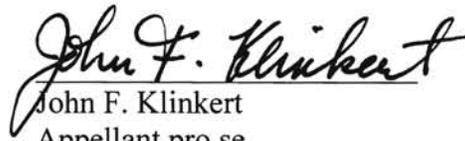
(b) declares that RCW 70.155.100 (3) and RCW 70.155.100 (4), when read together with RCW 70.155.100 (8), are unconstitutional on their face;

(c) declares that I am the prevailing party in this action and that the Washington State Liquor Control Board's actions against me were not substantially justified; and

(d) awards me, pursuant to RCW 4.84.350, my costs (which include the \$100 penalty I paid to the Washington State Liquor Control Board).

Dated this 9th day of December, 2012

Respectfully submitted,


John F. Klinkert
Appellant pro se

Appendix

tobacco on tribal lands did surface. It's considered a big step just to have had the discussion around a very sensitive topic. A minor part of this forum was supported by the Department of Health, however most of the dollars were came from federal non-SAPT Block Grant grants.

3. Describe any challenges the State faces in complying with the Synar regulation. (Check all that apply.)

- Limited resources for law enforcement of youth access laws
- Limited resources for activities to support enforcement and compliance with youth tobacco access laws
- Limitations in the State youth tobacco access laws
- Limited public support for enforcement of youth tobacco access laws
- Limitations on completeness/accuracy of list of tobacco outlets
- Limited expertise in survey methodology
- Laws/regulations limiting the use of minors in tobacco inspections
- Difficulties recruiting youth inspectors
- Geographic, demographic, and logistical considerations in conducting inspections
- Cultural factors (e.g., language barriers, young people purchasing for their elders)
- Issues regarding sources of tobacco under tribal jurisdiction
- Other challenges (Please list.) _____

Briefly describe all checked challenges and propose a plan for each, or indicate the State's need for technical assistance related to each relevant challenge.

Limited resources for law enforcement of youth access laws: FDA dollars should be helpful.

Limited resources for activities to support enforcement and compliance with youth tobacco access laws:

With the forthcoming funding from the Food and Drug Administration this will allow for dollars to specifically target youth access enforcement; we will be able to dedicate specific officers and specific time to the effort. Without specific funding, youth access enforcement is something that gets done as apart to the overall law enforcement job and that can mean that the importance of youth access enforcement can sometimes be overlooked.

PLAN: We will continue to advocate that SAMHSA provide some allowance of federal SAPT Block Grant dollars to be allocated for enforcement purposes.

Geographic, demographic, and logistical considerations in conducting inspections:

Washington State has many lightly populated areas that require extensive time and resources in order to complete checks.

PLAN: Continue to combine resources with DoH, LCB & DBHR in order to reach as many retailers as possible for education purposes, in conjunction with Synar compliance checks.

Cultural factors (e.g., language barriers, young people purchasing for their elders):

1
2
3
4
5
6 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
7 **DIVISION I**

8
9 JOHN F. KLINKERT,

10 Appellant

11 vs.

12 WASHINGTON STATE
13 LIQUOR CONTROL BOARD,

14 Respondent

NO. 69359-0-1

DECLARATION OF MAILING

15 I certify that I am over 18 years of age, that I am not a party to this action, and that I served a
16 copy of the APPELLANT'S OPENING BRIEF on the party named below on the date below by
17 depositing it in the US mail, postage prepaid, in Lynnwood, Washington.

18 Stephanie Happold, AAG
19 Office of the Attorney General
20 GCE Division
21 P. O. Box 40100
1125 Washington Street SE
Olympia, WA 98504-0100

22 DATED this 10th day of December, 2012 at Lynnwood, Washington.

23
24 
25 Caron C. Curry-Klinkert

26
DECLARATION OF MAILING -- 1

JOHN F. KLINKERT
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LYNNWOOD, WASHINGTON 98087
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APPELLANT (PRO SE)