

72129-1

72129-1

No. 72129-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

STEVE MAAS,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT ..... 5

    1. The evidence was insufficient to prove that the defendant committed the offense of attempting to elude a pursuing police vehicle. .... 5

        a. The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. .... 5

        b. Eluding requires proof that the defendant drove in a “reckless manner.” ..... 6

        c. The evidence that the defendant briefly exceeded the speed limit was insufficient to prove that he drove in a “reckless manner.” ..... 7

    2. By limiting the defendant’s cross examination of a police officer on what was needed to accurately measure speed, the court violated the defendant’s right to present a complete defense and to confront his accusers. .... 10

        a. Defendants have a constitutional right to present a complete defense and to cross-examination..... 10

        b. By excluding evidence on whether the officer needed evidence from radar to reliably estimate speed, the court violated the defendant’s right to present a complete defense..... 12

        c. The error was not harmless beyond a reasonable doubt. .... 14

d. Alternatively, the error was prejudicial under the lesser standard applied to evidentiary errors..... 15

F. CONCLUSION..... 15

## **TABLE OF AUTHORITIES**

### **United States Supreme Court Cases**

<u>Burks v. United States</u> , 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)	6
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)	11
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)	14
<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)	11
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	5

### **Washington Supreme Court Cases**

<u>State v Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005)	6
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	11
<u>State v. Davis</u> , No. 89448-5 slip op., 2014 WL 7338504 (Wash. Dec. 24, 2014)	9
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969)	15
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	6
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984)	15
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010)	11, 14
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)	14
<u>State v. Partridge</u> , 47 Wn.2d 640, 289 P.2d 702 (1955)	7
<u>State v. Randhawa</u> , 133 Wn.2d 67, 941 P.2d 661 (1997)	7, 10

### **Washington Court of Appeals Cases**

<u>State v. Perez</u> , 166 Wn. App. 55, 269 P.3d 372 (2012)	10
--	----

State v. Ridgley, 141 Wn. App. 771, 174 P.3d 105 (2007) ..... 6

**Constitutional Provisions**

Const. art I, § 3 ..... 5  
Const. art. 1, § 22 ..... 11  
U.S. Const. amend. VI ..... 11  
U.S. Const. amend. XIV ..... 5

**Statutes**

RCW 46.61.024(1)..... 6  
RCW 46.61.465 ..... 7

**Rules**

ER 401 ..... 11  
ER 402 ..... 11

## **A. INTRODUCTION**

To be guilty of attempting to elude a pursuing police vehicle, a person must drive recklessly, i.e., in a rash or heedless manner, indifferent to the consequences. Because the defendant's act of briefly driving past the speed limit for about two blocks was insufficient to prove that he drove recklessly, his conviction for eluding should be reversed and dismissed. Alternatively, the conviction should be reversed because the defendant was deprived of his right to present a complete defense when the trial court precluded him from cross-examining a testifying police officer on whether radar was necessary to prove a speeding infraction.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of the Fourteenth Amendment to the United States Constitution, the evidence was insufficient.

2. In violation of the Sixth Amendment to the United States Constitution, the defendant was deprived of his right to present a defense and to cross-examination.

3. In violation of the rules of evidence, the trial court erred in sustaining the State's relevance objection.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To be guilty of attempting to elude a pursuing police vehicle, the defendant must have driven in a reckless manner, defined as driving in

a rash or heedless manner, indifferent to the consequences. By itself, speeding is not necessary reckless. In a 25 miles per hour zone, police pursued Mr. Maas about two blocks for about 12 seconds. Police visually estimated that Mr. Maas accelerated to about 40 to 50 miles per hour. Police found Mr. Maas's vehicle safely parked in the neighborhood. Police did not issue Mr. Maas a speeding citation. Did the State fail to prove beyond a reasonable doubt that Mr. Maas drove in a reckless manner?

2. A defendant has a constitutional right to present a complete defense. A defendant also has the right to present relevant evidence and to cross-examination. Mr. Maas's defense was that his driving was not reckless. In support of this defense, he tried to impeach the visual estimation of his speed by two police officers as unreliable. One of these officers testified that he was in traffic enforcement before, had used radar, and estimated speed frequently. On cross-examination, the defendant asked if the officer was required to obtain evidence of speeding by radar to prove a speeding violation in court. The court sustained the State's relevance objection, precluding further inquiry. Did this constitutional and evidentiary error deprive Mr. Maas of his right to a fair trial?

#### **D. STATEMENT OF THE CASE**

Officer Anatoly Kravchun was patrolling Everett in an unmarked police car on April 10, 2014. RP 92, 94, 158. Around 9:30 p.m., he saw a pickup truck at a gas station at 100 Street Southeast and 19th Avenue. RP 95, 103-04. After checking the license plate number, he learned that the registered owner, Steve Maas, had an outstanding arrest warrant for a probation violation. RP 98-99, 104. He determined that the driver was Mr. Maas. RP 99.

Officer Kravchun followed Mr. Maas north about three miles to central Everett. RP 95, 97; Ex. 26. After following Mr. Maas for several minutes, Officer Duane Wantland joined Officer Kravchun in his own unmarked police car on Beverly Boulevard around 75th Street. RP 111, 194; Ex. 29.<sup>1</sup> They turned right from Beverly Boulevard onto East Madison Street, heading east. Ex. 29; RP 212.

Following Mr. Maas, they then turned right onto Jefferson Avenue, going south. Ex. 29; RP 162, 212. This area is a typical neighborhood with a grid pattern and cross-streets. RP 92. The speed limit on this part of Jefferson is 25 miles per hour. RP 164. On Jefferson, the first four marked cross streets south of Madison are Columbia Avenue, Adams

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<sup>1</sup> Exhibit 29 is map of the area. It also shows Officer Wantland's account of the route he took in following Mr. Maas. A copy is attached in the Appendix.

Avenue, Monroe Avenue, and Jackson Avenue. Ex. 29. Yield signs on Columbia tell drivers to yield to drivers on Jefferson. Ex. 1.<sup>2</sup> Yield signs on Jefferson tell drivers to yield to others at Adams and Monroe. Ex. 1. The intersection at Jackson is a four-way stop. Ex. 1.

Shortly after turning, Officer Kravchun told dispatch he was southbound on Jefferson. RP 159-60, 236; Ex. 24.<sup>3</sup> About eight seconds later he turned on his emergency lights. RP 158, 236; Ex. 24. Officer Kravchun, who had not noticed anything wrong with Mr. Maas's driving earlier, perceived that Mr. Maas accelerated. RP 105, 143. About 12 seconds later and after pursuing Mr. Maas about two blocks or less, Officer Kravchun told dispatch, "he's not stopping." RP 163, 199, 204, 237, 239; Ex. 23,<sup>4</sup> 24. Following policy that they were not to chase drivers who did not stop, the officers pulled over somewhere between Columbia and Monroe. RP 90, 163, 199, 206, 209. The pursuit had lasted about 12 seconds. RP 162, 240; Ex. 24. Though Officer Kravchun was

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<sup>2</sup> Exhibit 1 is a CD with video of the area taken later during daylight hours.

<sup>3</sup> Exhibit 24 is a copy of the "CAD" log. This stands for computer-aided dispatch. RP 232. CAD logs are written logs showing the history of an event from when an "incident" is initiated by a police officer. RP 232.

<sup>4</sup> Exhibit 23 is a CD with a copy of audio from police to dispatch.

unsure before trial, he testified that he saw Mr. Maas turn right on Jackson Avenue, going west. RP 167-68.

About two minutes later, Officer Wantland found Mr. Maas's truck parked about half a mile to the southwest at 1710 75th Street Southeast. RP 171, 201; Ex 29. Mr. Maas came out of the nearby house. RP 144. Mr. Maas told officers he parked there because he did not want his truck to get stolen or towed. RP 146.

The State charged Mr. Maas with attempting to elude a pursuing police vehicle while on community custody. CP 72. The jury convicted him as charged. CP 29. Mr. Maas appeals.

## **E. ARGUMENT**

### **1. The evidence was insufficient to prove that the defendant committed the offense of attempting to elude a pursuing police vehicle.**

#### **a. The State bears the burden of proving all the elements of an offense beyond a reasonable doubt.**

Due Process requires the State prove every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art I, § 3. Evidence is sufficient to support a determination of guilt only if a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. State v. Green, 94

Wn.2d 216, 220–22, 616 P.2d 628 (1980). Reversal for insufficient evidence requires dismissal of the charge with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

**b. Eluding requires proof that the defendant drove in a “reckless manner.”**

To be guilty of attempting to elude a pursuing police vehicle, the person must drive in a “reckless manner”:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1) (emphasis added).<sup>5</sup> For eluding, driving in a “reckless manner” means driving in a rash or heedless manner, indifferent to the consequences. State v Roggenkamp, 153 Wn.2d 614, 622, 106 P.3d 196 (2005); State v. Ridgley, 141 Wn. App. 771, 781, 174 P.3d 105 (2007).<sup>6</sup> This is more than mere negligent driving. State v. Partridge, 47 Wn.2d

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<sup>5</sup> The “to-convict” instruction told the jury it must find that “the defendant drove his vehicle in a reckless manner.” CP 40.

<sup>6</sup> The jury was so instructed. CP 41 (“To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.”).

640, 645, 289 P.2d 702 (1955) (operation of a motor vehicle in a reckless manner is “something more” than ordinary negligence).

**c. The evidence that the defendant briefly exceeded the speed limit was insufficient to prove that he drove in a “reckless manner.”**

Speeding is prima facie evidence of reckless driving. RCW 46.61.465. Of course, speeding is not necessarily reckless. See State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (driver’s speed of 10 to 20 miles per hour over posted speed limit of 50 miles per hour was not “so excessive that one can infer solely from that fact that the driver was driving in a rash or heedless manner, indifferent to the consequences.”). Because speeding is not necessarily reckless, an instruction telling the jury that it may infer reckless driving based on driving in excess of the maximum lawful speed may be erroneous. Randhawa, 133 Wn.2d at 75-78. Rarely will speed alone justify such a permissive inference instruction. Randhawa, 133 Wn.2d at 78.

Officers Kravchun and Wantland estimated that Mr. Maas drove at about 40 to 50 miles per hour. RP 105, 147, 198. According to Officer Wantland, this was not especially fast. RP 198 (“it wasn’t a high rate of speed.”). Moreover, the officers did not cease their immediate pursuit because Mr. Maas was driving too fast. Instead, they stopped the pursuit because of police policy and as a tactic. Both officers testified it was

police policy not to chase drivers who do not stop. RP 90, 206. Officer Kravchun also testified he tries to make drivers think they lost the police as a ploy. RP 91. Officer Wantland further testified that when they stopped the immediate pursuit, he believed they were setting up a containment strategy. RP 200. Given the law that speeding is rarely adequate to constitute recklessness and the evidence that the police did not stop their pursuit because Mr. Maas was driving too fast, the evidence that Mr. Maas briefly drove in excess of the speed limit was insufficient to prove that he drove recklessly.

Other evidence that Mr. Maas drove recklessly is lacking.

According to the testimony, Mr. Maas continued south on Jefferson for a few blocks after police signaled him to stop. During this time, Mr. Maas drove through the cross streets at Adams and Monroe, which had yield signs. RP 93; Ex. 1. Drivers are not required to stop at yield signs. RP 167. Further, these cross streets were visible and one could see if other cars were coming. RP 167. There was no testimony that Mr. Maas failed to yield to any driver at these intersections. According to Officer Kravchun, Mr. Maas then turned right at the intersection at Jackson Street, which was the first controlled intersection with a four-way stop. RP 111; Ex. 1. Police lost sight of Mr. Maas after he turned, but found his vehicle parked safely nearby about two minutes later. RP 171, 201; Ex 29.

Officer Kravchun perceived that when Mr. Maas turned right, another car that was already in the intersection had to stop for Mr. Maas. RP 154. However, Officer Kravchun did not report this to dispatch, did not get the license plate number for this vehicle, and did not follow up with this purported witness. RP 154-55. Moreover, Officer Wantland, who during the pursuit pulled next to Officer Kravchun in the northbound lane and had a clear view down Jefferson, did not see any cars taking defensive action as Mr. Maas drove on Jefferson. RP 210. It is also not unusual for drivers to fail to negotiate who will proceed first at a four-way stop. While the State is entitled to all favorable inferences in a challenge to the sufficiency of the evidence, appellate courts are not required to ignore unfavorable facts. State v. Davis, No. 89448-5 slip op. at 4, 2014 WL 7338504 at \*7 (Wash. Dec. 24, 2014) (Stephens, J. dissenting).<sup>7</sup> Accordingly, it would be unreasonable to infer that another car had to stop to avoid Mr. Maas.

The lack of evidence of reckless driving in this case can be contrasted with other cases. For example, in Randhawa, the evidence was sufficient to prove that the defendant drove in a rash or heedless manner,

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<sup>7</sup> This portion of Justice Stephens's dissent received four concurring votes, making it precedent. Davis, slip op. 2014 WL 7338504 at \*5 (Wiggins, J. concurring in part, dissenting in part) (concurring with dissent in that evidence was insufficient to sustain firearm possession convictions).

indifferent to the consequences, because the defendant was intoxicated, speeded, veered outside his lane, and got into an accident. Randhawa, 133 Wn.2d at 74-75. In Perez, the evidence was sufficient to sustain an eluding conviction where the defendant accelerated to over 50 miles per hour in a 25 miles per hour zone, frightened a pedestrian and a dog, and ran through an intersection with a stop sign. State v. Perez, 166 Wn. App. 55, 61, 269 P.3d 372 (2012). Here, Mr. Maas was not intoxicated, he stayed in his lane, he did not run through an intersection with a stop sign (he turned at one), there was no evidence he frightened anyone, and he did not get into an accident. All he did was exceed the speed limit for a block or so, turn right at a four-way stop, and park his vehicle nearby.

This evidence was insufficient to prove beyond a reasonable doubt that Mr. Maas drove in a rash or heedless manner, indifferent to the consequences. The conviction should be reversed and dismissed with prejudice.

**2. By limiting the defendant's cross examination of a police officer on what was needed to accurately measure speed, the court violated the defendant's right to present a complete defense and to confront his accusers.**

**a. Defendants have a constitutional right to present a complete defense and to cross-examination.**

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's

accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The United States Constitution guarantees an accused person “a meaningful opportunity to present a complete defense.” Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). The state and federal constitutions guarantee the right to confront and cross-examine adverse witnesses. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI; Const. art. 1, § 22. Claimed violations of the Sixth Amendment are reviewed de novo. Jones, 168 Wn.2d at 720.

Defendants have a right to present relevant evidence, but not irrelevant evidence. Jones, 168 Wn.2d at 720. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. All relevant evidence is admissible. ER 402. Thus, the threshold to admit relevant evidence is very low and even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

**b. By excluding evidence on whether the officer needed evidence from radar to reliably estimate speed, the court violated the defendant's right to present a complete defense.**

Officers Kravchun and Wantland testified that they estimated Mr. Maas to have been driving somewhere around 40 to 50 miles per hour. RP 105, 147, 198. Mr. Maas's cross-examination of Officer Kravchun's estimate was not hindered. Officer Kravchun admitted that he did not know how fast he himself was actually going, that he was not radar certified, that he had no method of testing his visual estimations of speed, and that the only way for him to cite drivers for speeding was to conduct a pace. RP 165-66.

In contrast, Mr. Maas's cross-examination of Officer Wantland was improperly hindered. Officer Wantland testified on direct examination that he estimated speed daily, had worked in traffic enforcement in the past, and had used radar before. RP 198-99. During cross-examination, Mr. Maas tried to challenge the reliability of Officer Wantland's estimation of his speed. Defense counsel successfully elicited that the officer had failed to write an estimate of Mr. Maas's speed in his report. RP 206. Trying to further undercut the officer's opinion on Mr. Maas's speed, defense counsel asked whether Officer Wantland needed evidence from a radar gun to uphold a speeding ticket in court:

Okay. And you testified - - I mean, if you're in court on a traffic ticket, you're trying to establish speed, you need a radar gun?

RP 206-07. While the State had raised the issue of the officer's experience in estimating speed and had not objected to a similar question to Officer Kravchun, the State objected, contending this evidence was irrelevant. RP 207. Counsel protested that the State had asked questions about how Officer Wantland estimated speed on direct. RP 207 ("Counsel asked questions about how he estimates speed."). The court sustained the objection. RP 207.

The court erred in sustaining the State's relevance objection. Mr. Maas's speed was relevant because it bore on whether he drove recklessly. The manner in which Officer Wantland estimated speed was plainly relevant. Whether Officer Wantland needed radar evidence to successfully prove a speeding citation in court was also relevant. If the answer was yes, this would have tended to show that Officer Wantland's visual estimate of Mr. Maas's speed was unreliable. Even if Officer Wantland had answered no, and testified that visual estimates are acceptable, it still would have been relevant. Mr. Maas would have been able to follow up and elicit testimony that visual estimates were not the best way of accurately measuring speed. Thus, regardless of the answer, Mr. Maas would have been able to bolster his closing argument that the

officers' visual estimation of his speed was unreliable. See RP 281 (arguing to jury that officers did not have a reliable basis to estimate his speed).

**c. The error was not harmless beyond a reasonable doubt.**

The State bears the burden to prove constitutional errors harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). An officer's testimony often carries a special aura of reliability. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Thus, absent effective cross-examination, the jury was likely to find that the officers' opinions of Mr. Maas's speed were reliable. The court precluded Mr. Maas of the fair opportunity to challenge the officers' estimate of his speed, which was a central issue at trial. Without evidence that Officer Wantland's visual estimation of his speed was unreliable, Mr. Maas could not mount his complete defense that he had not driven recklessly. Mr. Maas's closing argument that the officers' estimate of speed was unreliable would have been much stronger had the evidence been admitted. See RP 281. The State cannot meet its burden to prove the error harmless.

**d. Alternatively, the error was prejudicial under the lesser standard applied to evidentiary errors.**

Additionally, the error in sustaining the objection was evidentiary error. As argued, the evidence was plainly relevant. Moreover, the State opened the door to the topic by inquiring into the officer's experience in estimating speed. See State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) ("It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it."). This Court may reverse on this alternative ground.

Evidentiary errors are harmless if, within reasonable probabilities, the outcome of the trial would have been different. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Given the meager, if not insufficient, evidence of reckless driving, Mr. Maas establishes prejudicial error under this alternative standard. The jury likely would have rejected the contention that Mr. Maas drove at about double the speed limit. This court should reverse and remand for a new trial.

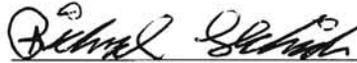
**F. CONCLUSION**

The evidence was insufficient to prove that Mr. Maas drove in a reckless manner. Accordingly, the conviction should be reversed and dismissed. Alternatively, the conviction should be reversed and remanded

for a new trial because of constitutional and evidentiary error in excluding relevant and highly probative evidence.

DATED this 16th day of January, 2015.

Respectfully submitted,

  
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Washington Appellate Project  
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# Appendix

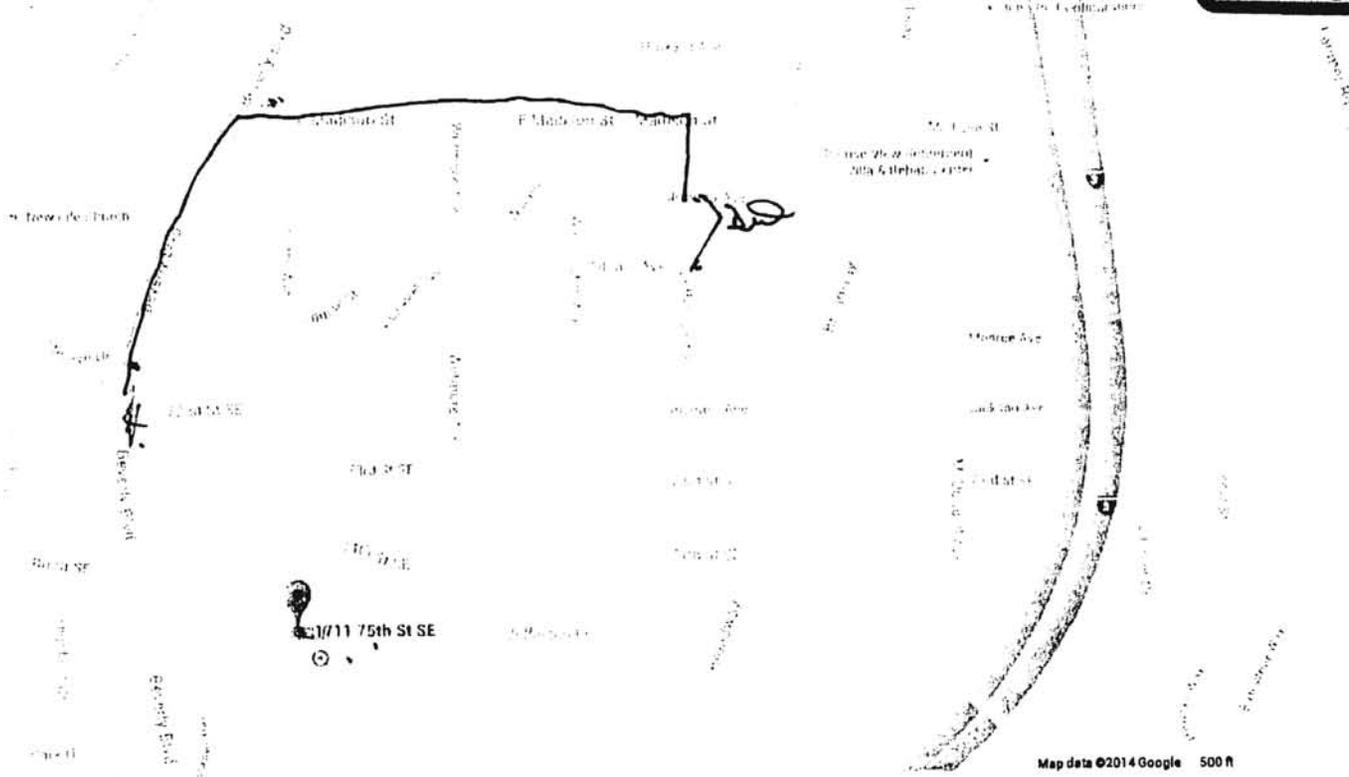
5/15/2014

1711 75th St SE - Google Maps



1711 75th St SE, Des Moines, IA 50319

Street View



D. WATLAND EVERETT P.D.



5-29-14



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72129-1-I
	)	
STEVE MAAS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |   |                   |                                     |
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| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | STEVE MAAS<br>ID #286977<br>SNOHOMISH COUNTY JAIL<br>3025 OAKES ST<br>EVERETT, WA 98201         | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 16<sup>TH</sup> DAY OF JANUARY, 2015.

X \_\_\_\_\_ 

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