

NO. 34592-7-II
Cowlitz Co. Cause NO. 05-1-00768-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ROGER NEIL HAGER,

Appellant.

STATE OF WASHINGTON
DEPT. OF APPEALS
DIVISION II
JAN 24 11:11:19
BY [Signature]

BRIEF OF RESPONDENT

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P.M. 1-22-07

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I. ISSUES

- 1. ARE OFFICERS ENTITLED TO TAKE NECESSARY STEPS TO CONTROL THE SCENE OF A TRAFFIC STOP WHEN A PASSENGER VOLUNTARILY REMAINS AT THE SCENE OF THE TRAFFIC STOP?**
- 2. IS EVIDENCE THAT WOULD INEVITABLY HAVE BEEN DISCOVERED IN THE COURSE OF LAWFUL POLICE PROCEDURES ADMISSIBLE WHEN A DEFENDANT WAS UNLAWFULLY SEIZED?**

II. SHORT ANSWERS

- 1. Yes, officers are entitled to take necessary steps to control the scene of a traffic stop when a passenger voluntarily remains at the scene of the traffic stop.**
- 2. Yes, evidence that would inevitably have been discovered in the course of lawful police procedures is admissible when a defendant was unlawfully seized.**

III. FACTS

On June 23, 2005, at approximately 5:21 pm, Trooper Frank Black of the Washington State Patrol monitored southbound traffic on I-5 atop the Kalama River Road and observed a small pickup truck going 89 miles an hour in a 70 miles an hour zone while cutting in and out of traffic, failing to use turn signals, driving aggressively, and following too closely. (Transcript, p. 11-14). Trooper Black stopped the pickup at milepost 30 on I-5 and there were three occupants in the pickup, all three

occupants sat on the front seat of the small pickup. The Appellant was the registered owner of the pickup. (Transcript, p. 14 and Stipulation, p. 2).

The driver was William Cole, the middle passenger was Ginnie Pender, and the far right passenger was the Appellant. All three occupants had bloodshot watery eyes and appeared tired. (Stipulation, p. 2). The driver had constricted pupils and a flushed face, spoke on tangents, was slow to respond to Trooper Black's questions, and had a suspended license. The driver performed poorly on voluntarily field sobriety tests and was arrested for driving under the influence. Trooper Black is a drug recognition expert and trained to administer field sobriety tests. (Transcript, p. 14, Stipulation, p. 2, and Findings of Fact, p. 2).

After the driver was arrested, Trooper Black's sergeant, Trooper Schmidt, arrived on scene and Trooper Black asked both passengers to exit the vehicle so that he could search the pickup incident to the driver's arrest. (Transcript, p. 15-16 and 21). Trooper Black did not order the passengers out of the vehicle, did not investigate the Appellant for any criminal activity, did not arrest the Appellant for any crime, and did not order the passengers to remain at the scene of the traffic stop. (Transcript, p. 15-17 and 26). Both passengers were not required to remain at the scene and were free to leave the scene of the traffic stop. (Transcript, p. 16-17 and 19-20).

Both passengers elected to remain at the scene (Transcript, p. 15-17, 19-22, and 24-25 and Findings of Fact, p. 2). Trooper Black asked to pat the Appellant down for weapons for safety concerns because Trooper Black had to turn his back to the Appellant to perform the search of the pickup and the Appellant was in close physical proximity. (Transcript, p. 21 and 25-26). Trooper Black asked to see the Appellant's driver's license because the Appellant was the registered owner of the pickup and Trooper Black wanted to ensure that the Appellant was licensed prior to turning the pickup over to the Appellant. (Transcript, p. 20-21, 24-25, and 29). Trooper Black asked the Appellant to stand by Trooper Schmidt as he searched the pickup incident to the driver's arrest. (Transcript, p. 15-17, 19-22, and 24-25). Appellant felt everything was straightforward and felt he was free to leave. (Transcript, p. 29 and Findings of Fact, p. 2).

During the search of the vehicle, Trooper Black found some powder substance behind the driver's seat resembling cocaine and a jacket in the center of the vehicle behind the front seat. (Transcript, p. 17-18). The jacket was within arm's reach from where the Appellant had sat and was right behind the Appellant's left side. When Trooper Black picked up the jacket, one of the jacket's front breast pockets fell open and exposed the tip of a glass pipe. The pocket had no flap and Trooper Black recognized the glass pipe to be a smoking device and saw white powder

residue at tip of the glass pipe. (Transcript, p. 18 and 23). Upon closer inspection, Trooper Black observed quite a bit of residue in the pipe that he recognized as being methamphetamine. The residue in the pipe tested positive for methamphetamine. (Transcript, p. 19).

During the search of the pickup, the Appellant was not asked any questions, was not required to answer any questions, and was not required to stay at the scene of the traffic stop. (Transcript, p. 19-20). After the search, the Appellant claimed ownership of the jacket and was arrested for the drug paraphernalia and methamphetamine residue found in his jacket. Trooper Black searched the Appellant incident to his arrest and found a white powder substance that Trooper Black recognized as being cocaine in one of the Appellant's pockets. (Transcript, p. 19-20). The Washington State Crime Laboratory tested the white powder and found the content to contain Cocaine, a controlled substance. (Stipulation, p. 3).

IV. ARGUMENTS

1. **OFFICERS ARE ENTITLED TO TAKE NECESSARY STEPS TO CONTROL THE SCENE OF A TRAFFIC STOP WHEN A PASSENGER WHO IS FREE TO LEAVE THE SCENE ELECTS TO REMAIN AT THE SCENE OF THE TRAFFIC STOP.**

Traffic stops are inherently dangerous and the police have a legitimate need to control the scene of such stops to ensure officer safety. *State v Mendez*, 137 Wash.2d 208, 219-220 (1999). While interacting

with the stopped driver, the officer may “take whatever steps necessary to control the scene.” *Id.* at 220. The officer does not have automatic authority to order passengers either in or out of the stopped car, but he or she can issue directions to the passengers if there is an objective safety rationale for doing so. *Id.* at 220-221. Such control of the passengers is constitutional even when the officer has stopped the driver for a mere infraction. *Id.* at 211, 212, and 220-221.

Determining whether the objective safety rationale exists depends on the totality of the circumstances; the *Mendez* court identified several non-exclusive factors such as the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants. *Id.* at 221. The arrest of the driver is an additional highly significant safety or “scene control” factor. *State v Horrace*, 144 Wash.2d 386, 393 (2001), *State v Reynolds*, 144 Wash.2d 282, 288-290 (2001), and *State v Parker*, 139 Wash.2d 486, 502 (1999). Controlling the location of passengers by directing them either to stay in or to get out of the stopped car is merely a “de minimis” seizure. *Reynolds*, 144 Wash.2d at 287 and 290 and *Mendez*, 137 Wash.2d at 220. During a valid traffic stop, if the officer develops a reasonable articulable

suspicion that a passenger is armed, the officer may conduct a protective frisk of that passenger. *Horrace*, 144 Wash.2d at 394-397.

In the present case, the totality of the evidence indicates that the Appellant was not seized following the arrest of the driver and during the search of the vehicle because Trooper Black took reasonable necessary steps to control the scene and did not exert any show of authority to require the Appellant to remain at the scene. (Transcript, p. 15-17, 19-20, and 26). Following the arrest of the driver, Trooper Black requested the Appellant and the other passenger to exit the vehicle so that he could search the vehicle. This was necessary and reasonable for officer safety because having both passengers remain inside the vehicle would have exposed Trooper Black to a dangerous situation. Not only was there a disparity between the number of passengers to the number of officers searching the vehicle, but Trooper Black would have been placed in a physically vulnerable position because he would have been in close physical proximity to both passengers, would have had his back turned to them while performing the search, and could not have seen the passengers at all times.

Once outside the vehicle, the passengers were free to leave, but elected to remain at the scene of the traffic stop. (Transcript, p. 15-17, 19-20, 26, and 29 and Findings of Fact, p. 2). There was a heightened safety

concern because the driver was arrested, the vehicle was about to be search, the Appellant was the registered owner, Trooper Black was about to be in a vulnerable position from being in close physical proximity and having to turn his back to the passengers to search the vehicle, and Trooper Schmidt was outnumbered by the number of passengers outside the vehicle. Therefore, Trooper Black's pat down of the Appellant was reasonable and necessary to control the potentially dangerous situation.

Trooper Black acted reasonably and did not exert any show of authority in controlling the scene as acknowledged by the Appellant when he indicated that everything was straightforward and he felt he was free to leave the scene of the traffic stop, (Transcript, p. 15-17, 19-22, 24-26, and 29 and Findings of Fact, p. 2). Therefore, the court correctly denied the Appellant's motion to suppress the evidence because Trooper Black took reasonable necessary steps to control the scene of the traffic stop and the Appellant was not unlawfully seized after the arrest of the driver and during the search of the vehicle. (Findings of Fact, p. 2).

2. EVIDENCE THAT WOULD INEVITABLY HAVE BEEN DISCOVERED IN THE COURSE OF LAWFUL POLICE PROCEDURES IS ADMISSIBLE WHEN A DEFENDANT WAS UNLAWFULLY SEIZED.

“Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the

exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.” *State v Gaines*, 154 Wash.2d 711, 718 (2005).

“The doctrine of inevitable discovery is recognized as an exception to the exclusionary rule under the Fourth Amendment. The doctrine permits admission of illegally obtained evidence if the State can prove that the police did not act unreasonably or attempt to accelerate discovery, and would have inevitably discovered the evidence through proper and predictable investigatory procedures.” *State v Richman*, 85 Wash.App. 568, 572 (1997). “Under this rule, the prosecution must prove by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered using lawful procedures.” *State v O’Neill*, 148 Wash.2d 564, 591 (2003).

In *Gaines*, an officer conducted a felony stop of a vehicle and arrested two defendants for kidnapping, robbery, and assault. In a search incident to the arrests, the officer found a loaded pistol in an unlocked glove box and an extra clip under the driver’s seat. Another officer at the scene took keys out of the ignition, used the keys to unlock the trunk, saw the barrel of an assault rifle and numerous rounds of ammunition in the trunk, and closed the trunk and impounded the vehicle. A day after the vehicle was impounded, another officer obtained a search warrant for the

vehicle and seized the assault rifle from the vehicle. *Id.* at 714-715. In *Gaines*, the court found that while a constitutional violation resulted from the officer's search of the locked trunk, the evidence was admissible under the independent source exception because the evidence was ultimately obtained pursuant to a valid search warrant with information independent of the constitutional violation. *Id.* at 720-722.

Should the court find that the Appellant was unlawfully seized by Trooper Black, the evidence should be admissible because like *Gaines*, the evidence was ultimately obtained by lawful means independent of the Appellant's unlawful seizure. The Appellant does not challenge the validity of the traffic stop, the arrest of the driver for driving under the influence, and Trooper Black's ability to search the vehicle incident to the driver's arrest. (Findings of Fact, p. 2). Search of vehicle incident to arrest of driver extends to passenger compartment, not locked containers. *State v Stroud*, 106 Wn.2d 144 (1986). The pipe with methamphetamine residue found sticking out of the Appellant's jacket was obtained as a result of the search incident to the driver's arrest and is independent from the Appellant's unlawful seizure. The pipe and methamphetamine residue fall within the independent source exception to the exclusionary rule and is admissible at trial. 154 Wash.2d at 718 and 720-722.

The pipe with methamphetamine residue gave Trooper Black probable cause to arrest the defendant for either use of drug paraphernalia or possession of methamphetamine. (Findings of Fact, p. 2-3). "Probable cause is an objective inquiry," *State v. O'Neill*, 104 Wn.App. 850, 868 (2001), that requires more than a "bare suspicion of criminal activity," but does not require facts that would establish guilt beyond a reasonable doubt. *State v. Gillenwater*, 96 Wn.App. 667, 670 (1999) (quoting *State v. Terrovona*, 105 Wn.2d 632, 643 (1986)). The expertise of trained officers should be taken into consideration in determining where or not there was probable cause to arrest the defendant. "An officer of a narcotics detail may find probable cause in activities of a suspect and in the appearance of paraphernalia or physical characteristics which, to the eye of a lay man, could be without significance. His action should not, therefore, be measured by what might or might not be probable cause to an untrained civilian passer-by, but by a standard appropriate for a reasonable, cautious and prudent narcotics officer under the circumstances of the moment." *State v. Patterson*, 83 Wn.2d 57 (1973).

Therefore, Trooper Black's search of the Appellant incident to his arrest is not only lawful, but is also proper and predictable investigatory procedures. The evidence found stemmed from Trooper Black's search of the Appellant incident to the Appellant's arrest. Therefore, the court

correctly denied the Appellant's motion to suppress the evidence because it would inevitably have been discovered in the course of lawful police procedures.

V. CONCLUSIONS

The Appellant's appeal should be denied because Trooper Black took reasonable necessary steps to control the scene of the traffic stop, the Appellant was not unlawfully seized after the driver was arrested and during the course of the search of the vehicle, and the evidence would inevitably have been discovered in the course of lawful police procedures.

Respectfully submitted this 22 day of January 2007.

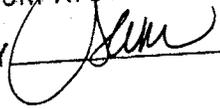

Mike K. Nguyen / WSBA 31641
Deputy Prosecuting Attorney
Attorney for Respondent

Dustin R. Davidson
WSBA 34094

FILED
SUPERIOR COURT

2006 MAR 22 P 2:35

COWLITZ COUNTY
RONY A. BOOTH, CLERK

BY 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,)

NO. 05-1-00768-8

Plaintiff,)

STIPULATION OF THE PARTIES

ROGER NEIL HAGER,)

Defendant.)

THIS MATTER having come before the undersigned judge of the above-entitled court and the State being represented by MIKE K. NGUYEN, Deputy Prosecuting Attorney for Cowlitz County, and Defendant being present and represented by ELEANOR COUTO, and the Court considering the following Stipulation of Facts for the purpose of trial to the court, preserving any right of the defendant to appeal any adverse ruling in pre-trial matters.

I. STIPULATION OF FACT

WE, THE UNDERSIGNED, AGREE AND STIPULATE to the following facts to be considered by the court as to the issue of guilt in this matter in a trial to the court without a jury.

By his signature, Defendant acknowledges that he is aware of his absolute right to a trial by a

Stipulation of Parties - 1

Cowlitz County Prosecuting Attorney
312 SW 1st Avenue
Kelso, WA 98626

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1 jury, that no one has made threats or promises to persuade Defendant to waive this right, and that
2 Defendant knowingly and willingly waives his right to have the matter tried to a jury, choosing
3 to have a trial by a Judge only.

- 4 1. On June 23, 2005, at 5:21 PM, Trooper Frank Black observed a standard cab pickup
5 speeding southbound on I-5 at 89 mph in a 70 mph zone and changing lanes without
6 signals in the County of Cowlitz.
- 7 2. Trooper Black stopped the pickup at milepost 30. There were three occupants in the
8 vehicle. The driver was William Cole, the middle passenger was Ginnie Pender, and the
9 far right passenger was the defendant. All three occupants had bloodshot watery eyes
10 and appeared tired.
- 11 3. The driver had constricted pupils and a flushed face, spoke on tangents, was slow to
12 respond to Trooper Black's questions, and had a suspended license. The driver
13 performed poorly on voluntarily field sobriety tests and was arrested for driving under the
14 influence. Trooper Black is a drug recognition expert and trained to administer field
15 sobriety tests.
- 16 4. Ms. Pender and the defendant were asked to step out of the vehicle so that Trooper Black
17 could search the vehicle incident to the driver's arrest. Ms. Pender and the defendant
18 were not under arrest, were free to leave scene, and voluntarily chose to remain at the
19 scene. The defendant was the owner of the pickup.
- 20 5. Prior to searching the vehicle, Trooper Black patted down the defendant for officer safety
21 reasons and asked the defendant about his driving status to avoid impounding the pickup.
22

1 Defendant showed Trooper Black his driver's license and Trooper Black handed the
2 driver's license back to the defendant.

3 6. During the search of the vehicle, Trooper Black found a loose used syringe and a
4 camouflage jacket with a glass pipe sticking out of the front breast pocket. The pipe had
5 testable white residue. Trooper Black recognized the pipe as being a drug paraphernalia
6 and the white residue as being a controlled substance.

7 7. The defendant indicated that he was the owner of the jacket and was arrested for violating
8 the Uniform Controlled Substances Act.

9 8. Trooper Black searched the Defendant incident to his arrest and found a piece of plastic
10 containing a white powder in the defendant's left pant pocket. Trooper Black concluded
11 the white powder as being Cocaine. Defendant was transported to jail and two more
12 glass pipes, exactly like the pipe found sticking out of the Defendant's jacket, were found
13 on the defendant.

14 9. The Defendant did not have a valid prescription for the Cocaine.

15 10. The Washington State Crime Laboratory tested the white powder and found the content
16 to contain Cocaine, a controlled substance.

17 **II. CONCLUSIONS OF LAW**

18 This court finds and concludes beyond a reasonable doubt that on June 23, 2005, in the
19 County of Cowlitz, State of Washington, the defendant possessed Cocaine, a derivative of coca
20 leaves, a controlled substance, without obtaining such substance directly from or pursuant to a
21 valid prescription or order of a practitioner acting in the course of their professional practice;
22 contrary to RCW 69.50.4013(1) & (2).

23 Stipulation of Parties - 3

Cowlitz County Prosecuting Attorney
312 SW 1st Avenue
Kelso, WA 98626

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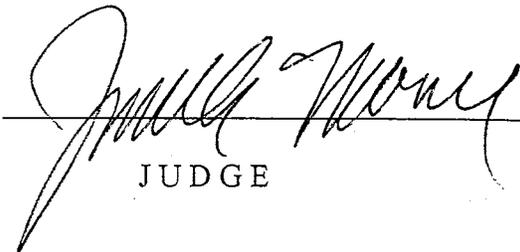
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III. VERDICT

As to Count I of the information charging Defendant with Violation of the Uniform
Controlled Substance Act – Possession of a Controlled Substance 69.50.4013(1) & (2), the Court
finds the Defendant, GUILTY.

DONE IN OPEN COURT this 22 of Mar, 2006.


JUDGE

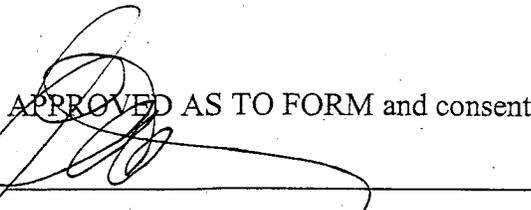
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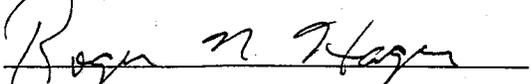
MIKE K. NGUYEN WSBA#31641

Deputy Prosecuting Attorney

APPROVED AS TO FORM and consent to entry granted


ELEANOR COUTO, WSBA # 19544

Attorney for Defendant



ROGER NEIL HAGER

Defendant

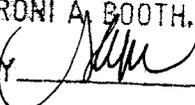
Stipulation of Parties - 4

Cowlitz County Prosecuting Attorney
312 SW 1st Avenue
Keiso, WA 98626

FILED
SUPERIOR COURT

2005 MAR 22 P 2:35

COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

v.)

ROGER NEIL HAGER,)

Defendant,)

NO. 05-1-00768-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ON DEFENDANT'S MOTION
TO SUPPRESS

On December 6, 2005, the Honorable James Warne, Superior Court Judge, presided over the defendant's motion to suppress. The court heard testimonies witnesses, considered the evidence presented, and found the following:

Findings of Fact

1. On June 23, 2005, at 5:21 PM, Trooper Frank Black observed a standard cab pickup speeding southbound on I-5 at 89 mph in a 70 mph zone and changing lanes without signals in the County of Cowlitz.
2. Trooper Black stopped the pickup at milepost 30. There were three occupants in the vehicle. The driver was William Cole, the middle passenger was Ginnie Pender, and the far right passenger was the defendant. All three occupants had bloodshot watery eyes and appeared tired.
3. The driver had constricted pupils and a flushed face, spoke on tangents, was slow to respond to Trooper Black's questions, and had a suspended license. The driver

1 performed poorly on voluntarily field sobriety tests and was arrested for driving under the
2 influence. Trooper Black is a drug recognition expert and trained to administer field
3 sobriety tests.

4 4. Ms. Pender and the defendant were asked to step out of the vehicle so that Trooper Black
5 could search the vehicle incident to the driver's arrest. Ms. Pender and the defendant
6 were not under arrest, were free to leave scene, and voluntarily chose to remain at the
7 scene. The defendant was the owner of the pickup.

8 5. Prior to searching the vehicle, Trooper Black patted down the defendant for officer safety
9 reasons and asked the defendant about his driving status to avoid impounding the pickup.
10 Defendant showed Trooper Black his driver's license and Trooper Black handed the
11 driver's license back to the defendant.

12 6. During the search of the vehicle, Trooper Black found a loose used syringe and a
13 camouflage jacket with a glass pipe sticking out of the front breast pocket. The pipe had
14 testable white residue. Trooper Black recognized the pipe as being a drug paraphernalia
15 and the white residue as being a controlled substance.

16 7. The defendant indicated that he was the owner of the jacket and was arrested for violating
17 the Uniform Controlled Substances Act.

18 **Conclusions of Law**

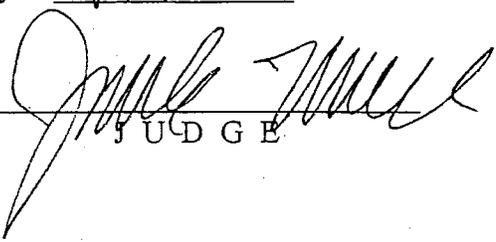
19 1. Trooper Black had probably caused to arrest the driver for driving under the influence
20 and was authorized to search the vehicle incident to the driver's arrest.

21 2. The Defendant was not seized prior to his arrest because Trooper Black did not exert any
22 force or show of authority to restrain the defendant's movement and a reasonable person
23 in the defendant's position, in light of all the circumstances, would believe he or she is
24 free to go or otherwise end the encounter.

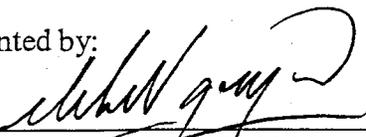
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1 3. Trooper Black had probable cause to arrest the defendant upon finding a glass pipe with a
2 controlled substance in the defendant's jacket during the search of the vehicle and
3 incident to the driver's arrest.

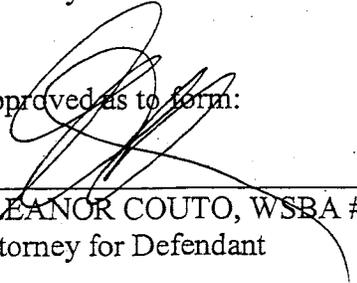
4 DATED this 22 day of Mar 2006.

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6 
7 J U D G E

8 Presented by:

9 
10 MIKE NGUYEN, WSB#31641
11 Attorney for the State

12 Approved as to form:

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14 ELEANOR COUTO, WSBA # 19544
15 Attorney for Defendant
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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
) Appellant,)
)
 vs.)
)
) CERTIFICATE OF)
) MAILING)
)
) ROGER NEIL HAGER,)
)
) Respondent.)
)
 _____)

07 JAN 24 11:19 AM
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY: *[Signature]*

I, Audrey J. Gilliam, certify and declare:

That on the 22 day of January, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals Valerie Marushige
950 Broadway, Suite 300 Attorney at Law
Tacoma, WA 98402 2136 S. 260th St., BB304
Des Moines, WA 98198

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 22 day of January, 2007.

Audrey J. Gilliam

Audrey J. Gilliam