

NO. 45327-4

---

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

---

JAMES D. WATKINS,

Respondent,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,

Appellant.

---

**APPELLANT'S REPLY BRIEF**

---

ROBERT W. FERGUSON  
Attorney General

SCHUYLER B. RUE  
Assistant Attorney General  
WABA# 42167  
Licensing & Admin. Law Division  
P.O. Box 40110  
Olympia, WA 98504-0110  
(360) 256-2588  
OID# 91029

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ARGUMENT .....2

    A. Watkins Reads Evidentiary Restrictions Into the Implied  
    Consent Hearing Process That Do Not Exist.....2

        1. Any evidence accompanying the sworn or certified  
        jurisdictional report is admissible without further  
        evidentiary foundation under former RCW  
        46.20.308(8) .....2

        2. Chapter 9A.72 RCW does not require all police  
        reports to be sworn or certified.....4

        3. Case law does not support the rule Watkins asks the  
        Court to establish.....4

    B. Watkins’s Right to Subpoena and Confront Witnesses  
    Limits the Risk of Erroneous Deprivation That Could  
    Occur Based on Uncertified Documents.....8

III. CONCLUSION .....12

## TABLE OF AUTHORITIES

### Cases

<i>Alforde v. Dep't of Licensing</i> , 115 Wn. App. 576, 63 P.3d 170 (2003).....	2, 3, 5
<i>Flory v. Dep't of Motor Vehicles</i> , 84 Wn.2d 568, 527 P.2d 1318 (1974).....	10
<i>In re Ross</i> , 45 Wn.2d 654, 277 P.2d 335 (1954).....	6
<i>Ingram v. Dep't of Licensing</i> , 162 Wn.2d 514, 173 P.3d 259 (2007).....	5, 6, 11
<i>Lytle v. State Dep't of Licensing</i> , 94 Wn. App. 357, 971 P.2d 969 (1999).....	10
<i>Mackey v. Montrym</i> , 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).....	10
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d. 18 (1976).....	8, 9, 11
<i>Metcalf v. Dep't of Motor Vehicles</i> , 11 Wn. App. 819, 525 P.2d 819 (1974).....	5
<i>Nirk v. Kent Civil Serv. Comm'n</i> , 30 Wn. App. 214, 633 P.2d 118 (1981).....	7, 8, 9
<i>State v. Clifford</i> , 57 Wn. App. 127, 787 P.2d 571 (1990).....	9
<i>State v. Patterson</i> , 37 Wn. App. 275, 679 P.2d 416 (1984).....	7
<i>State v. Storhoff</i> , 133 Wn.2d 523, 946 P.2d 783 (1997).....	8

<i>U.S. v. Kras</i> , 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).....	9
<i>Weekly v. State, Dep't of Licensing</i> , 108 Wn. App. 218, 27 P.3d 1272 (2001).....	10

**Statutes**

Former RCW 46.20.308(7).....	3
Former RCW 46.20.308(8).....	1, 2, 3, 4
Laws of 2004, ch. 68, §1.....	11
RCW 46.20.308.....	2
RCW 46.20.308(8).....	5
RCW 9A.72.....	2, 4
RCW 9A.72.010.....	4
RCW 9A.72.085.....	4, 5

**Regulations**

WAC 308-103-140.....	10
----------------------	----

## I. INTRODUCTION

Under the plain language of former RCW 46.20.308(8), any evidence accompanying the sworn or certified report of a law enforcement officer is admissible without further evidentiary foundation. Deputy Smith's report, which accompanied Trooper Rushton's certified report, was admissible under this statute. Watkins relies on evidentiary rules and principles that do not apply to administrative hearings conducted under the implied consent statute and relaxed rules of evidence.

Watkins argues that due process requires a certification on Deputy Smith's report. However, it is well settled that a person has a right to confront witnesses against him or her in an implied consent hearing. A person may assert that right by subpoenaing an officer, and Watkins could have subpoenaed and cross examined Deputy Smith. Accordingly, a person who contests the veracity of a law enforcement officer's statement may require a witness to be subpoenaed and sworn prior to the witness providing oral testimony.

For these reasons, the Department's order of revocation should be affirmed.

//

//

## II. ARGUMENT

### A. **Watkins Reads Evidentiary Restrictions Into the Implied Consent Hearing Process That Do Not Exist**

Watkins argues that all law enforcement officer reports admitted at an implied consent hearing must be sworn or certified under either RCW 46.20.308, chapter 9A.72 RCW, or case law. But none of those prescribes the evidentiary rule Watkins urges.

#### 1. **Any evidence accompanying the sworn or certified jurisdictional report is admissible without further evidentiary foundation under former RCW 46.20.308(8)**

Former RCW 46.20.308(8) provides that “[t]he sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and *any other evidence accompanying the report shall be admissible without further evidentiary foundation.*” The provision plainly applies to any evidence, including written police reports, that may accompany the jurisdictional report and that otherwise might require the laying of foundation before a tribunal would admit it. The clause’s purpose is to limit the need for the State to call witnesses. *Alforde v. Dep’t of Licensing*, 115 Wn. App. 576, 582, 63 P.3d 170 (2003). Watkins asks the Court to make a distinction between evidence that is written by an officer involved in the arrest (which he insists must be sworn or certified to be admissible) and other types of evidence that may accompany the

jurisdictional sworn or certified report. Br. of Resp't at 16. No such distinction exists in the implied consent statute, and the Court should not read one into it.

Watkins also asserts that Deputy Smith's report is not evidence accompanying the sworn report of Trooper Rushton because Deputy Smith's report should be characterized as "*the* sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer," as used in former RCW 46.20.308(8) (emphasis added). That reading ignores the clear context and plain operation of the statute. The *Alforde* court recognized that the use of the definite article in former RCW 46.20.308(8) refers back to the usage applied in the earlier sections that refer only to "a" sworn report. *Alforde*, 115 Wn. App. at 582-83. The previous statutory section—former RCW 46.20.308(7)—authorizes an initial action based "upon the receipt of *a* sworn report or report under a declaration authorized by RCW 9A.72.085." (emphasis added). The language indicates that in a multiple officer investigation, like the one here, one report is sufficient to justify the Department's initial action. The subsequent use of "*the* sworn report" in former RCW 46.20.308(8) merely refers back to the report that initiated the revocation, which in this case was Trooper Rushton's certified report. *Alforde*, 115 Wn. App. at 582-83. The identification of that jurisdictional report in former

RCW 46.20.308(8) does not create an additional requirement that additional law enforcement reports accompanying the jurisdictional report be certified.

**2. Chapter 9A.72 RCW does not require all police reports to be sworn or certified**

Watkins also argues that chapter 9A.72 RCW independently requires certification of Deputy Smith's report. Br. of Resp't at 10-11. It is true that a certification described in RCW 9A.72.085 may be used in an official proceeding when a matter is "required or permitted to be supported" by a sworn statement. But Watkins does not cite to any specific provision in the chapter that establishes that all police reports must be certified or sworn. Moreover, Deputy Smith's report was not required to be sworn under former RCW 46.20.308(8) or any other law governing the implied consent hearing process because it accompanied Trooper Rushton's sworn report. Watkins also cites to several definitions contained in RCW 9A.72.010. Br. of Resp't at 10-11. None of these definitions establish an affirmative obligation for a law enforcement officer to certify a report.

**3. Case law does not support the rule Watkins asks the Court to establish**

Watkins argues case law requires certification of all law enforcement reports. Br. of Resp't at 16, 17. He is mistaken. *Alforde*

held that a prima facie case is established by a sworn report, or a self-certified report under a declaration authorized by RCW 9A.72.085, so long as the facts provided are sufficient to support the evidentiary issues of RCW 46.20.308(8). *Alforde*, 115 Wn. App. at 577. *Ingram* held that documentary hearsay evidence is admissible under the Department's relaxed rules of evidence. *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 526, 173 P.3d 259, 265 (2007). The fact that the documentary evidence in those cases was certified was not necessary for resolution of either case.

*Metcalf v. Dep't of Motor Vehicles* addressed unsworn reports. 11 Wn. App. 819, 820, 525 P.2d 819 (1974). Under a former version of the implied consent law, a law enforcement report was required to be sworn to a person qualified to administer oaths. *Id.* at 821. In *Metcalf*, the officer had signed the document reciting the statutory grounds for revocation but not "sworn to" it. *Id.* The court noted that the unsworn report would become the basis for a suspension or revocation if a hearing were not timely requested. *Id.* at 821. In deciding that the "sworn report" requirement is jurisdictional, the court stated that "the law disapproves of visiting serious consequences upon parties on the basis of *only* unsworn evidence." *Id.* at 821-822 (emphasis added). Unlike *Metcalf*, an uncontested suspension in this case would have been supported by the certified evidence of Trooper Rushton.

Watkins's reliance on *In re Ross* is similarly misplaced. 45 Wn.2d 654, 277 P.2d 335 (1954); Br. of Resp't at 12. That case involved the permanent termination of a father's fundamental parental rights, and the trial court did not place a witness under oath upon the father's request. *Id.* at 655. In contrast to the relaxed rules of evidence that apply at administrative implied consent hearings, at parental termination hearings, "the usual rules relative to the admissibility of evidence should be applied." *Id. Ross* is thus inapplicable.

Watkins relies on *Ingram v. Department of Licensing* to argue that Trooper Rushton's lack of personal knowledge of the arrest precluded him from certifying the summary language contained in the first page of the report. *Ingram*, 162 Wn.2d at 524, 173 P.3d at 264; Br. of Resp't at 8. Personal knowledge is an evidentiary restriction found in ER 604 that prohibits a witness from testifying unless there is sufficient evidence that a witness has personal knowledge of the matter. But the *Ingram* court held that the rules of evidence excluding hearsay and requiring foundation do not apply in implied consent proceedings. *Ingram*, 162 Wn.2d at 524. Trooper Rushton had elicited key facts about the stop and arrest from Deputy Smith. CP at 21 (FF 3) 37–38. It would be inconsistent with an informal and streamlined implied consent process to require a law enforcement officer to have personal knowledge about all steps in a DUI

investigation before attesting to them. In similar contexts, a law enforcement officer can certify facts to a judicial officer even though the officer lacks personal knowledge. *State v. Patterson*, 37 Wn. App. 275, 277, 679 P.2d 416, 419 (1984) (law enforcement officer may provide a certified statement to a judicial officer in an application for a warrant even though the statement relays hearsay information from a fellow officer).

Watkins incorrectly argues that all investigative reports must be certified in light of *Nirk v. Kent Civil Serv. Comm'n*, 30 Wn. App. 214, 633 P.2d 118, 119 (1981). In *Nirk*, the chairman of a civil service commission declined to swear a witness prior to giving oral testimony at an administrative hearing held to determine whether a police officer should be discharged. *Id.* at 215. Prior to the witness giving testimony, the chairman explained that “[w]e are not going to swear the witnesses. It is our decision. We want the facts in the case so that we can make an honest decision.” The Court of Appeals held that the witness was denied due process because administration of an oath was minimally inconvenient relative to the interest at stake and an implicit legislative intent that oaths be administered at commissioner hearings. *Id.* at 221.

*Nirk* differs from the present case in several respects. First, Deputy Smith’s report is not testimony; it is an investigative report prepared prior to the initiation of an administrative action. Second, the

driver had the opportunity to confront Deputy Smith by subpoenaing him for the hearing, at which time he would have been placed under oath. In contrast to *Nirk*, there was no opportunity to cure the unsworn statements. Third, a substantial amount of evidence in the present case was in fact submitted under penalty of perjury. Finally, *Nirk* involved a permanent deprivation at a discharge hearing, whereas the administrative hearing here involves only a temporary deprivation of the driving privilege. *Nirk* therefore does not apply.

**B. Watkins's Right to Subpoena and Confront Witnesses Limits the Risk of Erroneous Deprivation That Could Occur Based on Uncertified Documents**

The *Nirk* holding was based in part on due process. *Nirk* at 221. Generally, procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997). The *Nirk* court discussed due process but did not explicitly apply *Mathews* balancing.

Under *Mathews*, due process is a flexible standard designed to balance the needs of the public and the individual and arrive at the minimum acceptable process that safeguards the interests of all involved. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d. 18 (1976). The procedures required by due process are not rigidly set, but reflect the nature of the proceeding. *Id.* at 334. In order to determine the

process due in a given case, the Court balances (1) the private interest affected by the government action, (2) the risk of erroneous deprivation of that interest under existing procedural protections, and (3) the countervailing government interest, including the function involved and the fiscal and administrative burdens additional procedures would entail. *Id.* at 335.

With regards to the first factor, a driver's interest in his personal driver's license, while important, is not "fundamental" in the constitutional sense. See *U.S. v. Kras*, 409 U.S. 434, 444, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973); see also *State v. Clifford*, 57 Wn. App. 127, 130, 787 P.2d 571 (1990) (requiring a driver's license does not unconstitutionally infringe on freedom of movement). In *Nirk*, the interest at stake was significant because it involved the permanent termination from employment as a police officer. The interest in a driver's license is different and significantly less than continued employment as a police officer, and any resulting deprivation is only temporary.

The second *Mathews* factor examines the risk of erroneous deprivation based on the existing procedural safeguards and the probable value of any additional procedural protections. Due process does not mandate procedures "that assure perfect, error-free determinations."

*Mackey v. Montrym*, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).

In Washington, a licensee enjoys significant procedural protections that guard against erroneous revocation. It is well settled that a driver has a due process right to confront witnesses against him in an implied consent proceeding. *Lytle v. State Dep't of Licensing*, 94 Wn. App. 357, 362, 971 P.2d 969, 971 (1999); *Flory v. Dep't of Motor Vehicles*, 84 Wn.2d 568, 571–72, 527 P.2d 1318 (1974). However, a person does not have an unqualified right to confront an officer but must subpoena the officer if the person seeks to challenge the written report. *Weekly v. State, Dep't of Licensing*, 108 Wn. App. 218, 225, 27 P.3d 1272, 1276 (2001) (Driver “failed to request the officer’s presence at his own peril”). Any person providing oral testimony at a hearing must be placed under oath. WAC 308-103-140.

Watkins had the right to subpoena the arresting deputy if he doubted the veracity of his uncertified report. Watkin’s decision to not issue a subpoena for the arresting deputy—instead hoping to exclude his report—was a decision made at his own peril. Requiring that every narrative officer statement contain a certification would be an additional procedural rule that would provide little additional protection against the risk of erroneous deprivation.

The third *Mathews* factor, the countervailing interest of the State, is to “ensure swift and certain consequences for those who drink and drive.” *Ingram*, 162 Wn.2d at 517, Laws of 2004, ch. 68, §1. To accomplish that goal, the legislature intentionally established an informal and streamlined administrative process for implied consent hearings. *Ingram*, 162 Wn.2d at 525. One purpose of the implied consent law is to avoid lengthy litigation of license suspension and revocation proceedings. *Id.* Watkins’ proposal that each officer’s report be separately certified would undermine the legislature’s goal by resulting in a greater number of license revocation proceedings being dismissed based on a technicality. When compared to the low (if any) value of additional procedures, the third *Mathews* factor also weighs in favor of the State.

Because due process does not require the rule Watkins asks the court to prescribe, the Court should reverse the superior court and affirm the Department’s order of revocation.

//

//

//

//

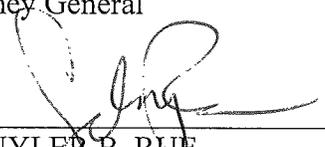
//

### III. CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court reverse the decision of the superior court, thereby affirming and reinstating the hearing officer's revocation order.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September, 2014.

ROBERT W. FERGUSON  
Attorney General



---

SCHUYLER B. RUE  
WSBA No. 42167  
Assistant Attorneys General  
OID # 91029  
Attorneys for Washington State  
Department of Licensing

**PROOF OF SERVICE**

I, Bibi Shairulla, certify that I caused a copy of this document – **Appellant’s Reply Brief** – to be served on all parties or their counsel of record on the date below by Electronic Mail and US Mail Postage Prepaid via Consolidated Mail Service as indicated:

Michael R. Frans  
Law Office of Michael R. Frans  
645 SW 153rd St., Ste # C2  
Burien, WA 98166-2262  
Email: law98166@msn.com

Filed electronically with Court of Appeals, Division II via Washington Courts’ Electronic Filing for the Court of Appeals (COA).

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

DATED this 5<sup>th</sup> day of September, 2014, at Olympia, WA.

  
\_\_\_\_\_  
BIBI SHAIRULLA, Legal Assistant

# WASHINGTON STATE ATTORNEY GENERAL

**September 05, 2014 - 9:39 AM**

## Transmittal Letter

Document Uploaded: 453274-Reply Brief.pdf

Case Name: James D. Watkins v. State, Dept of Licensing

Court of Appeals Case Number: 45327-4

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

Appellant's Reply Brief and Proof of Service

Sender Name: Bibi S Shairulla - Email: [BibiS@atg.wa.gov](mailto:BibiS@atg.wa.gov)

A copy of this document has been emailed to the following addresses:

[law98166@msn.com](mailto:law98166@msn.com)

[SchuylerR@atg.wa.gov](mailto:SchuylerR@atg.wa.gov)