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No. 81271-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

City of Spokane,

Petitioner,

vs.

Lawrence J. Rothwell, *et. al.*,

Respondents.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
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3. Identity and Interest of Amicus

Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation organized primarily for educational purposes and the advancement of knowledge in the area of municipal law. WSAMA has no direct interest in this matter. It has an interest in the impact that this case has upon administration of justice in inferior criminal courts.

4. Argument

This case presents a consolidated appeal of criminal driving under the influence convictions from the Spokane Municipal Department of the Spokane District Court. Division Three of the Court of Appeals held, in *City of Spokane v. Rothwell*, 141 Wn.App. 680, 684-685, 170 P.3d 1205 (2007), that state statutes regarding municipal departments of district courts require that each full time equivalent judicial position be filled through an election by the citizens of the municipality for which the department was established. A majority of the Court of Appeals panel in *Rothwell* also held that the District Court Judge in these consolidated cases did not possess *de facto* authority. *Rothwell*, 141 Wn.App. at 686-687. Judge Brown dissented in part, writing that he would hold that the District Court Judge in these consolidated cases acted as a *de facto* judicial officer. *Rothwell*, 141 Wn.App. at 687 (Brown, J. dissenting in part). The majority in *Rothwell*

reversed the defendants' convictions. *Rothwell*, 141 Wn.App. at 687.

Amicus submits that this court should accept review pursuant to RAP 13.4(b)(1), because the reversal of the convictions by *Rothwell* conflicts with the decisions of this court in *State v. Canady*, 116 Wn.2d 853, 809 P.2d 203 (1991) and *In re Dillenburg v. Maxwell*, 70 Wn.2d 331, 352-356, 413 P.2d 940, 422 P.2d 783 (1966), *cert. denied*, 386 U.S. 998 (1967).

The majority in *Rothwell* held that the trial judge did not possess a color of right to act as a municipal judge since she was neither elected nor appointed by the electors of the City of Spokane. *Rothwell*, 141 Wn.App. at 686. Judge Brown disagreed, reasoning that the office of municipal judge was defective only by a flawed legislative act and should be regarded as a *de facto* office until such time that the act or ordinance creating the office was declared invalid. *Rothwell*, 141 Wn.App. at 687 (citing *Canady*, 116 Wn.2d 853, 856-57, 809 P.3d 203 (1991)).

Amicus offers that either the Spokane Municipal Department of the District Court was not properly created and the consolidated cases were by default heard before the correct judicial officer; or, the department was validly created, and only the method of selection of judges was defective, in which case, the judicial officer possessed *de facto* authority. In the former instance, there was no *de jure* office of municipal department judge, the

Spokane District Court possessed jurisdiction, and the remedy is a transfer remand. In the latter instance, the office of municipal department judge was a *de jure* position, the occupants of that office exercised *de facto* authority despite the irregularity in their appointment, and the convictions should be affirmed.

If the Spokane Municipal Department was itself invalid, the trial judge in this matter possessed *de jure* authority. These consolidated criminal matters were heard at the trial court level by a Spokane District Court Judge. This judge was properly elected to the District Court bench. *Smith* AR; Declaration of Paul Brandt (6/14/2005, ¶7). As such, the District Court Judge would normally possess jurisdiction over the local DUI matters at issue here. RCW 3.66.060 (“The district court shall have jurisdiction: (1) Concurrent with the superior court of all ... gross misdemeanors committed in their respective counties and of all violations of city ordinances.”); see also Washington State Constitution, Article IV, §12. The District Court Judge was deprived jurisdiction only by the existence of the municipal department at issue in this case and RCW 3.46.030 which in part provides that “[a] municipal department shall have exclusive jurisdiction of matters arising from ordinances of the city.” See *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 681-683, 146 P.3d 893 (2006).

State statutes authorize cities to establish independent municipal courts. RCW Ch. 3.50; *see also* RCW Ch. 35.20. They also may petition the county legislative authority to establish a municipal department of the district court. RCW 3.46.010 and RCW 3.46.040. It is undisputed that the Spokane Municipal Court was purportedly established as a department of the Spokane District Court. *See* City of Spokane's Petition for Review, appendix F and Defendant's Answer to Petition for Review, appendix D; *see also* *Nollette v. Christianson*, 115 Wn.2d 594, 601-603, 800 P.2d 359 (1990) (tracing the history of the Spokane Municipal Court).

In *Dillenburg*, a juvenile was convicted of a criminal charge in Superior Court after a probation officer signed an order surrendering juvenile court jurisdiction. This court held that the Superior Court lacked jurisdiction under the juvenile justice statutes unless a juvenile court first declines jurisdiction in accordance with the conditions prescribed by statute. *Dillenburg*, 70 Wn.2d at 340. This court further held that the statutory requirements had not been met since a judge had not signed the surrender order. *Id.* On rehearing, however, the court held that reversal of the conviction was necessarily required. *Id.* at 354-355. The court reasoned that the "legislature did not intend to establish, nor did it undertake to establish, a juvenile court separate and distinct from the superior court. Instead, it

simply authorized the characterization of the superior court, or a 'session' thereof, as a 'juvenile court' when processing those cases falling within the terms of the Juvenile Court Law." *Id* at 352. The court went on to write that the proper remedy was remand to determine whether the faulty transfer was in fact correct:

It is our view that in those cases where it is demonstrated, in appropriate post conviction proceedings, that a transfer from juvenile court control has been faulty, proper relief can be afforded, in the ordinary case, by a de novo hearing before the superior court as to the propriety of the challenged transfer, i.e., whether the facts before the juvenile 'session' of the superior court in the first instance warranted and justified the transfer for criminal prosecution.

Dillenburg, 70 Wn.2d at 355. If the transfer was in hindsight determined to be correct, the conviction would stand despite the procedural irregularity. *Id*; see also *Pers. Restraint of Dalluge*, 152 Wn.2d 772, 785-787, 100 P.3d 279 (2004) (adhering to the *Dillenburg* remedy).

As in *Dillenburg*, the court at issue in these consolidated cases was a division of another court. RCW Ch. 3.46, RCW Ch. 3.50, and RCW Ch. 35.20 all relate to the same subject matter, establishment of municipal courts, and they are therefore read *in pari materia*. *Personal Restraint of Yim*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999). Municipal courts under RCW Ch. 3.50 and RCW Ch. 35.20 operate independently. See RCW 3.50.010 and RCW 35.20.010(1). In contrast, municipal courts under RCW Ch. 3.46

operate as “a municipal department of the district court.” RCW 3.46.010. “Each judge of a municipal department shall be a judge of the district court in which the municipal department is situated.” RCW 3.46.020. “It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent.” *Seeber v. Public Disclosure Comm’n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981). The Spokane Municipal Court was not separate and distinct from the Spokane District Court.

Amicus acknowledges that the *Dillenburg* court noted that the juvenile justice statutes did not divest jurisdiction from the Superior Court or purport to vest exclusive jurisdiction in another court. *Dillenburg*, 70 Wn.2d at 352. Amicus further acknowledges that RCW 3.46.030 does purport to vest exclusive jurisdiction in the municipal department of the Spokane District Court. Amicus submits though that defendants cannot bring themselves within the rule restated in *Canady* without destroying the allegedly exclusive jurisdiction of the Spokane Municipal Court.

This *Canady* court held that the *de facto* authority doctrine does not apply in cases involving *invalid courts* rather than *invalid judges*. *Canady*, 116 Wn.2d at 856-857. The principle expressed in *Canady* and other cases is that “there must be a *de jure* office before there can be a *de facto* officer.”

State v. Edmonds Municipal Court, 27 Wn.App. 762, 768, 621 P.2d 171 (1980), review denied, 95 Wn.2d 1016 (1981); see also *Higgins v. Salewsky*, 17 Wn.App. 207, 211, 562 P.2d 655 (1977) (quoted in *Canady*, 116 Wn.2d at 857). Defendants argue that this rule applies and that there can be no *de facto* authority, because “there ‘was no municipal department created in compliance with chapter 3.46 RCW,’ at the time of the defendants’ convictions and that Judge Walker had no authority to preside over their trials.” Defendant’s Answer to Petition for Review, at 8-9 (quoting *Rothwell*, 141 Wn.App. at 687).

Amicus submits that if there was no valid municipal department, RCW 3.46.030 does not apply, by operation of law RCW 3.66.060(1) does apply, and the remedy in these cases is remand for entry of judgment in the District Court. In other words, defendants can’t have it both ways under *Canady*. If the Spokane Municipal Department does not exist for purposes of providing *de facto* authority to Judge Walker, it does not exist for purposes of preventing Judge Walker’s exercise of *de jure* authority. In that situation, the cases before Judge Walker were, at most, improperly captioned as municipal court cases, but that would not affect jurisdiction. See *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996).

The Legislature did not intend for the districting statutes at issue in

this case to create a escape mechanism for criminal defendants. RCW 3.38.031 provides in pertinent part that “[p]ending cases, proceedings, and matters shall be transferred to the appropriate court as provided in RCW 3.74.900.” That statute in turn provides that “[a]ll cases, proceedings and matters pending before justice courts, police courts, municipal courts and night courts shall be transferred to the appropriate courts established by chapters 3.30 through 3.74 RCW, together with all files, records and proceedings relating to such cases.” RCW 3.74.900. RCW 3.74.900 was enacted as part of the 1961 court reorganization act to effect the transfer of cases to courts created by that act. Laws of 1961, reg. sess. Ch. 299 §127. The enactment of RCW 3.38.031 manifests legislative intent that the statute would have continuing effect. The 1965 legislature by reference continued the transfer provisions by adoption of RCW 3.38.031. Laws of 1965, ex. sess., Ch. 110, §3. RCW 3.38.031 was again amended as part of 1984 Court Improvement Act, and the transfer provision was retained. Laws of 1984, reg. sess., Ch. 258, §24. “Earlier enactments dealing with the same subject matter are presumed to have been considered by the legislature when it amends legislation. Any new provisions of a statute are then deemed adopted in light of and with reference to the earlier act.” *State v. Roth*, 78 Wn.2d 711, 715, 479 P.2d 55 (1971). In both 1965 and 1984, the Legislature considered

statutes referencing the broad transfer provisions of RCW 3.74.900 and opted to give them continuing effect.

“[B]oth the legislature and this court have recognized that in some cases it is appropriate to transfer jurisdiction of an open case to another division of the same court or to another court.” *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 682, 146 P.3d 893 (2006). Amicus submits that Spokane District Court Judge Walker was the appropriate judicial officer to hear these consolidated cases if “there ‘was no municipal department created in compliance with chapter 3.46 RCW,’” and the remedy in this case should either be remand to the Spokane County District Court if defects in the process used to establish the department prevent application of the *de facto* authority doctrine.

Conversely, if the Municipal Department was properly created, and the defect relates to the method of selection of judges for that department, Judge Walker possessed *de facto* authority despite the irregularity in the method of appointment. *See State v. Britton*, 27 Wn.2d 336, 344-346, 178 P.2d 341 (1947). In such case, the convictions should simply be affirmed.

5. Conclusion

Amicus curiae requests that this court accept discretionary review in this case and either affirm the convictions of the defendants on the basis of

the *defacto authority* of the trial judge or remand the cases for entry of judgments of conviction under the *dejure authority* of the trial judge.

DATED 4/21/2008

A handwritten signature in black ink, appearing to read "Tim Donaldson", written over a horizontal line.

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