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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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THE STATE OF WASHINGTON, Appellant/Plaintiff,

v.

ABDINASIR OSMAN, Respondent/Defendant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WESLEY SAINT CLAIR

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**AMENDED BRIEF OF APPELLANT**

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**ORIGINAL**

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**A. ASSIGNMENTS OF ERROR**

1. The superior court, on RALJ appeal, erred when it found that the missing portion of the record was material.
2. The superior court, on RALJ appeal, erred in reversing the district court determination that the missing portion of the record was neither material nor significant.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

**RALJ 5.4 leaves to the discretion of the court of limited jurisdiction the determination of whether a missing record is material or significant. The District Court found that given the fact that its missing rulings were accurately and thoroughly reflected in the docket and that almost all rulings were in favor of Osman, the missing portion of the record was not material or significant. Did the RALJ court err in reversing the District Court and finding that the missing portion was material?**

**C. STATEMENT OF THE CASE**

Substantive Facts

On October 17, 2003, at about 2:50 a.m., King County Sheriff's Deputy David Jeffries was on routine patrol around South 200<sup>th</sup> and Pacific Highway in King County. 1RP 21.<sup>1</sup> Abdinasir Osman's vehicle first drew the deputy's attention because it was weaving in the two eastbound lanes of South 200<sup>th</sup> towards the

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<sup>1</sup> 1RP (January 12, 2005 Motion Hearing); 2RP (April 20, 2007

freeway. 1RP 22. Osman initially crossed over the lane dividers and eventually twice crossed the center line. 1RP 22. At the intersection, just prior to entering the freeway, Osman activated his right turn signal. 1RP 22. Rather than turning, Osman continued straight in the left lane onto the freeway. 1RP 22. As he entered the freeway, Osman crossed the fog line onto the shoulder. 1RP 22. At that point, Deputy Jeffries activated his emergency equipment to stop Osman's vehicle. 1RP 22.

When he contacted Osman, Deputy Jeffries noted that Osman had the strong odor of intoxicants on his breath, red, watery, bloodshot eyes, and slurred speech. 1RP 22. Osman's movements were slow and lethargic. 1RP 22. There were two passengers in Osman's vehicle and open alcohol containers on the front passenger floorboard. 1RP 23.

Upon exiting his vehicle to perform the field sobriety tests, Osman was not very sure on his feet. 1RP 24. Also, he had to use the car to steady himself. 1RP 24. Deputy Jeffries first had Osman perform the horizontal gaze nystagmus test. 1RP 24. Osman exhibited six of six clues on this test, leading the deputy to believe that Osman had consumed alcohol. 1RP 25-7. Next, Osman

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Remand Hearing); 3RP (June 22, 2007 RALJ Hearing).

agreed to perform the walk and turn test, however, during Deputy Jeffries' explanation of the test, Osman began arguing. 1RP 27. At that point, Deputy Jeffries placed Osman under arrest for driving under the influence. 1RP 28.

Deputy Jeffries advised Osman of his Constitutional Rights at the scene. 1RP 28-31. The deputy also advised Osman of his Implied Consent Warnings for breath. 1RP 31-4. Deputy Jeffries asked Osman if he understood these warnings and Osman indicated that he did. 1RP 34.

During transport to the Seatac Police Station, Osman continued to argue with the deputy, insisting that he had only two beers and that he was okay to drive. 1RP 34-5. At the station, Deputy Jeffries again reviewed the Constitutional Rights and Implied Consent Warnings with Osman. 1RP 35-6. Osman again indicated that he understood but refused to sign either form. 1RP 36. Osman then invoked his right to counsel. 1RP 36. After speaking with the on-call public defender, Osman refused to submit to a breath alcohol test. 1RP 38.

#### Procedural Facts

The State charged Osman with driving under the influence. Osman pleaded not guilty and set the case for motions and trial.

CP 2-5.<sup>2</sup> At the motions hearing on January 12, 2005, the trial court heard testimony from Deputy Jeffries and Osman. See 1RP. Osman moved to suppress all of his statements and his refusal to submit to the breath alcohol test pursuant to State v. Prok.<sup>3</sup> The trial court found that 1) Osman was read his rights in the field and understood his rights in the field. Thus, his statement that he had two beers and was okay to drive was admissible; 2) Osman was read his rights at the Seatac facility, and he invoked his rights. Thus, any statements made thereafter were suppressed; 3) Deputy Jeffries read Osman his rights and warnings in the field and at the station. However, the trial court was not satisfied that Osman understood his rights and suppressed his refusal of the breath alcohol test; 4) Deputy Jeffries had probable cause to stop Osman based on his observations of Osman's driving; and 5) Deputy Jeffries had probable cause to arrest. CP 7-9.

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<sup>2</sup> Due to this prosecutor's error, when the State's Designation of Clerk's Papers was filed with this Court, it was not also filed with the Superior Court. This Amended Appellant's Brief includes page number CP cites.

<sup>3</sup> 107 Wn.2d 153, 727 P.2d 652 (1986). In Prok, the Washington State Supreme Court held that once the right to counsel accrues, a defendant must be advised of that right "in words easily understood." Id. at 156-7. The remedy is suppression of subsequently obtained evidence. Id.

On February 24, 2005, Osman proceeded to jury trial. CP 10. The jury found Osman guilty of driving under the influence. CP 12. Osman timely appealed. CP 14.

At RALJ, the parties agreed that a portion of the electronic recording from the January 12, 2005 motions hearing was missing and that the matter should be remanded to the court of limited jurisdiction to determine whether that missing portion was material or significant. CP 322-23. On April 20, 2007, retired Judge Pro Tem Fred Yeatts decided the materiality and significance of the missing portion of the record. See 2RP. Referring to his personal notes located in the court file, Judge Yeatts found that the rulings in the docket entry accurately and thoroughly reflected the rulings he made. 2RP 5-7. Judge Yeatts also noted that almost all of the rulings were in favor of Osman. 2RP 5. At the insistence of defense counsel that he "make a record," Judge Yeatts read his notes into the record. 2RP 6-7. Judge Yeatts asked Ms. Friese (defense counsel from the motions hearing) if there was anything that she thought he misstated. 2RP 8. Ms. Friese indicated that there was not. 2RP 8. Based upon the above listed factors, Judge Yeatts found that the missing portion of the record was neither material nor significant. 2RP 7.

Osman then moved the RALJ court to review the District Court's decision regarding materiality and significance and remand the matter for a new trial pursuant to RALJ 5.4. See 3RP. At a motion hearing before the RALJ court, Osman argued that 1) the District Court improperly attempted to reconstruct the record and 2) the missing portion was material and significant. 3RP 2-5. The State responded that 1) RALJ 5.4 does not specify a preferred procedure for the District Court to use in making the determination of materiality and significance; 2) the determination of materiality and significance is left to the sound discretion of the District Court; 3) Judge Yeatts read his notes into the record only at the insistence of defense counsel; 4) the docket accurately reflected all rulings; and 5) most of the rulings went in favor of Osman. 3RP 5-7. The RALJ court reversed the District Court and ruled that the missing portion of the record was material: "Having considered the briefing and arguments of both sides, the Court in this instance does find the missing portions of the transcript to be material." The court ruled that remand for a new trial was necessary. 3RP 10. This Court granted the State's motion for discretionary review.

#### **D. ARGUMENT**

##### **1. THE RALJ COURT ERRED IN REVERSING THE DISTRICT COURT FINDING THAT THE MISSING PORTION OF THE RECORD WAS NEITHER MATERIAL NOR SIGNIFICANT.**

###### **a. Standard of Review**

Court rules are interpreted pursuant to the rules of statutory construction. In re Stenson, 153 Wn.2d 137, 146, 102 P.3d 151 (2004). Where a court rule is unambiguous, it is not subject to construction. Id. The language of a court rule is unambiguous if it is not "susceptible to more than one reasonable meaning." Id. On appeal, reviewing courts do not owe deference to the lower court, but review court rules de novo. State v. Robinson, 153 Wn.2d 689, 693, 107 P.3d 90 (2005).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court abuses its discretion where its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Id. "An abuse of discretion occurs only when no reasonable person would

take the view adopted by the trial court." State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

RALJ 5.4 entitles appellants to new trials when significant or material portions of the electronic record have been lost, but leaves the decision as to materiality up to the court of limited jurisdiction:

In the event of loss or damage of the electronic record, or any significant or material portion thereof, the appellant, upon motion to the superior court, shall be entitled to a new trial, but only if the loss or damage of the record is not attributable to the appellant's malfeasance. In lieu of a new trial, the parties may stipulate to a nonelectronic record as provided in rule 6.1(b). The court of limited jurisdiction shall have the authority to determine whether or not significant or material portions of the electronic record have been lost or damaged, subject to review by the superior court upon motion.

After designating the materiality and significance determination to the court of limited jurisdiction, RALJ 5.4 does not specify a preferred procedure for making that determination. The fact that the district court has authority to make the materiality determination, when combined with the fact that the district court has the discretion to determine the procedures for making the determination of materiality, suggests that the determination of materiality should be reviewed for abuse of discretion. But however the standard of review is phrased, some measure of deference is

appropriate because the district court is in the best position to judge the significance of the proceedings it has conducted.

Nonetheless, Osman contended in his Response to the State's Motion for Discretionary Review that under well established law, the appropriate standard of review is *de novo*. In support of this contention, Osman cited to a number of cases that apply a *de novo* standard for reviewing a trial court's application of a court rule or statute to a specific set of facts. Response to Motion for Discretionary Review at 10. However, appellate courts routinely review materiality determinations for an abuse of discretion. State v. Boyd, 160 Wn.2d 424, 431, 158 P.3d 54 (2007) (discretionary disclosure upon a showing of materiality under CrR 4.7(e) reviewed for an abuse of discretion); State v. Downing, 151 Wn.2d 265, 237, 87 P.3d 1169 (2004) (grant or denial of a continuance based in part upon materiality reviewed for an abuse of discretion); State v. Uthoff, 45 Wn. App. 261, 268-69, 724 P.2d 1103 (1986) (grant or denial of order disclosing informant's identity upon requisite showing of materiality of informant's testimony reviewed for an abuse of discretion); State v. Lodge, 42 Wn. App. 380, 391, 711 P.2d 1078 (1985) (grant or denial of motion to compel attendance of out-of-state witness upon requisite showing of materiality

reviewed for an abuse of discretion); Williams v. Queen Fisheries, Inc., 2 Wn. App. 691, 699, 469 P.2d 583 (1970) (questions of relevancy and materiality of evidence ordinarily within the discretion of the trial judge); State v. Gray, 64 Wn.2d 979, 984, 395 P.2d 490 (1964) (same).

More importantly, in the context of RALJ 5.4, it simply makes sense to give deference to the court of limited jurisdiction in making the materiality and significance determination. The court of limited jurisdiction hears the missing portion of the record as well as the surrounding testimony and argument. Thus, the court of limited jurisdiction is in the best position to know what portions of the record played a material or significant role in its resulting rulings. The court of limited jurisdiction should thus be given some degree of deference in its determination of materiality or significance.

- b. The district court properly exercised its discretion and found the missing portion of the record neither material nor significant.

RALJ 5.4 sets a number of prerequisites that must be met before the remedy of a new trial is to be granted. First, the record or a portion thereof must have been lost or damaged. Second, the loss or damage must not have been caused by Osman. Third, if the situation does involve a missing or damaged portion of the

record, it must be determined that the missing or damaged portion was "material or significant."

The State concedes, as it did at RALJ and on remand to the court of limited jurisdiction, that the first two prerequisites are met: a portion of the record is missing and the loss cannot be attributed to Osman. Thus, the only remaining issue is whether that missing portion of the record is material or significant.

Neither "material" nor "significant" is defined by the rule, but significant and material are synonymous in this context. When a statutory term is undefined, the term is given its ordinary dictionary meaning. State v. Edwards, 84 Wn. App. 5, 10, 924 P.2d 397 (1996). As an adjective, "material" is defined as "(12) of substantial import; of much consequence; important; (13) pertinent or essential; (14) likely to influence the determination of a case." Dictionary.com Unabridged (v 1.1). Random House, Inc. <http://dictionary.reference.com/browse/treat> (accessed: August 6, 2007). "Significant" is defined as "important; of consequence." Dictionary.com Unabridged (v 1.1). Random House, Inc. <http://dictionary.reference.com/browse/treat> (accessed: August 6, 2007).

Here, a portion of the January 12, 2005 CrRLJ 3.5 and 3.6 motion hearing is missing. That portion includes the end of the State's cross examination of Osman, Osman's redirect, the argument of counsel, and the court's rulings. CP 8; 1RP 72. On April 20, 2007 at the remand hearing, Judge Yeatts (the judge who presided over the January 12, 2005 motion hearing) found that the missing portion of the record was neither material nor significant. 2RP 7. His finding appears to have been based upon two primary factors: 1) the docket entry accurately and thoroughly reflected his rulings and 2) his rulings almost entirely favored Osman. 2RP 5-7.

The District Court properly exercised its discretion in finding the missing portion neither material nor significant based upon the fact that the docket accurately reflected all of its rulings. As the hearing on remand was more than two years after the lost portion of the motion hearing, it was reasonable for Judge Yeatts to rely upon his personal notes contained in the court file to make his determination. Based upon those notes, Judge Yeatts found that the docket correctly reflected his rulings from the missing portion of the recording as well as all exhibits admitted. 2RP 5. Judge Yeatts was also able to describe the substance of the missing portions of Osman's cross examination and redirect examination, as recorded

in his notes. 2RP 6-7. In these circumstances, Osman cannot show that no reasonable judge would have found the missing portion of the record immaterial.

Osman may argue, as he did below, that the fact that the District Court recreated the record shows that the missing portion was material. But the fact that the judge used his notes to help recall the missing portion of the record has nothing to do with whether that portion of the record was actually material or significant.

Moreover, the District Court properly exercised its discretion in finding the missing portion neither material nor significant based upon the fact that all but two rulings were in Osman's favor. The District Court made five rulings at the conclusion of the missing portion of the motion hearing: 1) Osman's statement that he had two beers and was okay to drive was admissible; 2) Osman's statements after the second reading of his rights were suppressed; 3) Osman's refusal to submit to the breath alcohol test was suppressed; 4) Deputy Jeffries had probable cause to stop based upon his observations of Osman's driving; and 5) Deputy Jeffries had probable cause to arrest. CP 8. Osman's statement that he had consumed only two beers and was okay to drive was self-

serving. Moreover, the fact of his alcohol consumption was cumulative of other evidence presented at the motions hearing in the preserved portion of the record.<sup>4</sup> Thus, the only rulings relevant to any appeal are the trial court's findings of probable cause to stop and arrest.

The preserved portion of the motions hearing and Judge Yeatts's notes concerning the missing portions of that hearing show that the missing portions of the record are not material to Osman's ability to challenge the district court's findings of probable cause to stop and arrest. Determinations of reasonable suspicion and probable cause are reviewed *de novo*. State v. Jackson, 82 Wn. App. 594, 604, 918 P.2d 945 (1996). Similarly, conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). Thus, the trial court's finding of probable cause to arrest will be reviewed *de novo* should this Court remand for RALJ appeal, rather than a new trial.

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<sup>4</sup> 2RP 22 (Deputy Jeffries "noticed a strong odor of intoxicants on [Osman's] breath, red, watery, bloodshot eyes, slurred speech, and his slow lethargic movements."); 2RP 23 (Deputy Jeffries "also noticed there were open alcohol containers visible upon [his] initial contact."); 2RP 25 (Deputy Jeffries concluded "[t]hat [Osman] had consumed alcohol" based upon Deputy Jeffries "training and

Washington courts use the rationale set forth in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S. Ct. 1868 (1968), when examining the validity of investigative stops. State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986). A Terry stop of a person or vehicle is justified if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Terry, 392 U.S. at 21; State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982); Kennedy, 107 Wn.2d at 6.

Officers need only reasonable suspicion, not probable cause, to stop a vehicle to investigate whether the driver committed a traffic infraction or a traffic offense. See State v. Duncan, 146 Wn.2d 166, 173-175, 43 P.3d 513 (2002). "Reasonable suspicion" is defined as "the ability to reasonably surmise from the information at hand that a crime was in progress or had occurred." Kennedy, 107 Wn.2d at 6 (citing United States v. Cortez, 449 U.S. 441, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981)). Thus, the degree of probability required for the police conclusion is less in a stop situation than in an arrest. Id.

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experience and [Osman's] performance of the gaze nystagmus.")

Here, the preserved portion of the record shows that the missing portion could not have affected Osman's ability to effectively appeal the trial court's ruling that Deputy Jeffries' initial stop was justified. Deputy Jeffries' testimony provided ample evidence to support a reasonable suspicion that Osman had committed a traffic violation. He testified that, before he stopped Osman, he saw Osman's vehicle weaving; crossing lane dividers and the center line. He said he saw Osman signal without turning, then cross the fog line onto the shoulder. And Osman's direct examination, preserved in its entirety, did nothing to weaken this evidence. See 1RP 60-67. Osman did not address his driving in his direct examination, nor in the preserved portion of his cross-examination. His direct examination focused on his assertions that he had understood very little during his contact with Deputy Jeffries, that he had required a Somali interpreter, and that he had suffered police brutality. 1RP 60-67. We know from Judge Yeatts's notes that in the missing portion of Osman's cross, he testified that he took the test for his driver's license with a Somali interpreter, was familiar with DUI investigations from prior incidents and knew that a DUI would lead to license suspension. 2RP 7. On redirect, Osman testified that he had been through a previous DUI trial and that

there was a Prok issue in that case as well. 2RP 7. Thus, there is no reason to believe that the brief portion of the electronic record that is missing is material to Osman's ability to challenge the basis for the initial stop on appeal.

The same is true of the trial court's ruling that the deputy had probable cause to arrest Osman. A police officer may arrest a person without a warrant upon probable cause to believe that the person has committed the offense of driving while intoxicated.

O'Neill v. Department of Licensing, 62 Wn. App. 112, 116, 813 P.2d 166 (1991). Probable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed. Waid v. Department of Licensing, 43 Wn. App. 32, 34-5, 714 P.2d 681 (1986). In making this determination, reviewing courts must give consideration to an arresting officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Probable cause to arrest requires more than "a bare suspicion of criminal activity," State v. Terravona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), but does not require facts that would establish guilt beyond

a reasonable doubt. State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261 (1990).

Here, in addition to the driving described above, upon contact with Osman, Deputy Jeffries noted the strong odor of intoxicants on Osman's breath; red, watery, and bloodshot eyes; slurred speech; slow lethargic movements; that Osman was unsure on his feet and had to use the car to steady himself; that Osman exhibited six of six clues on the horizontal gaze nystagmus test; and that Osman was argumentative. 1RP 22-27. At that point, Deputy Jeffries placed Osman under arrest. 1RP 28. Based upon this evidence, the trial court found that Deputy Jeffries had probable cause to arrest Osman for driving under the influence. As discussed above, Osman did not address his driving on direct examination. Osman did challenge some of the deputy's testimony on cross examination. He denied 1) that he told Deputy Jeffries he had only two beers and that he was okay to drive; 2) that he smelled of alcohol; 3) that Deputy Jeffries asked him to perform field sobriety tests; and 4) that Deputy Jeffries read him his rights at the scene. 1RP 69-72. But these contradictions in testimony mean that the district court must have made a credibility determination in finding probable cause. Credibility determinations are for the trier

of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, any missing testimony that might have further supported the version of events that Osman testified to at the suppression hearing would be irrelevant on appeal.

Given the evidence in the preserved portion of the record and the trial court's recollection of the missing portion of the record, the missing portion is neither material nor significant to the trial court's rulings that the stop and arrest were valid.

c. The determination of materiality and significance was properly before the court of limited jurisdiction.

Osman argued in response to the State's Motion for Discretionary Review, despite agreeing to remand, that the RALJ court's decision should be affirmed because the determination of materiality and significance is for the RALJ court, not the District Court, to make.

RALJ 5.4 explicitly empowers the courts of limited jurisdiction to decide whether a missing record (or portion thereof) is "significant or material":

The court of limited jurisdiction shall have the authority to determine whether or not significant or material portions of the electronic record have been

lost or damaged, subject to review by the superior court upon motion.

RALJ 5.4. Where the term "shall" is used in a rule, the meaning is presumed to be mandatory (rather than permissive or suggestive). State v. Mollichj, 132 Wn.2d 80, 86, 936 P.2d 408 (1997). As a result, and at the agreement of both parties, the RALJ court declined to make the decision as to whether the missing portion of the electronic record was significant or material and instead remanded the matter to the District Court for it to make that determination. CP, 322-23.

Despite this, Osman argued that this was error. In support of this proposition, Osman cited to third party analysis of the Bar Rules Committee intention when it amended RALJ 5.4 in 1995 to add this provision. In making this argument, Osman was attempting to add his interpretation a clear and unambiguous rule.

"If language of a statute is clear, its plain meaning must be given effect without resort to rules of statutory construction." State v. Thielken, 102 Wn.2d 271, 275, 684 P.2d 709 (1984). Thus, "[o]nly if the statute is ambiguous, do we resort to aids of construction, such as legislative history." State v. Fisher, 139 Wn. App. 578, 583, 161 P.3d 1054 (2007). RALJ 5.4 is unambiguous in

that it explicitly authorizes the court of limited jurisdiction to determine the materiality and significance of missing electronic records. There is nothing in the rule that limits that power, the methods that can be used to exercise it, or the circumstances in which it can be exercised. It would be inappropriate to read any such limits into the unambiguous rule by resorting to the rule's legislative history.

**E. CONCLUSION**

For these reasons, the State respectfully asks this Court to reverse the Superior Court's decision reversing the District Court finding that the missing portion of the record was neither material nor significant.

RESPECTFULLY SUBMITTED this 28 day of January 2008.

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