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83277-3

Court of Appeals No. 61679-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF SEATTLE,
Respondent,

vs.

THE HON. GEORGE W. HOLIFIELD, et al.,
Petitioners.

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STATE OF WASHINGTON
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On Appeal from the Court of Appeals,
Division One

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT.

The City of Seattle asks this court to deny review of the decision designated in Part B of this motion.

B. DECISION.

The Court of Appeals, Division One, in a decision filed and published on May 26, 2009, reversed the Superior Court's decision denying a writ of review of the trial court's suppression of the breath test. The Court of Appeals decision is filed and published as *City of Seattle v. The Hon. George W. Holifield et al.*, case number 61679-0-I.

C. ISSUES PRESENTED FOR REVIEW.

1. Did the Court of Appeals, Division One, err in reversing the Superior Court's decision denying a writ of review of a trial court decision suppressing breath tests when the decisions of both the Superior Court and the trial court were contrary to decisions of the Supreme Court and the Court of Appeals?

D. STATEMENT OF THE CASE.

The Petitioner was arrested and charged with Driving Under the Influence. He subsequently submitted to a breath test pursuant to RCW 46.20.208. The Petitioner moved to suppress his breath test, raising the "Ann Marie Gordon" issue. In the Petitioner's case, Ann Marie Gordon

had allegedly tested simulator solutions associated with their breath tests.

On March 11, 2008, the Honorable George W. Holifield entered an order suppressing breath test evidence in **all** cases where the tests were conducted with simulator solutions allegedly tested by Ann Marie Gordon. That order was officially entered in the case of *City of Seattle v. Roger C. Kennedy*, however it acted to suppress breath tests in many other cases, including the Petitioner's.

On April 1, 2008 the City sought review of the trial court order by writ before the Honorable Cheryl Carey in King County Superior Court. The petition alleged that the suppression of evidence under CrRLJ 8.3 was a clear error of law, and that the City had no adequate remedy on appeal. In an order issued on April 25, 2008, the court ruled that "Motion for Writ of Review is Denied. The Court finds that trial court's ruling is a clear legal error. The City has failed to meet its burden."

The City appealed the failure to issue the writ of review in the Court of Appeals, Division One. That court reversed the Superior Court, holding that suppression of evidence is not an available remedy under CrRLJ 8.3(b), and that a writ is available to correct errors of law, therefore the Superior Court erred in denying the writ.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED.

1. Defendant Has Not Established Any Grounds Justifying Discretionary Review.

RAP 13.4(b) provides for the considerations governing acceptance of review by the Supreme Court of a decision of a Court of Appeals decision terminating review:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Petitioner has failed to allege in his Motion for Discretionary Review any of the above requirements for acceptance of discretionary review by this court. For this reason and the reasons set forth below, discretionary review should be denied.

2. The Court of Appeals, Division One, Correctly Held That The Superior Court Erred When It Found That The Trial Court Committed Clear Legal Error But Also Found That The City Failed To Meet Its Burden For Acceptance Of A Writ Of Review.

A superior court may grant a writ of review of a lower court's decision only if a lower tribunal exceeded its jurisdiction or acted illegally,

and there is no appeal or adequate remedy at law.¹ In the case below, the Superior Court apparently found that while the trial court judge committed clear legal error in suppressing breath tests, the City had nonetheless failed to meet its burden for obtaining a writ of review. While this is only vaguely articulated in the Superior Court order, based on the language of the order this is the only logical conclusion that can be reached. In this respect the Court of Appeals, Division One, correctly held that the decision of the Superior Court and the lower court was in conflict with opinions of this court as well as the Court of Appeals, as it sanctioned suppression of evidence when no prejudice had been established by the defendant and when no ordinance, statute, court rule, or court opinion provided the authority to act in such a manner.

a. **The City had no plain, speedy and adequate remedy absent review by writ.**

The Petitioner established in the Superior Court that a writ of review was appropriate in this case and should have been granted. Absent review by writ, no remedy exists to reverse the erroneous suppression of evidence in this case. The suppression below did not terminate the prosecution's case completely, therefore an appeal prior to trial was precluded. *See* RALJ 2.2(c)(2). Further, the Superior Court recognized

¹ *Seattle v. Keene*, 108 Wn. App. 630, 634, 31 P. 3d 1234 (2001).

the clear error of the trial court's decision suppressing the breath tests, but because that court denied the writ, the trial court was under no obligation to reverse itself.

If the matter proceeded to trial, the error of which the City complained would have become moot. The result of a trial must logically be either an acquittal or a conviction. Neither circumstance provides the City an opportunity to appeal the suppression. RALJ 2.2(c)(1) and both state and federal constitutions forbid an appeal from an acquittal.

Similarly, if the prosecution obtains a conviction, appeal is precluded because the prevailing party may not appeal a favorable judgment. RALJ 2.1(a)(1). Thus, no appeal of the suppression proceeding was possible for the prosecution in this matter and, as correctly decided in the Court of Appeals, a writ should have issued. *See e.g. Seattle v. Keene*, 108 Wn. App. 630 (2001).

The Respondents may argue that a cross-appeal is an adequate remedy. Aside from the obvious incongruity of arguing City's right of "appeal" should be construed to rely entirely upon the Respondent's choice to appeal, a mere possibility of a remedy by review should not be construed as a substitute for an actual review. The possibility of a remedy is not a remedy.

Further, even a successful cross-appeal would leave the prosecution empty handed. A successful appeal would reinstate the breath test evidence, however if a defendant has already been tried under the “under the influence” prong of RCW 46.61.506, jeopardy has attached and he cannot be tried anew on the “above .08” prong. This means that in cases where defendants’ breath tests exceed .15, the prosecution is denied the enhanced penalties available despite the clear legal error of the suppression.

If the trial court’s illegal suppression is not addressed and City is required to proceed to trial, the wrongful suppression is not remedied. The ill of which City complained, proceeding to trial without critical evidence of guilt, will have occurred. The mere possibility City might, under an unlikely and speculative set of circumstances, have its complaints addressed in another trial is no “remedy”.²

Black’s Law Dictionary 5th Ed. defines “adequate remedy” as:

[A] remedy which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as a remedy in equity[.]

Any remedy provided by the appellate process in these cases is

² *Gall Landau Young v. Hedreen*, 63 Wn. App. 91, 99, 816 P.2d 762 (1991)(Court properly exercises equity jurisdiction when remedy is not certain or does not provide complete relief).

inadequate. Inadequacy is shown where it is apparent to the court that it will not be able to protect the rights of litigants or afford them adequate redress, otherwise than through use of one of the extraordinary writs.³

The court in *Seattle v. Keene*, supra, cited with approval *Bushman v. New Holland*⁴. The *Bushman* court concluded a Writ is appropriate to address pre-trial discovery complaints because “the trial court’s alleged erroneous interpretation of the discovery rules would greatly hinder the plaintiff in her investigation of the case and greatly restrict her ability to present evidence at trial.”⁵ Our circumstances herein mitigate even more favorably for a Writ because, unlike the defendant in *Bushman*, the City has no right of appeal⁶.

The legal circumstance presented here is also similar to *State v. Mack*⁷, where petitioner sought a Writ to prevent a trial based upon a double jeopardy violation.⁸ The *Mack* court held the petitioner should not be required to litigate the case in municipal court and re-litigate the case in

³ *State ex rel. Public Utility Dist. No. 1 of Pend Oreille County v. Schwab et al.* 40 Wn. 2d 814, 246 P. 2d 1081 (1952).

⁴ 83 Wn.2d 429, 518 P.2d 1078 (1974).

⁵ *Bushman*, 83 Wn.2d at 432.

⁶ See e.g. *State v. Whitney*, 69 Wn.2d 256, 418 P.2d 143 (1966).

⁷ 89 Wn.2d 788, 576 P.2d 44 (1978).

⁸ Writ of Prohibition cases differ in many ways from Writs of Review, but they share the same requirement of a “plain, adequate, and speedy remedy”.

Superior Court in order to address the merits of whether he should even have had the first trial. This same analysis is followed in numerous subsequent cases.⁹ Thus, even if City had a right to appeal, the conclusion of these cases is appeal would not be an adequate remedy.

In *State v. Glasser*¹⁰, the court held that grant of a deferred prosecution petition after trial was an act in excess of jurisdiction and a Writ to the superior court should have been granted to reverse the illegal act. Although a petition for deferred prosecution might someday be revoked and defendant eventually be convicted, the implicit reasoning was that a possible favorable future outcome is not a “plain, adequate, and speedy remedy.” Like the *Glasser* court, this court should conclude that a speculative favorable outcome by cross-appeal is neither a “plain” nor an “adequate” remedy.

Similarly, in *City of Mount Vernon v. Mount Vernon Municipal Court*¹¹, the court held that a Writ of Review should have issued to correct the illegal suppression of a breath test result based on a plainly erroneous interpretation of a WAC. The City of Mount Vernon was precisely in the

⁹ See e.g. *State v. Mandel*, 23 Wn. App. 562, 597 P.2d 443 (1979); *State v. Ladiges*, 66 Wn.2d 273, 401 P.2d 977 (1965); *State v. Miller*, 59 Wn.2d 27, 365 P.2d 612 (1961).

¹⁰ 37 Wn. App. 131, 132, 678 P.2d 827 (1984) *rev. denied* 102 Wn.2d 1008 (1984).

same position as the City of Seattle herein and a writ should issue.

Applied herein, the cases cited above strongly support the conclusion that no “adequate remedy” is available.¹² The inherently speculative nature of cross-review is not a “plain, adequate, and speedy remedy” and a writ should have issued.

b. The ruling of the trial court in *Seattle v. Kennedy* is a clear error of law.

The Petitioner argues that despite the decision of the Superior Court judge recognizing the clear legal error of the trial court’s order, the trial judge’s order was nonetheless based on sound legal principle and thus not erroneous. This argument by the Petitioner fails.

CrRLJ 8.3 is by its nature a rule that provides for *dismissal* of actions in cases of governmental misconduct. The rule provides:

RULE 8.3 DISMISSAL

(b) On Motion of Court. The court, in the furtherance of justice after notice and hearing, may *dismiss* any criminal prosecution due to arbitrary action or governmental misconduct when there has been *prejudice* to the rights of the accused which *materially* affect the

¹¹ 93 Wn. App 501, 973 P.2d 3 (1998).

¹² See also, *State v. Houser*, 91 Wn.2d 269, 588 P.2d 219 (1978)(where trial set beyond speedy trial deadline, Writ is appropriate remedy to prevent trial).

accused's right to a fair trial. The court shall set forth its reasons in a written order.

(Emphasis added). The rule makes no provision for suppression of evidence.

Court rules are interpreted using principles of statutory construction.¹³ The construction of a statute is reviewed de novo.¹⁴ Language which is clear does not require or permit any construction.¹⁵ Where there is no ambiguity in a rule there is nothing for a court to interpret.¹⁶ The parties' ability to argue two interpretations of a statute does not necessarily render the statute ambiguous.¹⁷

As the Superior Court acknowledged, the trial court erred as a matter of law in suppressing evidence under CrRLJ 8.3. Applying the rules of statutory construction, a court may *dismiss* charges against a defendant if there is 1) governmental misconduct; and 2) actual prejudice. Dismissal of charges is the only remedy sanctioned by the rule to cure governmental misconduct that results in actual prejudice. Suppression is **not** a remedy contemplated by the rule.

¹³ *State v. Greenwood*, 120 Wn. 2d 585, 592, 845 P. 2d 971 (1993).

¹⁴ *State v. Azpitarte*, 140 Wn. 2d 138, 140-41, 995 P. 2d 31 (2000).

¹⁵ *State v. Hutchinson*, 111 Wn. 2d 872, 877, 766 P. 2d 447 (1989).

¹⁶ *Id.*

¹⁷ *State v. Taplin*, 55 Wn. App. 668, 670, 779 P. 2d 1151 (1989)

Additionally, case law supports the position that suppression is not a remedy under CrRLJ 8.3. Where the defense has failed to establish actual prejudice, suppression of evidence *is not* appropriate as an alternative remedy, notwithstanding alleged misconduct.¹⁸ The cases relied on by the trial court in its conclusions of law do not support suppression under CrRLJ 8.3. Rather, those cases dealt with suppression of evidence for violation of the *right to counsel*.¹⁹ In *Orwick*, the defendant sought and obtained dismissal of his case in the trial court for denial of the right to counsel. On appeal, the Supreme Court held that dismissal was unwarranted in cases where suppression of evidence would eliminate the prejudiced cause by an infringement of the right of access to counsel.

In *Busig*,²⁰ the defendant contended that her case should have been dismissed pursuant CrR 8.3(b) due to arbitrary action or governmental misconduct based on inaccurate statements in an affidavit of probable cause for a search warrant. The defendant alleged that the search warrant led to an invasion of her home and prejudice to her case. The Court of

citing *Armstrong v. Safeco Ins. Co.*, 111 Wn. 2d 784, 765.2d 276 (1988).

¹⁸ *City of Seattle v. Orwick*, 113 Wn.2d at 831 citing *State v. Ivey*, 73 Wn.2d 859, 590, 439 P.2d 974 (1968).

¹⁹ See, e.g. *Seattle v. Orwick*, at 831.

²⁰ 119 Wn. App. 381, 81 P. 3d 143 (2003)

Appeals, Division Three, affirmed the trial court, stating in dicta that neither dismissal nor suppression of evidence under CrR 8.3(b) was justified. The Court did not hold that suppression was an available remedy under CrR 8.3(b).

The courts in both *Orwick* and *Busig* addressed issues related to an alleged violation of a constitutional right. While in *Busig* the trial court action resulting in the appeal began as a motion to dismiss under CrR 8.3(b), the ultimate question answered in both *Orwick* and *Busig* was whether suppression was an appropriate remedy for a violation of a constitutional right where prejudice is *presumed*.²¹ This is to be contrasted with CrRLJ 8.3(b), where a defendant must show his right to a fair trial has been materially affected.

The petitioner nonetheless argues that a recent Division Two case validates his argument that suppression is a remedy under CrRLJ 8.3. Again, the petitioner is incorrect. The petitioner cites *State v. Brooks*²², however he completely misinterprets the court's conclusions as to the remedy provided by CrRLJ 8.3. That court did not suggest that the rule provided a remedy of suppression in addition to dismissal. The court simply noted that in the trial court, after the case had been dismissed, the

²¹ *Orwick*, 113 Wn. 2d at 829.

prosecution argued several alternatives *under different rules* that would be appropriate.²³ There is no suggestion in that case that the *Brooks* court is departing from well established case law interpreting CrRLJ 8.3.

The trial judge erred as a matter of law when he suppressed breath tests results pursuant CrRLJ 8.3 because suppression is not a remedy under the rule. Moreover, *any* action under CrRLJ 8.3 would be a clear error of law because the Petitioner completely failed to establish any actual prejudice, as evidenced by the trial court's failure to make any findings as to how any defendant had been *materially* affected by any of the allegations of misconduct. The trial judge merely found that the magnitude of the misconduct was the equivalent of prejudice. While the court's order stated that the trial judge would not believe the testimony of certain witnesses (BKL, EF, MP and AMG) if called to testify at trial, there was no finding that any of those witnesses would, in fact, testify at trial. Moreover, there is no showing in the order that any breath test – the subject of the suppression motion - was materially affected by any of the alleged governmental misconduct. In meeting the burden of proof under CrRLJ 8.3(b), a defendant *may not rely on speculation*.²⁴ See, e.g. *State*

²² Slip opin. No. 36171-0-II, March 24, 2009.

²³ *Id.*

²⁴ *Id.*; *State v. White*, 126 Wn. App. 131, 135, 107 P.3d 753

v. *White*, 126 Wn. App. 131, 135, 107 P.3d 753 (2005)(finding that the alleged prejudice may not be merely vague or speculative - it must directly relate defendant's ability to have a fair trial); *State v. Louie*, 68 Wn. 2d 304, 413 P.2d 7 (1966)(finding the defense motion to dismiss alleging a due process violation was properly denied because the defendant's claim of prejudice was "purely speculative").

The trial judge erred as a matter of law in suppressing the breath tests in these cases. Applying the rules of statutory construction and established case law, suppression of evidence is not a remedy under CrRLJ 8.3. Further, the Petitioner did not suffer any actual prejudice which would warrant any action under the rule.

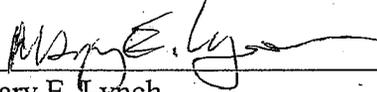
F. CONCLUSION.

Based on the foregoing argument, this court should deny the Petitioner's Motion for Discretionary Review of the decision of the Court of Appeals, Division One, and remand the case to Seattle Municipal Court for trial.

Respectfully submitted this 12th day of May, 2009.

(2005)(finding that the alleged prejudice may not be merely vague or speculative- it must directly relate defendant's ability to have a fair trial); *See also State v. Louie*, 68 Wn. 2d 304, 413 P.2d 7 (1966)(finding the defense motion to dismiss alleging a due process violation was properly denied because the defendant's claim of prejudice was 'purely

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