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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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Respondent

vs.

STEPHEN CHRISS JOHNSON,

Petitioner,

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SUPREME COURT
STATE OF WASHINGTON
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REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

Jon E. Cushman
Kevin Hochhalter
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

360-534-9183

Attorneys for Petitioner

1800.007
w/c file

 ORIGINAL

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I. INTRODUCTION

Stephen Johnson, Petitioner, replies to the State's response to his motion for discretionary review.

II. ARGUMENT

The court should accept review because this case involves issues of great public interest and significant constitutional questions that should be resolved by an appellate court of this state. The State did not respond to any of Mr. Johnson's arguments of public interest, instead essentially arguing that "Mr. Johnson is wrong therefore there is no public interest." This is not enough. Mr. Johnson has shown that his statutory and constitutional arguments are well-grounded. If he is correct, the decision rendered by this court could impact the lives of hundreds of thousands of Washington drivers. This court should accept review.

A. There Is Great Public Interest In Knowing the Correct Interpretation of the DWLS Statute.

Nearly 300,000 Washington drivers currently have their licenses suspended for failure to pay their tickets. Many feel compelled to continue driving in order to earn a living. If these drivers were to consult the DWLS statute to determine what penalties they face, what they would find is a lengthy mess of difficult language and cross references that even the

District Court described as “confusing,” “extremely complicated,” and “not a good situation at all.” (App. at 177.) What the drivers would find is that it is a misdemeanor to drive with a license suspended for failing to respond to a notice of infraction, failing to appear in court, or failing to comply with what the notice of infraction required them to do. The drivers would not find any language in RCW 46.20.342 to put them on notice that there is a criminal penalty for a suspension based solely on failure to pay. Yet the State is prosecuting and the District Courts are convicting drivers like Mr. Johnson for that very thing. The difference between the plain language of the statute and the way it is being applied is a matter of great public interest that should be resolved by an appellate court.

B. The State’s Interpretation of the DWLS Statute Has No Basis In the Plain Language or Legislative Intent.

The State’s interpretation is based on a stretched and untenable reading of the language “failed to comply with the terms of a notice of traffic infraction or citation.” Both the State in its arguments and the courts in their rulings have glossed over their flawed interpretation by using a shorthand: “failed to comply with the infraction.”¹ This reveals their true

¹ E.g. Response at 6 (State: “fails to comply with their traffic infraction”); App. at 223 (Superior Court: “failure to comply with the terms and conditions of a traffic offense”); App. at 199 (State: “comply with a traffic infraction”); App. at 180 (District Court:

goal: finding a way to punish failure to pay, rather than applying the law that was enacted by the legislature.

It is a fundamental principle of American criminal justice that it is better to mistakenly let a criminal go free than to mistakenly punish an innocent man. The legislature is tasked with determining what conduct warrants punishment and what that punishment should be. In keeping with these principles, criminal statutes are strictly construed. *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). Courts are not to add language that the legislature did not use. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

In the DWLS statute, the legislature did not say “failed to comply with an infraction” or “failed to comply with the infraction process” or “failed to comply with the terms and conditions of an infraction” or “failed to comply with an order of the court.” The legislature said: “failed to comply with the terms of a notice of traffic infraction or citation.” The courts cannot change or add to the meaning of this statutory language.

The central question for this court on review will be what that

“comply with the infraction”). The State even tries to redefine the issues in this motion with this shorthand. *See* Response at 1 (“failure to comply with the terms of a traffic infraction”; “failure to comply with a traffic infraction”).

phrase means. The answer is not only clear from the plain language, but is reinforced by the legislative history and use in related statutes: It means the terms printed on the notice of infraction itself, nothing more.

The bill that added RCW 46.20.342(1)(c)(iv) to DWLS 3rd was enacted to fully implement the Nonresident Violator Compact (RCW 46.23.010) by requiring suspension of a license, rather than criminal penalties, for failure to comply with the terms of a citation. (App. at 285-87.) It was part of a movement to *decriminalize* traffic violations, not to enhance enforcement efforts.²

The Compact requires license suspension for “failure of a motorist to comply with the terms of a traffic citation.” RCW 46.23.010, Art. III.

The Compact defines “terms of the citation”:

(1) “Citation” means any summons, ticket, *notice of infraction*, or other official document issued by a police officer for a traffic offense containing an order which requires the motorist to respond.

...

(11) “Terms of the citation” means *those options expressly stated upon the citation*.

RCW 46.23.010, Art. II (emphasis added).

² See House Bill Report HB 1741, 1993, reproduced in App. at 286 (“Crimes relating to failure to respond to a traffic infraction and failure to comply with a traffic citation are repealed. The offenses are made infractions for which the Department of Licensing (DOL) is to suspend a driver’s license.”); accord Senate Bill Report SHB 1741, 1993, App. at 294 (“This bill follows the move to decriminalize minor traffic crimes.”).

The legislature intentionally used this same language in RCW 46.20.342(1)(c)(iv): “failed to comply with the terms of a notice of traffic infraction or citation.” The phrase means the same thing as it does in the Compact: a failure to comply with “those options expressly stated upon the [notice of infraction].” The notice of infraction Mr. Johnson received did not expressly state anything requiring him to pay a fine imposed by the court after a contested hearing. Mr. Johnson’s failure to do so was not a failure to comply with the options expressly stated on his notice of infraction. Mr. Johnson’s failure to pay his civil debt to the court may have been wrong, but it was not a valid basis for a conviction under DWLS 3rd.

The State argues that this result is absurd because it does not require an escalated punishment. This argument was addressed by the legislature when the bill was passed. The committee heard testimony that decriminalizing failure to respond, appear, or comply could hamper enforcement. (App. at 287.) The legislature soundly rejected this criticism, passing the bill unanimously. (App. at 284.) Weaker enforcement is not an absurd result; rather, it is a result the legislature anticipated and accepted.

The State also argues the result is absurd because it allows dangerous drivers to keep driving. This argument was addressed by the Washington Supreme Court in *City of Redmond v. Moore*, 151 Wn.2d 664,

677, 91 P.3d 875 (2004):

The State's interest in suspending an individual's driver's license for failing to appear, pay, or comply with a notice of traffic infraction is in the efficient administration of traffic regulation. . . . Simply put, failing to resolve a notice of traffic infraction does not pose the same threat to public safety as habitually unsafe drivers do.

Suspension for failure to respond, appear, or comply has nothing to do with keeping unsafe drivers off the road. It is a tool to obtain payment, nothing more. Habitually unsafe drivers are subject to criminal penalties under DWLS 1st (habitual offenders) and DWLS 2nd (various unsafe acts). Mr. Johnson's interpretation of DWLS 3rd does not remove legislatively determined penalties for unsafe driving.

Mr. Johnson's interpretation of the DWLS statute is not absurd. It follows the plain language of the statute and is supported by legislative history and the treatment of similar conduct under the law.³ What is absurd is the State's blind insistence that failure to pay is included in the meaning of "failed to comply with the terms of a notice of traffic infraction" when the terms of the notice do not require it. This court should accept review and reverse Mr. Johnson's erroneous conviction.

³ See Motion for Discretionary Review at 8, note 6 (suspension for failure to pay child support, a similar type of debt, is not a basis for conviction under the DWLS statute).

C. Whether Suspension of a Licence for Failure to Pay By an Indigent Defendant Violates Equal Protection Is a Significant Constitutional Question.

The State spends two pages of its response on RCW 46.20.091, an issue that Mr. Johnson has not even raised in this appeal.⁴ The State then proceeds to attack a straw man by misstating Mr. Johnson's arguments and presenting erroneous conclusions of constitutional law. Because this is a significant constitutional question, the court should accept review.

Both the State and the courts below have incessantly repeated the mantra, "Driving is a privilege and not a right," despite the clear statement of the Washington Supreme Court in *State v. Dolson*, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999) (cited in *Moore*) that "A driver's license represents an important property interest and cannot be revoked without due process of law." These attempts to resurrect long-ago discredited doctrines betray the State's and the lower courts' greater interest in punishment than in understanding and correctly applying the law.⁵

⁴ See Motion for Discretionary Review, Part 3, Issues Presented for Review.

⁵ An example that is typical of the treatment Mr. Johnson has received in this case occurred at the hearing on Mr. Johnson's motion for reconsideration, when Judge Rowe of the District Court claimed that *City of Redmond v. Moore* was a Court of Appeals opinion that could not overturn *State v. Rawson*, an antiquated 1942 opinion that held that deprivation of a driver's licence could never be unconstitutional. (App. at 64.) *Moore* is, in fact, a Washington Supreme Court opinion that followed the holding in *Dolson*, supra, which directly contradicts the *Rawson* holding relied upon by Judge Rowe.

Perhaps this misguided focus is to blame for their apparent inability to understand Mr. Johnson's argument that coercive suspension of an indigent driver offends equal protection. For purposes of this equal protection argument, we can assume that the indigent driver complies with his suspension and does not drive. Thus the driver is under no threat of incarceration.⁶ However, the very suspension itself is offensive to equal protection when applied to the indigent driver. The problem is not that suspensions are applied differently to indigent drivers; the problem is that coercive suspensions, even applied equally, work an invidious discrimination against indigent drivers, punishing them severely for something they are unable to control—their inability to pay.

Even the State's claim that suspensions are applied equally is dubious. Fines naturally impose a different burden on people of different incomes. A person with some discretionary income will feel the bite of the fine but will readily pay it. People with greater incomes will be punished less, because they have to give up proportionally less in order to pay the fine. At high incomes, the punishment of a fine becomes insignificant. But for a person who is just getting by, the sacrifice required to pay the fine is

⁶ Mr. Johnson has never argued, as the State claims, that an indigent person is effectively sentenced to a jail term when his license is suspended for failure to pay.

immense. For an indigent person, who does not even have the means to meet their basic needs, the burden becomes insurmountable.

Generally speaking, people who are able to pay the fine will pay it and will not be suspended. Those who are unable to pay will be suspended indefinitely, perhaps for the rest of their lives. Suspensions are not handed out equally, and they punish the poor and the indigent to a far greater degree than they punish the wealthy.

The Washington Supreme Court has acknowledged that suspension can be an effective tool to coerce payment from a person who is *able to pay*. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 227 (2006). The constitutional problem arises when suspension is applied to an indigent driver. Suspension will never coerce payment from someone who simply cannot pay. A person who is able to pay holds the key to the “prison” of suspension; all they have to do is pay. The indigent driver has no key and must endure the punishment without hope or power to escape. This is precisely the problem condemned by the U.S. Supreme Court in *Tate v. Short*, 401 U.S. 395 (1971), as offensive to equal protection.

In fact, the problem here is even worse. Whereas, in *Tate*, the indigent defendant earned credit toward payment of the fine for each day in prison, here the indigent driver earns no credit for time spent suspended.

The suspension, easily removed by a person with means, is infinite for the indigent driver. This violates equal protection and is thus a significant constitutional question. This court should accept review.

D. The District Court Violated Due Process On Appeal.

Even if the hearing was authorized by statute and Mr. Johnson was not indigent (both untrue), it was done without any advance notice or meaningful opportunity to be heard, in violation of Mr. Johnson's due process rights. By its own terms, RCW 10.101.020(4) applies only to a provisional appointment, which this was not. In addition, Mr. Johnson was indigent under the statutory definition.⁷ This erroneous deprivation of Mr. Johnson's right to appointed counsel on appeal violated due process. This court should accept review of this significant constitutional question.

III. CONCLUSION

The correct interpretation of the DWLS statute is a matter of great public interest that should be authoritatively determined by an appellate court of this state. The case also involves significant constitutional questions. This court should accept review on all of these issues.

⁷ The State complains about "previously undisclosed information." The information was not disclosed because the State never asked for it. (App. at 36.) Regardless, Mr. Johnson was indigent because he was a recipient of food stamps and, alternatively, because his income was below 125% of federal poverty level. *See* RCW 10.101.010(1)(a) and (c). The additional information was irrelevant to the determination of indigency.

Respectfully Submitted this 19th day of September, 2011.

CUSHMAN LAW OFFICES, P.S.


Kevin Hochhalter, WSBA #43124
Attorney for Stephen Johnson

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 19, 2011, I caused to be served a true copy of the foregoing Reply in Support of Motion for Discretionary Review, by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail
copy:	Shane Michael O'Rourke, 345 W. Main St, 2 nd Floor Chehalis, WA 98532	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail

DATED this 19th day of September, 2011 in Olympia, Washington.


Elisabeth Cushman
Paralegal to Kevin Hochhalter