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STATE OF WASHINGTON
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NO. 88694-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERISTUS JORDAN JOHNSON,

Appellant.

STATE'S RESPONSE TO AMICUS CURIAE

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 ORIGINAL

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A. INTRODUCTION

Amicus ACLU makes several general proclamations about certain activities that, when engaged in by an individual, may be protected by the First Amendment. Primarily, Amicus asserts that merely observing or criticizing police officers is protected speech. For the most part, when these activities are engaged in separately, the State agrees that the activities may be protected. The State also agrees with the importance of safeguarding the ability to engage in these activities.

What is missing, however, from Amicus' argument calling for the dismissal of the defendant's conviction is an appropriate nexus or legal mechanism connecting Amicus' general proclamations to the proven facts of the defendant's case and the remedy they seek. No motion to suppress any evidence was ever made in this case. The legal claims on appeal are limited to a First Amendment challenge to the obstruction statute itself, and an "as applied" challenge based on the proven facts of the case. Appellate courts do not make credibility determinations, do not resolve factual disputes, do not make findings of guilt or innocence, and do not conduct suppression hearings. Thus, an "as applied" challenge

cannot be based on disputed or unproven facts, acts viewed in isolation, or facts taken in the light most favorable to the defendant.

B. ARGUMENT IN RESPONSE

1. THE STATE AND AMICUS AGREE THAT THE OBSTRUCTION STATUTE IS CONSTITUTIONAL.

While Amicus calls for the dismissal of the defendant's conviction, Amicus appears to be in agreement with the State that the obstruction statute, RCW 9A.76.020, is constitutional. See Amicus br. at 11-13. With (1) a *mens rea* element that requires that the perpetrator act "willfully" in obstructing a law enforcement officer, (2) this Court's finding that the obstructing statute focuses on conduct -- not speech, and (3) this Court having previously placed a limiting construction on the statute that requires that any conviction under the statute be based at least in part on a perpetrator's conduct, the parties appear to agree that the statute does not violate the First Amendment. See State v. Grant, 89 Wn.2d 678, 575 P.2d 210 (1978); State v. Williams, 171 Wn.2d 474, 251 P.3d 877 (2011).

**2. THE DEFENDANT'S ACTIONS DO NOT FALL
WITHIN THE PROTECTED ACTIVITIES
DISCUSSED BY AMICUS.**

While Amicus offers general propositions that certain activities are protected by the First Amendment, and then asserts that the defendant's conviction must be dismissed, Amicus cites no nexus or legal mechanism that would allow this Court to dismiss the conviction. In other words, there are practical impediments that bar the remedy sought by Amicus.

To begin, the defendant never moved to suppress any evidence in the trial court. Thus, all the evidence admitted at trial was properly considered by the trial court in determining whether the defendant was guilty of the crime of obstructing a law enforcement officer. See State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (citing State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539 (1967)) ("Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of facts.").

CrR 3.6 is the rule governing motions to "suppress physical, oral or identification evidence." The party seeking to suppress evidence "shall" file a written motion with a supporting affidavit or document setting forth the facts the moving party anticipates will be

elicited at a hearing. CrR 3.6(a). The trial court will then decide the facts, apply the law, and enter the required written findings of fact and conclusions of law. CrR 3.6(b). CrR 3.5 addresses the admission of statements of an accused. As with CrR 3.6, after a hearing on the admissibility of statements made by the accused, the trial court is required to enter written findings of fact and conclusions of law. CrR 3.5(c). A defendant may waive his right to a suppression hearing before the trial court which may waive the right to contest the issue on appeal. See e.g., State v. Valladares, 31 Wn. App. 63, 639 P.2d 813, aff'd in part, rev. in part, 99 Wn.2d 663 (1982) (by withdrawing his motion to suppress evidence, defendant elected not to take advantage of the mechanism that the State placed at his disposal for excluding evidence, and therefore waived or abandoned his Fourth Amendment objections).

As a general rule, a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a "manifest error affecting a constitutional right." Robinson, 171 Wn.2d at 304; RAP 2.5(a). Here, defense counsel was specifically asked if there was a need for a CrR 3.6 hearing; counsel responded that there was not. RP 6. Defense counsel was also asked about the need for a CrR 3.5 hearing; again, counsel stated

that there was not. Id. Counsel stated that the sole basis for objecting to the admissibility of the defendant's statements was an assertion that the statements were inadmissible hearsay under the rules of evidence. Id.

Even where a defendant can show that his failure to raise an issue below may be excused under RAP 2.5, there may be a related problem that prevents full review of a claimed error – the lack of an adequate record for review. State v. Millan, 151 Wn. App. 492, 500-02, 212 P.3d 603 (2009), rev. on other grounds by Robinson, supra.

In State v. Riley,¹ for example, this Court declined to review the defendant's claim that his incriminating statements should have been suppressed as the fruits of an unlawful search. Because there had been no hearing in the trial court, this Court held, the factual record was insufficient to determine whether there was manifest error. Riley, 121 Wn.2d at 31.

In State v. Kirkpatrick,² a suppression hearing was held regarding the admissibility of the defendant's statements. The claim before the trial court was that Kirkpatrick's statements should

¹ 121 Wn.2d 22, 846 P.2d 1365 (1993).

² 160 Wn.2d 873, 161 P.3d 990 (2007), overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

have been suppressed because he had not been read his Miranda³ warnings. On appeal, Kirkpatrick claimed his statements should have been suppressed because of an unlawful seizure. While Kirkpatrick's claim "is constitutional in nature," and a hearing was held on the admissibility of his statements, this Court declined to hear the new argument, stating, "[t]he record is insufficient" to determine the validity and consequences of Kirkpatrick's claims. Kirkpatrick, at 881. "Moreover," this Court added, "Kirkpatrick's claim calls for a fact-specific analysis which this court is ill equipped to perform given the lack of trial court fact-findings." Id.

Appellate courts do not determine facts or make credibility determinations. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992). "This court has long recognized that it is the function and province of the jury to weigh the evidence and determine the credibility of the witnesses and decide disputed questions of fact." Stiley v. Block, 130 Wn.2d 486, 502, 925 P.2d 194 (1996) (citing State v. Dietrich, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969)).

It is the trial court at a motions hearing, or the jury or judge at trial, who determines the true facts. It is this fact finder who may

³ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

draw all inferences fairly deducible from the evidence and it is this fact finder who resolves conflicting evidence. In re Kier, 21 Wn. App. 836, 840, 587 P.2d 592 (1978); In re Infant Child Perry, 31 Wn. App. 268, 269, 641 P.2d 178 (1982). True conflicts in the evidence present a question for the trier of fact, not a reviewing court. State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). However, on appeal, when there is a claim of insufficient evidence, the evidence is viewed in the light most favorable to the opposing party. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Amicus asks this Court to dismiss the defendant's case because, Amicus claims, he was merely observing and criticizing the police -- a protected activity, and he stayed at least 10 to 15 feet away from the police at all times. See Amicus br. at 2, 13. This claim is factually inaccurate and assumes a factual conclusion not in the record. The citation to the 10 to 15 feet distance Amicus claims the defendant stayed back from the police (Amicus br. at 2, citing to RP 30), is actually the distance between where RJ and the officers were located and the front door of the house.⁴ Additionally, the officers testified that the defendant "came to us from the rear"

⁴ Q: And so the distance between where you [the officer] were standing with [RJ] and the front door, approximately how much distance is between there, would you say?

A: Maybe 10, 15 feet.

(RP 40), "walked up to where we were standing" (RP 39), and that he was not just observing or criticizing them, he was also conversing with RJ (RP 19, 36, 45) while the officers were trying to calm her down and conduct their investigation. Even the defendant admitted that he exited the house, left the porch, and went toward the officers based on his claim that an officer had raised a baton as if to strike RJ. RP 69-70.

In sum, there is no testimony that establishes how close the defendant actually got to the officers and RJ – whether he was face to face with them, or a few feet away. What the evidence does show is that the defendant did not remain in his house or at the front door, he did not remain on the front porch, and he did not remain 15 feet away from the officers. Additionally, the evidence does not support, and there is no finding, that all the defendant did was observe and criticize the police.

Amicus fails to articulate how it is that this Court can find the defendant's conviction violates the First Amendment when their argument is based on unresolved findings, disputed facts or conclusions not made by the trial court.⁵

⁵ The Court of Appeals recognized this problem, noting that the defendant never made any motion to suppress or constitutional challenge below, and questioning

Additionally, Amicus cites to what they assert is a history of misuse of the obstructing statute by the Seattle Police Department against persons of color, and in this case, claims that the statute was used to "silence the voice of a youth of color." Amicus br. at 6. Amicus then cites to references showing racial disproportionality in arrests for obstructing, and states that the defendant's conviction cannot stand. Id. But this argument suffers from two problems that Amicus does not address.

First, in making this argument, Amicus cites to no legal mechanism allowing for the reversal of the defendant's conviction. The only legal issues before this Court are a First Amendment challenge to the statute as a whole, and an "as applied" First Amendment challenge.

Second, claims of racial bias and a desire to silence criticism are not supported by the record in this case. At least one, if not more, of the officers in this case were of the same race as the defendant, RJ and RJ's mother. RP 68. Further, this event started as a domestic violence call by RJ's mother. While the testimony is undisputed that RJ was intoxicated and out-of-control, the officers did not arrest her for obstructing. The officers showed appropriate

how the defendant could somehow limit the evidence the court could consider in addressing the issues raised.

restraint and had actually calmed RJ down and were hoping to avoid having to place her under arrest. RP 39. It was after the officers had RJ calmed down that the defendant came outside and prevented the officers from resolving the situation as RJ's mother and the officer had wanted – having RJ removed from the residence in a peaceful manner and without having her placed under arrest. RP 17-18, 22-26, 39, 52.

Finally, Amicus does not address how the defendant's speech can be divorced from his conduct, or how only certain portions of his speech may be protected and should not be considered by the court. First, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Cox v. Louisiana, 379 U.S. 559, 563, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965). Second, to portion out specific aspects of the defendant's actions or speech, is to ask this Court to act as a trial court in determining whether certain evidence should be suppressed, and then to act as a jury by determining whether the remaining evidence establishes guilt.

The State does not mean to suggest that a First Amendment challenge cannot be made to a conviction. The challenge, however, must be made under a discernable legal theory and within the confines of the existing proven facts.

Amicus raises many valid and important issues in regards to the First Amendment and the use of the obstructing statute by police departments. This response is not meant to diminish in any way the importance of the points raised. The issues merit thorough discussion before this Court in the appropriate case, with the appropriate record and requisite factual determinations.

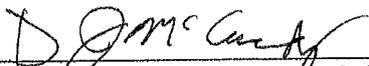
C. CONCLUSION

For the reasons stated in the Supplemental Brief of Respondent and as stated above, this Court should reaffirm that the obstructing statute is constitutional, and affirm the defendant's conviction.

DATED this 18 day of February, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the respondent, Lila Silverstein, of Washington Appellate Project, and attorneys for Amicus Curiae, La Ronda Baker of the ACLU and David Perez of Perkins Coie, containing a copy of the State's Response to Amicus Curiae, in State v. Johnson, Cause No. 88694-6, in the Supreme Court, for the State of Washington.

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

Name Dennis J McCurdy
Done in Seattle, Washington

Date 1/7/14

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To: OFFICE RECEPTIONIST, CLERK; McCurdy, Dennis
Cc: Lila Silverstein (Lila@washapp.org); 'Perez, David A. (Perkins Coie)'; La Rond Baker (lbaker@aclu-wa.org)
Subject: Eristus Jordan Johnson

Dear Clerk,

Please accept for filing in State v. Johnson, No 88694-6 the following documents: State's Responses to Amicus Curiae and Proof of Service

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