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NO. 102210-7

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

(Formerly Court of Appeals, Div. I, NO. 84246-3)

TERENCE R. JOHNSON,

PETITIONER,

v.

WASHINGTON STATE DEPT. OF LICENSING,

RESPONDENT.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Terence R. Johnson ("Johnson"), the Appellant in the proceeding below.

II. CITATION TO COURT OF APPEALS DECISION

Johnson seeks review of the Unpublished Opinion issued on May 8, 2023 by Division I of the Court of Appeals affirming the trial court's dismissal of Johnson's claim that, as applied to Johnson, RCW 46.20.289 violates the due process clause of the Washington Constitution and Johnson's rights under RCW 10.01.160(3) by its mandate that his property interest in his Washington Driver's License be taken without regard to whether Johnson had been afforded an ability to pay and payment plan hearing, and a determination he was in violation of such a plan.[1] On May 30, 2023, Johnson filed a Motion for Reconsideration seeking reconsideration of the Appellate Court's Unpublished Opinion. On June 9, 2023, the Court of

Appeals entered an Order Denying Motion for or Reconsideration.[2] On May 30, 2023, the Respondent Department of Licensing ("DOL") filed a Motion for Publication. On June 26, 2023, the Court of Appeals entered an Order Denying Motion to Publish.[3]

III. ISSUES PRESENTED FOR REVIEW

1. As applied to Johnson, does RCW 46.20.289 violate the due process clause of the Washington Constitution and Johnson's rights under RCW 10.01.160(3) by taking away his property interest in his Washington Driver's License without regard to whether Johnson had been afforded an ability to pay and payment plan hearing, and a determination he was in violation of such a plan?

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[1] A copy of the Unpublished Opinion is attached hereto as Appendix A.

[2] A copy of the Order Denying Motion for Reconsideration is attached hereto as Appendix B.

[3] A copy of the Order Denying Motion to Publish is attached hereto as Appendix C.

2. Is DOL's suspension of Johnson's Washington driver's license null, void, and unenforceable?

3. Must Johnson's Washington State driver's license be reinstated?

4. Must a Driving While License Suspended III citation pending in Mercer Island District Court be declared void, and must that action be dismissed?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

On May 16, 2014, Johnson was charged in Kirkland Municipal Court with driving under the influence. [CP 153; 159] At his arraignment, Johnson appeared *pro se* and pled guilty to the charge. [CP 153; 159] On May 19, 2014, the municipal court entered an order of conviction on the plea. [CP 153; 159]

Thereafter, the Kirkland Municipal Court imposed fines against Johnson in the amount of $4,068.91. [CP 154; 162] In imposing those fines, the Kirkland Municipal Court conducted

no hearing to determine Johnson's ability to pay the fines, nor to establish a reasonable payment plan for paying those fines. [CP 154]

On or about April 29, 2015, DOL received electronic notification from the Kirkland Municipal Court that Johnson had failed to pay the fines. On May 4, 2015, DOL mailed Johnson a Notice of Suspension based upon the Municipal Court's notification. Johnson timely submitted a request to DOL to challenge his suspension. On May 29, 2015, DOL issued a letter to Johnson stating it had completed its review and was upholding the suspension. [CP 28; 35-41]

Given Johnson's inability to pay the fines and his need to retain his driver's license, Johnson filed a Chapter 13 Bankruptcy Petition in the United States Bankruptcy Court for the Western District of Washington. [CP 154; 28] The filing of the bankruptcy proceeding stayed the action on the part of DOL to suspend Johnson's driver's license. However, Johnson's Chapter 13 bankruptcy case was dismissed in July 2017,

resulting in the stay being lifted with the dismissal of his case. [CP 154; 170]

Following the dismissal of Johnson's Bankruptcy case, the Kirkland Municipal Court issued another electronic notice of Johnson's nonpayment of the fines. [CP 28] On December 21, 2017, DOL issued Johnson a new Notice of Suspension, with an effective date of February 4, 2018. [CP 28; 154; 172] In response, Johnson contacted the collection agency for the Kirkland Municipal Court, Alliance One, in an attempt to negotiate a payment plan to avoid the suspension of his license. Alliance One declined to negotiate with Johnson and arbitrarily demanded a down payment in the amount of $1,797, an amount Johnson had no ability to pay (at the time, he was making $850 per month and on Medicaid). [CP 155; 174-177][4] Johnson then

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[4] It should be no surprise that AllianceOne provided no viable option to Johnson, let alone no "due process" protection. At the same time AllianceOne dictated payment terms to Johnson which he had no ability to pay, AllianceOne was a defendant in two separate class action lawsuits in the United States District Court for the Western District of Washington

wrote a letter to Judge Lambo at the Kirkland Municipal Court requesting relief but received no response. [CP 155; 178] DOL suspended Johnson's license on February 4, 2018. [CP 28; 155; 160]

The Administrative Review Request form provided by DOL to Johnson states explicitly that "We can only consider two issues during the review. These issues are: (1) whether our records correctly identify you, and (2) whether the information we received from the court or other agency accurately describes the action they took." RCW 46.20.245(2). DOL's appeal criteria, by statute, mandate that Johnson's license be suspended if he did not pay his fine, without regard to whether

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for overbearing and unlawful collection practices, which resulted in class action settlement payments of $1.9 million in 2017 and $2.2 million in 2019 (*Dibb et al v. AllianceOne Receivables Management, Inc.*, Case No. 3:14-CV-05835-RJB – see Docket No. 223, and *Rodriguez v. Experian Information Solutions, Inc. and AllianceOne Receivables Management, Inc.*, Case No. 2:15-cv-01224-RAJ – see Docket No. 66). No statute or case law authorizes AllianceOne to be the "gate keeper" for whether Johnson's driver's license may be suspended.

he had been afforded a hearing to consider his ability to pay and to establish a reasonable payment plan. [CP 155-156; 166] Under the statute, Johnson's ability to pay is assumed, and contumacious misconduct is presumed and punished.

Following DOL's unlawful suspension of Johnson's driver's license, on two occasions Johnson was cited for Driving While License Suspended III, one proceeding of which remains pending in Mercer Island Municipal Court. [CP 49] To obtain relief from DOL's unlawful suspension of his driver's license, Johnson filed the underlying suit against DOL in King County Superior Court on September 9, 2019.

B. Relevant Procedural History.

The appeal below was a second appeal to the Court of Appeals in the litigation by Johnson with DOL regarding DOL's unlawful suspension of Johnson's driver's license. The first appeal involved a dismissal of Johnson's due process violation claims based upon an insufficient record resulting from COVID 19 limitations on Johnson's ability to access

public information and the denial of a continuance of a summary judgment motion set by DOL In Johnson's first appeal, the Court of Appeals reversed that grant of summary judgment and the trial court's denial of a continuance of the hearing on the summary judgment motion, and remanded the case to the trial court to allow discovery and to allow Johnson to litigate his claims against DOL The relevant procedural history that preceded Johnson's first appeal is recited in the Unpublished Opinion by the Court of Appeals filed June 28, 2021 under appeal Case No. 8146-2-I [CP 46-56]

Following remand, with leave of court Johnson filed a First Amended Complaint for Declaratory Relief and Money Damages [CP 57-69] (the "Amended Complaint"). In his Amended Complaint, Johnson sought declaratory relief (1) that as applied to Johnson, RCW 46.20.289 violates the due process clause of the Washington Constitution, (2) that DOL's suspension of Johnson's Washington driver's license is null, void, and unenforceable, (3) that Johnson's Washington State

driver's license must be reinstated, and (4) that a Driving While License Suspended III citation pending in Mercer Island District Court is void and must be dismissed. [CP 63-64]

On April 29, 2022, Johnson filed a Motion for Summary Judgment [CP 76-98] on his Amended Complaint (the "Johnson MSJ"). [CP 80] In response, DOL filed Defendant's Opposition to Plaintiff's Summary Judgment Motion and Cross-Motion for Summary Judgment ("DOL's Opposition to MSJ). [CP 191-213] Johnson filed Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment. [CP 228-237]

The trial court heard oral argument on the Johnson MSJ and on DOL's cross-motion for summary judgment on June 3, 2022. Following oral argument, the trial court entered an Order Denying Plaintiff Summary Judgment and Granting Defendant Summary Judgment, dismissing all of Johnson's claims. [CP 238-239]

On June 10, 2022, Johnson filed a Motion for Reconsideration of Dismissal on Summary Judgment [CP 240-247] and a supporting Declaration of Michael E. Gossler. [CP 248-263] On June 28, 2022, the trial court entered an Order Denying Plaintiff's Motion for Reconsideration. [CP 270]

On June 29, 2022, Johnson appealed the Order Denying Plaintiff Summary Judgment and Granting Defendant Summary Judgment and the Order Denying Plaintiff's Motion for Reconsideration by filing a Notice of Appeal to Court of Appeals. [CP 264-268]

On May 8, 2023, the Court of Appeals denied Johnson's appeal and affirmed the trial court's dismissal of Johnson's claims.[5] The Court of Appeals based its decision on its erroneous conclusion that *City of Bellevue v. Lee*, 166 Wn.2d 581, 210 P.3d 1011 (2009) is controlling. *City of Bellevue v.*

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[5] Appendix A.

Lee did not address the due process issue raised by Johnson's appeal, and as discussed below, is not controlling.

Johnson moved for reconsideration. The Court of Appeals denied that motion.[6] DOL move to publish the Unpublished Opinion. The Court of Appeals denied that motion.[7] Johnson now seeks relief from the Washington Supreme Court by way of this Petition for Review.

V. ARGUMENT FOR GRANTING REVIEW

A. Applicable Standards for Granting Review.

Review should be granted under RAP 13.4(b)(3) and (4). Johnson's appeal presents a significant procedural due process question under the Washington State Constitution, and because the Washington State driver's license of every driver similarly situated to Johnson is at risk of loss as a result of the due process defect in the existing statutory scheme for license

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[6] Appendix B.

[7] Appendix C.

suspensions, Johnson's appeal presents an issue of substantial public interest.

B. RCW 46.20.289 Is Unconstitutional Because It Mandates the Suspension of Johnson's Driver's License Without First Ensuring He Had Been Afforded the Due Process Required by Article I, Section 3 of the Washington State Constitution.

1. A Washington Driver's License is a Protected Property Interest Under the Due Process Clause in Article I, Section 3 of the Washington Constitution.

Under Article I, section 3 of the Washington Constitution, no person may be deprived of life, liberty, or property, without due process of law.

Possession of a driver's license is an important property interest. A person cannot be deprived of a driver's license without due process of law. *City of Redmond v. Moore*, 151 Wn.2d 664, 670-71, 91 P.3d 875 (2004). See also *Flory v. Department of Motor Vehicles*, 84 Wn.2d 568, 527 P.2d 1318 (1974)(driver's licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment); *State v. Dolson*, 138 Wn.2d 773, 982 P.2d 100

(1999)("A driver's license represents an important property interest and cannot be revoked without due process of law;" "A revocation that does not comply with due process is void.").

The elements considered in a procedural due process claim are (1) the existence of a private interest; (2) the risk of an erroneous deprivation of the interest and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest. *City of Redmond v. Moore*, 151 Wn.2d at 670 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976)).

The private interest in this case is Johnson's substantial property interest in the continued use and possession of his driver's license. *City of Redmond v. Moore*, 151 Wn.2d at 670 ("Depriving a person of the use of his or her vehicle can significantly impact that person's ability to earn a living:" "the State will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any

delay in redressing an erroneous suspension through post-suspension review procedures.")

2. Due Process Requires an Ability-To-Pay Inquiry Before Sanctions Can be Imposed for Failure to Comply With a Court-Ordered Fine or Penalty.

In 1992, *State v. Curry,* 118 Wn.2d 911, 829 P.2d 166, 169 (1992) held that an indigent defendant cannot be jailed for failure to pay a mandatory victim penalty "unless the violation is willful." Five years later, *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997) held that although an indigent defendant may be ordered to pay appellate costs under a recoupment statute, "before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay."

The deprivation of the substantial property interest of a driver's license as a sanction for failure to pay a fine cannot be imposed consistently with due process if the driver does not have the ability to pay the fine. To prevent erroneous deprivation of the property right to a driver's license, the State

must evaluate whether the individual has the ability to pay the fine at issue before a driver's license lawfully may be suspended.

3. The Fatal Constitutional Flaw in the Existing License Revocation Scheme is that DOL Does Not Have Any Obligation or Ability to Consider Whether an Ability to Pay and Payment Plan Hearing Was Conducted Before Taking Away an Indigent Person's Driver's License.

RCW 46.20.289, and Washington's license suspension laws more generally, foreclose any ability-to-pay analysis, and mandate license suspensions without the procedural due process required by Article I, section 3.

Johnson's license was suspended by way of DOL's application of three sections of Chapter 46 RCW:

The first is RCW 46.20.289, which provides in pertinent part as follows:

> Except for traffic violations committed under RCW 46.61.165, the department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction for a moving violation, failed to appear

> at a requested hearing for a moving violation, violated a written promise to appear in court for a notice of infraction for a moving violation, or has failed to comply with the terms of a notice of traffic infraction, criminal complaint, or citation for a moving violation.

The second is RCW 46.64.025, which provides that when a driver "fails to comply with the terms of a notice of infraction for a moving violation or a traffic-related criminal complaint, the court with jurisdiction over the traffic infraction or traffic-related criminal complaint shall promptly give notice of such fact to the department of licensing."

The third is RCW 46.20.245. which provides that the department must give notice to the license holder, and allows the license holder to request a hearing within fifteen days of receipt of the notice, but limits that hearing to the following:

> (b) The only issues to be addressed in the administrative review are:
>
> (i) Whether the records relied on by the department identify the correct person; and
>
> (ii) Whether the information transmitted from the court or other reporting agency

> or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity.

This statute does not require DOL to consider whether an indigent licensee was provided an ability to pay and payment plan before suspending that persons driver's license.

The suspension of a person's driver's license without a requirement that the licensee be provided an ability to pay and payment plan hearing also violates Chapter 10.01 RCW. RCW 10.01.170(1) provides that if a defendant is sentenced to pay fines, and if the defendant is indigent,[8] "the court shall grant permission for payment to be made within a specified period of time or in specified installments."

RCW 10.01.160(3) further provides as follows:

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[8] RCW 10.101.010(3)(a-c) define a defendant to be indigent if he is (a) receiving public assistance, (b) has been involuntarily committed to a mental health facility, or (c) has an annual income of 125% or less than the currently established poverty level. Johnson qualified under subsection (c).

> (3) The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). **In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose**. [Emphasis added]

This Court's 2015 decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) is applicable. *Blazina* involved the trial court's imposition of discretionary legal financial obligations (LFOs) on Blazina under RCW 10.01.160(3) in its sentencing of Blazina on a conviction of one count of second-degree assault, without any individualized inquiry of Blazina on the record and consideration by the trial court of Blazina's ability to pay the discretionary fees. This Court held that the trial court's failure to conduct an individualized inquiry into Blazina's current financial ability to pay constituted a violation of his rights under RCW 10.01.160(3).

In Johnson's case here, DOL's suspension of Johnson's driver's license on February 4, 2018, violated Johnson's right to due process and his rights under RCW 10.01.160(3). In *Blazina,* this Court made it clear that "shall" means "shall," and that the sentencing court's failure to make an individualized determination of Blazina's ability to pay the fine and assessments violated the statute. In this case, the Municipal Court did not do so in issuing its May 19, 2014, Judgment and Sentence, in violation of the same "shall" mandate in RCW 46.63.110(6) and RCW 10.01.160(3). DOL's act of suspending Johnson's driver's license based upon a judgment entered in violation of the law is unlawful and must be held invalid.

In identical circumstances, the Washington Court of Appeals, Division I, in *Johnson v. City of Seattle*, 184 Wn.App 8, 21-22, 335 3d 1027 (2014) held that a City of Seattle Code section, which excluded consideration of a legal defense from the scope of review of a Code violation, violated due process. In the words of the Court:

> However, when Johnson tried to defend against his first citation with evidence of his nonconforming use, the hearing examiner would not consider his defense. The Code prevented the examiner from doing so.

Id. at 21. This, the Court of Appeals concluded "violated Johnson's right to procedural due process." *Id*. at 22.

So here, a statutory scheme (the combination of RCW 46.20.289, RCW 46.64.025, and 46.40.245), which restricts DOL's administrative review to a review of whether the licensee has been correctly identified and whether the information submitted by the referring court is authentic afforded Johnson no due process. Johnson had a due process right to have DOL consider and find whether he had been afforded an ability to pay and a reasonable payment plan hearing, and if so, and if he had defaulted on such a plan, before DOL had the legal right to suspend his license. Since RCW 46.20.245 requires no such inquiry, and indeed mandates the suspension of Johnson's driver's license without any such

inquiry, RCW 46.20.245 is unconstitutional on grounds of due process.

4. The Existing Statutory Scheme Gives Rise to a Substantial Risk of Erroneous Deprivation.

The second *Mathews* factor is the risk of erroneous deprivation of the interest at stake through the procedures used and the probable value, if any, of additional or substitute safeguards. *City of Redmond v. Moore*, 151 Wn.2d 664, 670-76, 91 P.3d 875 (2004). As was the case with the *City of Redmond v. Moore* case, wherein no procedure existed for an administrative hearing before DOL to contest the validity of the referral by the referring court – which created the risk of erroneous deprivation of driver's licenses – so here the absence of any provision in RCW 46.20.245 requiring DOL to determine whether Johnson had been afforded an ability to pay and payment plan hearing before suspending his license not only created the risk of an erroneous deprivation of Johnson's driver's license, it ensured that result.

As this Court observed in *City of Redmond v. Moore*:[9]

> Additionally "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey*, 443 U.S. at 12, 99 S.Ct. 2612.
>
> . . .
>
> Once a suspension takes effect, it remains in effect until the driver can resolve the matter with the court. Id. Thus the duration of an erroneous suspension under RCW 46.20.289 is dependent on the time it takes to get a court to reverse the error.

So here, the only "hearing" available to Johnson under RCW 46.20.245 provided him no due process relief because DOL could not consider whether he had been given an ability to pay and payment plan hearing because of the restricted scope of review available under RCW 46.20.245 (only verifying identity and the record). For the license suspension statute to pass constitutional muster, it either must require the referring court to provide proof that the driver was provided an ability to pay and payment plan hearing as part of the referral documentation,

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[9] *Id*. at 671.

and that there has been a failure to comply with that plan, or it should allow the suspension to be contested based upon the failure to have been provided such a hearing – as two possible alternative substitute safeguards. Neither is found in the existing language of RCW 46.20.289 and RCW 46.20.245.

In considering "the risk that a person wrongly will be deprived of a protected property right under the licensing statute", the Court of Appeals quoted language from this Court's decision in *City of Redmond v. Bagby,* 155 Wn.2d 59, 63-64, 117 P.3d 1126 (2005), that "there is minimal risk that a criminal defendant will be erroneously deprived of their driver's license," "since a criminal proceeding which results in a conviction provides sufficient due process," and these drivers pose greater public safety risks.[10] However, that analysis is applicable **only if** the basis for the license suspension was actually litigated – which is not the case here. Unlike *Bagby*,

[10] Unpublished Opinion, page 9.

where the basis for the license suspensions had been litigated before the referring court (by statute, specific criminal convictions, such as reckless driving, result in the automatic suspension of the defendant's driver's license immediately following the conviction), in Johnson's case here the municipal court made "no decision" on Johnson's ability to pay and considered no reasonable payment plan. DOL did not suspend Johnson's license on February 4, 2018, because of his DUI conviction in 2014, it suspended his license on February 4, 2018, because of his failure to pay the fine, for which he been given no hearing. A person's ability to pay a fine has no relationship to any public safety issue.

5. An Interest in Administrative Expedience Does Not Excuse the State's Obligation to Conduct an Ability-to-Pay Hearing

RCW 46.20.289 is not saved by a countervailing State interest. In suspending a driver's license under RCW 46.20.289, the State's sole interest is in "the efficient administration of traffic regulations" and "in ensuring offending

drivers appear in court, pay applicable fines, and comply with court orders."[11] The State's interest in assessing and collecting traffic fines simply does not outweigh the need for a pre-suspension hearing concerning a driver's ability to pay before suspending a license for failure to pay.[12]

Furthermore, declaring RCW 46.20.289's automatic suspension requirement unconstitutional imposes no burden on DOL. Gone with the statutory authority to suspend licenses is the burden of doing so. This leaves the Legislature to fashion a system that meets constitutional standards, or perhaps to

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[11] *Moore*, 151 Wn.2d at 677.

[12] *Moore*, 151 Wn.2d at 670 ("It is well settled that driver's licenses may not be suspended or revoked 'without that procedural due process required by the Fourteenth Amendment.'" (quoting *Dixon v. Love*, 431 U.S. 105, 112, 97 S. Ct. 1723, 52 L.Ed.2d 172 (1977) & citing *City of Redmond v. Arroyo–Murillo*, 149 Wn.2d 607, 612, 70 P.3d 947 (2003)).

abandon license suspensions as a penalty for failing to pay fines.[13]

6. *State v. Lee* Did Not Address the Due Process Issue At Issue In This Case.

City of Bellevue v. Lee, 166 Wn.2d 581, 585, 210 P.3d 1011 (2009) is not controlling here because this Court in *Lee* was not presented with, and therefore did not decide, the issue presented in this case. The only issue in *Lee* was whether the legislature cured the due process defect in a prior version of the suspension statute by providing for an administrative hearing to enable the department to determine whether any ministerial error occurred with the paperwork provided by the referring court to DOL. The sole issue on review by this Court in *Lee* was the nature of the hearing required to determine whether a ministerial error had occurred in the transmission of the record to DOL. In the words of this Court, "The DOL's suspension

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[13] Indeed, that is precisely what the legislature did to resolve this due process defect for the non-payment of fines for non-criminal moving violations. See Section B.7, *infra*.

process involves processing paperwork, not fact finding, and therefore there is no reason that an in-person hearing will resolve ministerial errors that an administrative review will not." This court then ruled that the nature of the review provided by the current version of the statute is adequate to ensure that the record had been correctly transmitted.

Johnson's challenge to the license suspension statute in this case is that the administrative review hearing fails to provide him due process because DOL deems itself by statute unable to consider, and therefore refuses to consider, in an appeal to DOL, whether Johnson was afforded his statutory and due process right to have his ability to pay and have an affordable payment plan set by the referring court prior to his license being suspended for failure to pay a fine. Johnson's claim in this case, not decided by *Lee*, is that a statute that mandates his license to be suspended without any consideration of whether he had first been provided an ability to pay and affordable payment plan hearing by the trial court takes away

his property interest in his driver's license without due process. That issue was neither addressed nor decided by this Court in *City of Bellevue v. Lee*.

7. Public Policy Implications.

Johnson is not the only person who has been wronged by Washington State's statutory scheme which obligates DOL to suspend driver's licenses for non-payment of fines without first affording a licensee a hearing to determine financial ability to pay and to have a reasonable payment plan provided, and DOL's implementation of that scheme. In October of 2020, Danielle Pierce and three other individuals filed a Complaint for Declaratory and Injunctive Relief against DOL and its Director in Thurston County Superior Court, Case No. 20-2-02149-34, seeking to invalidate Washington's statutory scheme for suspending driver's licenses for nonpayment of fines by indigent persons, on due process and other grounds (the "Pierce Complaint"). [CP 99; 102-142] In the Pierce Complaint, the plaintiffs cite a paper issued by the Washington State Attorney

General which estimates that the number of license suspensions under RCW 46.20.289 was approximately 190,000 in 2017 (paragraph 4 and fn.1). [CP 103]

Following the filing of the Pierce Complaint, the plaintiffs in that proceeding moved for summary judgment on their claims, and DOL cross-moved for summary judgment dismissal of those claims. On April 30, 2021, the trial court entered an Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment, and in doing so held that "RCW 46.20.289 is unconstitutional as applied to individuals who are indigent and is therefore void and unenforceable." [CP 99; 144-147] The court further ruled that it would grant further relief on motion by either party. [CP 145-146]

Thereafter, the Thurston County Superior Court entered a further agreed form of Order Enjoining Defendants from Suspending Certain Drivers Licenses and Requiring Rescission of Certain Driver's License Suspensions. [CP 149-152]

Among other things, that order enjoined DOL from suspending driver's licenses resulting from an individual's failure to pay or failure to appear for non-criminal moving violations, and ordered DOL to rescind all existing FTA suspensions for non-criminal moving violations imposed pursuant to RCW 46.20.289, to waive the $75 reissue fee, and to reinstate the previously suspended driver's licenses of said individuals. [CP 150-151].

Rather than appeal that decision, DOL pursued a legislative solution, as noted by the Court of Appeals at fn. 6 ("We note, however, that the court's ruling in Pierce has since been superseded by Statute. See Engrossed Substitute S.B. 5226, 67th Leg., Reg. Sess. (Wash. 2021) (amending RCW 46.20.289 to remove Department's authority to suspend licenses for non-payment of non-criminal moving violations)."[14]

[14] Appendix A.

The process held to be unconstitutional in the *Pierce* case is the identical process involved in this case.[15] Insofar as the payment of fines is concerned, there is no constitutional difference between a fine imposed for a "Non-Criminal Moving Violations" than for a "Criminal Moving Violation." Public safety is not enhanced or Violation butnying indigent drivers their driver's licenses because they cannot afford to pay a fine arising out of a Criminal Moving Violation, but allowing a person of means who is convicted of a Criminal Moving Violation to retain his license because that person had the ability to pay the fine. Public safety is addressed via other means – applicable to the indigent and wealthy alike, including the requirement of an Ignition Interlock Device as a condition of retention of one's license in the face of a DUI conviction.

[15] By granting Johnson's Petition for Review, this Court can definitively decide the due process issue and establish clear and binding precedent on this issue.

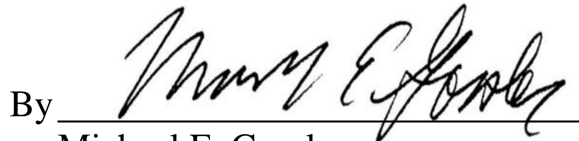
Because this case involves a substantial public interest, Johnson's Petition for Review satisfies RAP 13.4(b) (4).

VI. CONCLUSION

For all of the forgoing reasons, Johnson respectfully requests that this Court grant his Petition for Review. Washington State's statutory license suspension statutes are unconstitutional because they mandated the suspension of Johnson's driver's license, and they mandate the suspension of driver's licenses of everyone else similarly situated, without first ensuring that an indigent license holder has been afforded due process, resulting in the loss of a valuable property interest. The due process and substantial public interest issues raised by Johnson's appeal make this an appropriate case for this Court to grant review to Johnson.

RESPECTFULLY SUBMITTED this 25th day of July 2023.

MONTGOMERY PURDUE PLLC



By______________________________

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Based upon a word count performed by Microsoft Word, I certify that this Petition for Review contains 4981 words.

CERTIFICATE OF SERVICE

I, Lisa Hanlon, declare under penalty of perjury and in accordance with the laws of the State of Washington, that on July 25, 2023, I caused to be served a copy of the Brief of Appellant on counsel for Defendant via email and U.S. Mail at the address listed below:

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DATED: July 25, 2023 at Seattle, Washington.

Lisa Hanlon

APPENDIX A

FILED
5/8/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERENCE R. JOHNSON, Appellant, v. DEPARTMENT OF LICENSING, a Washington State Agency, Respondent.	No. 84246-3-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Under Washington law, when the Department of Licensing receives notice from a court that an individual has failed to pay court-ordered fines resulting from a drunk driving offense, it must suspend that person's license. After Terence Johnson repeatedly failed to pay his fines, the Kirkland Municipal Court provided such notice, and Johnson's license was suspended. Johnson contends the Department violated due process by not holding its own hearing to determine his ability to pay the fines. Our Supreme Court concluded that the statutory scheme governing license suspensions satisfies due process in City of Bellevue v. Lee, 166 Wn.2d 581, 210 P.3d 1011 (2009). Lee controls here; therefore, we conclude due process was satisfied and affirm.

FACTS

In May 2014, Johnson was charged with and pleaded guilty to driving under the influence in the Kirkland Municipal Court.[1] At sentencing, the municipal court imposed jail time and ordered Johnson to pay a series of

[1] Johnson was pro se during arraignment.

Citations and pin cites are based on the Westlaw online version of the cited material.

mandatory and discretionary legal financial obligations (LFOs). These LFOs totaled $4,068.91 and were payable to the municipal court clerk's office. The judgment and sentence contained a notice that "[f]ailure to pay [the fines] in full or have a payment plan set up with Signal Management by the due date . . . may result in additional late penalties and the matter will be referred to a collection agency." The notice informed Johnson that failure to pay "may also result in a bench warrant and/or the suspension of [his] driving privileges as directed by the Department of Licensing." Johnson did not challenge the imposition of the LFOs at sentencing and he did not appeal the judgment and sentence.

Between May 2014 and May 2019, Johnson appeared at several review hearings before the municipal court to evaluate his compliance with the requirements of his DUI conviction.

2015 Suspension

In 2015, the municipal court notified the Department that Johnson had failed to make required LFO payments. As mandated by statute, the Department sent Johnson a notice informing him of his pending license suspension and how to resolve the payment issue or seek administrative review of the Department's proposed action. See RCW 46.20.245(2) (setting out notice requirements in license suspension process). Johnson requested an administrative review of the proposed suspension. The Department completed its review and informed Johnson it was upholding the suspension.

Johnson then both appealed the Department's decision in King County Superior Court and filed a civil complaint against the Department in federal court,

alleging the Department unlawfully suspended his license. The federal court dismissed Johnson's case for failure to exhaust state administrative remedies. Johnson v. Dep't of Licensing, No. C15-0446MJP (W.D. Wash. June 22, 2015). Following this, and while his appeal was pending in superior court, Johnson filed a Chapter 13 bankruptcy petition. Filing for bankruptcy automatically stayed all collection actions against Johnson, which in turn stayed the Department's suspension of his license. Because of the stay, the Department reissued Johnson's license and the superior court dismissed his appeal as moot.

Two years later, in July 2017, the bankruptcy court dismissed Johnson's petition and Johnson was again required to pay his LFOs.

2018 Suspension

Soon after his bankruptcy petition was dismissed, the municipal court issued another notice to the Department about Johnson's nonpayment of the LFOs. In December 2017, the Department sent Johnson a new notice informing him that his license would be suspended if he did not either resolve the payment issue with the court or seek administrative review with the Department. Johnson did neither. Instead, in January 2018, Johnson filed a second civil complaint against the Department in federal court. Johnson v. Dep't of Licensing, No. C18-0147JLR (W.D. Wash. Feb. 26, 2018). The federal court again dismissed Johnson's complaint for failure to exhaust administrative remedies. Johnson, No. C18-0147JLR at *1. As a result of his inaction, Johnson's license was suspended for the second time in early February 2018.

While Johnson's license was suspended, he continued to drive and was subsequently charged in March 2019 for driving with a license suspended (DWLS) in Mercer Island District Court. The DWLS charge violated the terms of Johnson's 2015 DUI conviction and, as a result, the municipal court imposed 30 additional days of electronic home monitoring.

2019 Lawsuit

In May 2019, Johnson moved the municipal court to reduce or waive his remaining LFOs. The court removed his LFOs from collections, waived all accrued interest, cut Johnson's principal balance in half, and required him to make monthly payments of fifty dollars. The court also told Johnson that if he made payments for six months, he could move the court to strike the remaining balance. The court then sent the Department a notice indicating that Johnson was eligible for license reinstatement.

In September 2019, Johnson filed a third civil complaint against the Department, his first in King County Superior Court, alleging the Department unlawfully suspended his license without offering him a payment plan for his court fines. The Department moved for summary judgment. Johnson requested a continuance to obtain municipal court records, which the court denied. The court granted the Department's summary judgment motion and Johnson appealed to this court. We concluded that the superior court abused its discretion in denying Johnson's continuance motion and remanded for further proceedings. Johnson v. Dep't of Licensing, No. 81646-2-I, slip op. (Wash. Ct. App. June 28, 2021) (unpublished), https://www.courts.wa.gov /opinions/pdf/

816462.pdf.[2]

On remand, Johnson amended his complaint, maintaining his earlier arguments but seeking an additional declaration that the statutory scheme for license suspensions is unconstitutional. The parties cross-moved for summary judgment. The court granted the Department's motion and denied Johnson's motion for reconsideration.

Johnson appeals.

ANALYSIS

On appeal, Johnson contends (1) that the Department's suspension of his license violated his due process rights under article 1, section 3 of the Washington Constitution, (2) that the Department's suspension of his license violated his statutory rights under RCW 10.01.160, (3) he is entitled to a "decree" that his claims are justiciable, (4) he is entitled to another "decree" ordering the Department to reinstate his license and ordering the Mercer Island District court to dismiss his pending DWLS citation, and (5) that the court erred in denying his motion for reconsideration. Because we conclude Johnson's due process and statutory rights were not violated, we also conclude the court did not err in granting the Department's motion for summary judgment and we affirm.

Standard of Review

"We review summary judgment orders de novo, considering the evidence and all reasonable inferences from the evidence in the light most favorable to the

[2] GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

nonmoving party." Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c).

Due Process

Johnson asserts that the statutory scheme for suspending driver's licenses—which requires the Department to automatically suspend a license if it receives notice from a court under RCW 46.64.025—violates the due process clause of article I, section 3 of the Washington Constitution because it does not require the Department to certify that the court conducted an ability-to-pay hearing. He urges us to declare the automatic suspension requirement in RCW 46.20.289 unconstitutional. The Department contends that the constitutionality of the statutory scheme issue has already been addressed by our state Supreme Court in Lee, 166 Wn.2d at 589. We agree with the Department.

We review the constitutionality of a statute de novo. OneAmerica Votes v. State, 23 Wn.2d 951, 963, 518 P.3d 230 (2022). Statutes are presumed to be constitutional and the party challenging the constitutionality of the statute must prove its unconstitutionality beyond a reasonable doubt. Assoc. Gen. Contractors of Wash. v. State, 200 Wn.2d 396, 403, 518 P.3d 639 (2022).

Under RCW 46.64.025, whenever a person fails to comply with the terms of a criminal complaint or criminal citation for a moving violation, the court "*shall* promptly give notice of such fact to the department of licensing." (Emphasis added.) When the Department receives such notice from the court,

RCW 46.20.289 provides that "the department *shall* suspend all driving privileges." (Emphasis added.) Before suspension, the Department must give the driver 45 days written notice. RCW 46.20.245(1). The driver may then request an administrative review within 15 days of receiving the notice. RCW 46.20.245(3). The only issues to be addressed in the administrative review are: "(i) Whether the records relied on by the department identify the correct person; and (ii) Whether the information transmitted from the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity." RCW 46.20.245(b).

Our state Supreme Court addressed the constitutionality of the Department's suspension procedures as outlined in RCW 46.20.245 and RCW 46.20.289 and concluded they meet due process requirements.[3] Lee, 166 Wn.2d at 583. In Lee, motorists whose driver's licenses were suspended for nonpayment of traffic citations brought an action against the city, challenging the Department's suspension procedures. 166 Wn.2d at 583. Applying the

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[3] In Lee, the Court considered whether the statutory scheme violated the due process clause of the Fourteenth Amendment to the United States Constitution. See 166 Wn.2d at 583-86 (citing City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004), in which the Court invalidated a prior set of suspension procedures for violating the Fourteenth Amendment due process clause).

The Court has also held that article I, section 3 of the Washington Constitution is virtually identical to its federal analogue and provides " 'no further elaboration' " of rights. In re Pers. Restraint of Matteson, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (quoting State v. Ortiz, 119 Wn.2d 295, 302, 831 P.2d 1060 (1992).

Mathews[4] balancing test, the Court concluded that the Department's procedures met due process requirements because they provide both notice and a meaningful opportunity to be heard. Lee, 166 Wn.2d at 589.

Lee is controlling in the present case. Johnson advances a similar argument as the drivers in Lee—he asserts that the license suspension procedures outlined in RCW 46.20.245 and 46.20.289 violate due process because he was not provided an in-person hearing. 166 Wn.2d at 583-85. But Johnson offers no compelling argument as to how Lee is distinguishable from the present case; and the cases he cites in an attempt to distinguish Lee are unconvincing. Both predate Lee and concern different statutory schemes for license suspension. See Flory v. Dep't of Motor Vehicles, 84 Wn.2d 568, 527 P.2d 1318 (1974) (concluding due process requires Department to provide driver with full evidentiary hearing before suspending licenses under RCW 46.29.070); State v. Dolson, 138 Wn.2d 773, 982 P.2d 100 (1999) (holding Department violated due process by sending notice of suspension to driver's last known address, rather than driver's address of record as required by statute); cf. Lee, 166 Wn.2d at 583 ("We invalidated a prior set of procedures because drivers were not given any sort of hearing prior to the suspension of licenses [in 2004],

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[4] Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In cases involving the potential deprivation of a private interest by the government, we apply the Mathews balancing test to ensure that due process requirements are met. Gourley v. Gourley, 158 Wn.2d 460, 467-68, 145 P.3d 1185 (2006). The three Mathews factors are: (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest through the challenged procedures and probable value of additional procedural safeguards; and (3) the government's interest, including the potential burden of additional procedures. Mathews, 424 U.S. at 335.

. . . but we hold that the new procedures . . . meet due process requirements.") (citing City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004)). Though Johnson urges this court to conduct a Mathews balancing test to determine whether his due process rights were infringed, doing so would be duplicative; the Lee court analyzed this same statutory scheme using the Mathews balancing test and concluded there was no due process violation. 166 Wn.2d at 585-89.

Though Lee concerned civil moving violations, not criminal moving violations, the same substantial private interest—use of a driver's license—is present here. 166 Wn.2d at 586. Moreover, "there is minimal risk that a criminal defendant will be erroneously deprived of their driver's license," "since a criminal proceeding which results in a conviction provides sufficient due process." City of Redmond v. Bagby, 155 Wn.2d 59, 63-64, 117 P.3d 1126 (2005). And the governmental interest is significantly higher in cases involving criminal cases, since those suspended drivers are " 'more likely to be involved in causing traffic accidents, including fatal accidents, than properly licensed drivers, and pose a serious threat to the lives and property of Washington residents.' " Bagby, 155 Wn.2d at 65 (quoting LAWS OF 1998, ch. 203, § 1). Thus, the Mathews analysis in Lee is still applicable here.

Johnson also asserts that Johnson v. City of Seattle involved "identical circumstances" and should control. 184 Wn. App. 8, 21-22, 335 P.3d 1027 (2014). In Johnson, Johnson was cited by Seattle for parking too many vehicles on his single-family lot, in violation of Seattle Municipal Code 23.44.016, even though he subsequently established a vested right to a legal nonconforming use

to park the additional cars on his lot. 184 Wn. App. at 11. This court determined the ordinance violated due process because it prevented Johnson from presenting evidence of his nonconforming use during the fact-finding hearing with the Department of Planning and Development. Johnson, 184 Wn. App. at 20-22. But unlike the fact-finding hearing in Johnson, here the Department's review of mandatory suspensions is administrative and "involves processing paperwork, not fact-finding." Lee, 166 Wn.2d at 588. And Johnson's argument that RCW 46.20.245 impermissibly deprives him of "his right to interpose a legal defense" in violation of due process is unpersuasive. Johnson does not specify what "legal defense[s]" he was deprived of making.

Still, Johnson contends that Lee does not control and urges us to consider a recent Thurston County Superior Court decision—Pierce v. Department of Licensing—as persuasive authority.[5] But we are not bound by a superior court's conclusions of law and decline to consider Pierce.[6]

Lee concerned the same statutory scheme and dictates the outcome of this case. We conclude that Johnson's due process rights were not violated.

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[5] Pierce v. Dep't of Licensing, No. 20-2-02149-34 (Thurston County Super. Ct., Wash. April 30, 2021). Johnson acknowledges that Pierce is not legal authority and has no precedential value to this court.

[6] We note, however, that the court's ruling in Pierce has since been superseded by statute. See ENGROSSED SUBSTITUTE S.B. 5226, 67th Leg., Reg. Sess. (Wash. 2021) (amending RCW 46.20.289 to remove Department's authority to suspend licenses for non-payment of non-criminal moving violations).

RCW 10.01.160

In his briefing, Johnson asserts that the Department should have conducted its own ability-to-pay hearing and, in the alternative, that the Department's suspension of his license was based on an invalid judgment because the municipal court failed to conduct an ability-to-pay hearing as required by RCW 10.01.160(3). But at oral argument, Johnson took a different stance, contending that the Department must affirmatively state—via a checkbox—that it confirmed the court conducted an adequate ability-to-pay hearing before suspending a license. The Department contends that it performs a purely administrative function and is not authorized to evaluate the sufficiency of the process afforded in a judicial proceeding. We agree with the Department that it is not the appropriate entity from which Johnson can pursue the relief he seeks.

In an administrative review, RCW 46.20.245(b) authorizes the Department to address only the following: "(i) Whether the records relied on by the department identify the correct person; and (ii) Whether the information transmitted from the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity." Former RCW 10.01.160(3) (2015)[7] provides that "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." "To determine the amount and method for paying the costs, 'the court

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[7] Johnson contends that the Department violated his statutory rights when it suspended his license in February 2018. Accordingly, the version of RCW 10.01.160 in effect at that time applies.

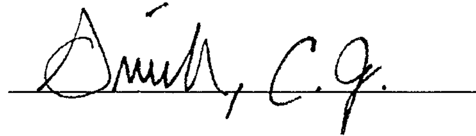
shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.' " State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (emphasis omitted) (quoting RCW 10.01.160(3)).

Here, the Department's function and review is purely administrative. See RCW 46.20.245(b). Neither RCW 46.20.245 nor RCW 10.01.160 permit the Department to intervene in court proceedings as Johnson envisions. Therefore, we do not reach, because the Department cannot reach, whether the court properly inquired into Johnson's ability to pay as required by Blazina. Though the record does not reveal whether or not the municipal court conducted an individualized inquiry, this is not the issue before us, and would be properly raised only on direct appeal of the municipal court action. Johnson cannot hold the Department accountable for his failure to object to the court's imposition of LFOs.

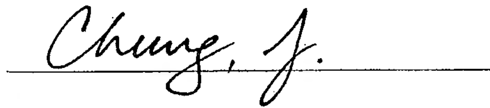
The plain language of RCW 10.01.160(3) makes clear that the *court*, not the Department, is tasked with conducting an ability-to-pay inquiry. RCW 10.01.160(3) ("The *court* shall not order a defendant to pay costs. . . . In determining the amount and method of payment of costs . . . , the *court* shall take account of the financial resources of the defendant.") (emphases added). Contrary to Johnson's assertion, the Department has not been granted the authority to ensure whether litigants receive an ability-to-pay hearing before their license is suspended. The Department is not required to provide Johnson another opportunity to assert an inability to pay during an administrative review. Moreover, when Johnson asked the proper entity—the court—to reduce his fees,

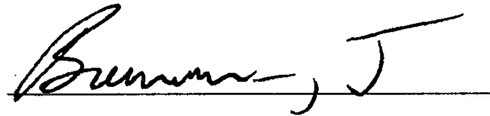
it did so immediately. Any delay in receiving relief was solely due to Johnson's own inaction. We conclude that the Department did not violate Johnson's statutory rights under RCW 10.01.160.

We affirm.



WE CONCUR:





LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
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May 8, 2023

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Case #: 842463
Terence R. Johnson, Appellant v. WA State Dept of Licensing, Respondent
King County Superior Court No. 19-2-23531-4

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

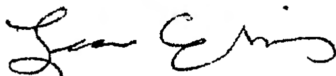
"We affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Lea Ennis
Court Administrator/Clerk

jh

c: The Honorable Veronica Alicea-Galvan

APPENDIX B

FILED
6/9/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

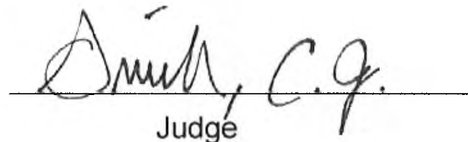
TERENCE R. JOHNSON, Appellant, v. DEPARTMENT OF LICENSING, a Washington State Agency, Respondent.	No. 84246-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Terence R. Johnson has moved for reconsideration of the opinion filed on May 8, 2023. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

APPENDIX C

FILED
6/26/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

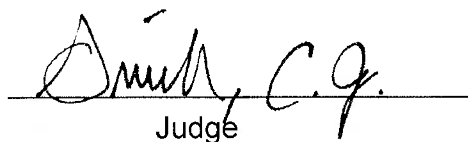
TERENCE R. JOHNSON, Appellant, v. DEPARTMENT OF LICENSING, a Washington State Agency, Respondent.	No. 84246-3-I ORDER DENYING MOTION TO PUBLISH

Respondent Department of Licensing has moved to publish the opinion filed on May 8, 2023. Appellant Terence Johnson has filed a response. Following consideration of the motion, the panel has determined the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to publish is denied.

FOR THE COURT:



Judge

MONTGOMERY PURDUE BLANKINSHIP & AUSTIN PLLC

July 25, 2023 - 1:36 PM

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