No: 1026803

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF WENATCHEE, Plaintiff-Appellant

v.

FRANK STEARNS, Defendant-Respondent

Answer to Petition for Review

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A. INTRODUCTION

COMES NOW Frank Stearns, Defendant-Respondent, and submits this Answer to the City of Wenatchee's Petition for Review.

This is an informant tip case. Police stopped Mr. Stearns following a tip from a citizen informant that he may be intoxicated. Mr. Stearns challenged this traffic stop, asserting that the tip was uncorroborated and otherwise did not bear sufficient indicia of reliability to justify a seizure.

The Court of Appeals' decision does not conflict with *Z.U.E.* The City argues that the Court of Appeals misapplied the applicable totality of circumstances test. Mr. Stearns responds that the Court of Appeals properly applied the test and simply concluded the evidence both provided to and gathered by law enforcement was insufficient to justify a seizure.

B. RESTATEMENT OF ISSUES

1. Whether the Court of Appeals' decision is in conflict with *State v. Z.U.E.,* 183 Wn.2d. 610, 352 P.3d 796 (2015);
2. Whether the Petition invokes a significant question of State Constitutional law; and
3. Whether the Petition invokes an issue of substantial public interest.

C. STATEMENT OF THE CASE

On July 12, 2019, David Gilliver called 911 to report a man staggering around in a parking lot who had gotten into and moved his truck. *Appendix to Petition for Review ("Apx.")* at 17. He provided innocuous descriptors: the location (Cascade Motorsports); black truck; white male; about 35 years old; grey hat; blue shirt; and jeans. *Id.*

Police dispatched Officer Natalie BrinJones, who initially contacted Mr. Gilliver, because he was also in a black truck. *Id.;*

RP[1] at 15:13-17. As she did so, Mr. Gilliver pointed at another truck about to leave the parking lot and said "something similar to, 'That's him! He's wasted!'" *Id.* at 15:18-20.

At that time, Officer BrinJones did not know and had never heard of Mr. Gilliver. *Id.* at 34:11-16. He did not introduce himself and she did not verify Mr. Gilliver's identity before beginning pursuit of the truck. *Id.* at 34:17-23. She also did not observe the staggering that Mr. Gilliver reported. *Id.* at 39:25-40:3 Critically:

> Q: … [Y]ou don't have any information that tells you that the person you met was actually the person who called in?
>
> A: Just besides that he was standing there on the phone when I pulled in.
>
> Q: Okay. But you weren't on the phone with him?
>
> A: Correct.

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[1] The Report of Proceedings for the Suppression Hearing begins at Page 26 of the *Appendix*. The pin citations within the RP refer to the page and line of the transcript.

Id. at 34:24-35:5. In short summation: the Officer had no information to indicate that she was even speaking with the same person who made the 911 call, much less that he was a reliable informant.

Officer BrinJones observed that the driver of the other truck was wearing a grey hat, sunglasses, and a blue shirt. *Id.* at 49:13-16. However, traffic prevented her from immediately following the vehicle. *Id.* at 35:6-36:10. To close the distance, she activated her emergency lights. *Id.* at 20:18-22. On the dashcam, Mr. Stearns' vehicle is not visible until approximately the 18-second mark.

The City offers several putative observations by Officer BrinJones probative of DUI, but none are supported by the evidence. She "could not see if he had crossed the centerline" at the beginning of the pursuit. *Id.* at 20:14-17. She testified that her vehicle was not equipped with a speed measurement device, and she could only pace other vehicles. *Id.* at 30:9-31:2. And she was not pacing Mr. Stearns. *Id.* at 31:6-16. In fact, the Officer agreed

there was no basis to believe Mr. Stearns was speeding. *Id.* at 31:17-23. Officer BrinJones testified concerning the maneuver exiting the roundabout. *Id.* at 32:6-33:12. Fundamentally, the issue at this point was that Mr. Stearns could have done the maneuver smoothly, but did not. *Id.* The Officer neither observed Mr. Stearns strike the curb nor cross the centerline. *Id.* at 32:12-17 (curb); 33:13-15 (centerline).

Mr. Stearns challenged the traffic stop in Chelan County District Court; his Motion was denied and he was later convicted at a bench trial. Mr. Stearns then prevailed on Appeal in Chelan County Superior Court and in Division III of the Court of Appeals.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals' Decision Does Not Conflict with *Z.U.E.*

Far from conflicting with *Z.U.E.* the Court of Appeals holding properly *applies Z.U.E.* while also harmonizing this case with *Saggers* and *Howerton*. The primary import of *Z.U.E.* is the

holding that "[t]he appropriate constitutional analysis for a stop precipitated by an informant is a review of the reasonableness of the suspicion under the totality of the circumstances." *Z.U.E.,* 183 Wn.2d at 620-21.

The City reads too far into the Court declining to adopt a bright-line rule concerning the "veracity" and "factual basis" prongs of reliability inquiry, suggesting that "more of one means less of the other is required." *Petition* at 7. What the City advocates is the rigid framework the Court rejected, stating that a "flexible approach" based on an "individualized review of the circumstances" is required. *Id*. at 621. These factors are "relevan[t] and useful[] to the reliability analysis. In any specific case, each factor may weigh differently." *Id.* at 624. Or as in *State v. Kennedy*, 107 Wn.2d 1, 8, 726 P.2d 445 (1986), one prong may not be assessed at all. *Id.* (*Z.U.E.*) at 620.

The City argues that the Court of Appeals made factual basis of the tip a required element of reliability analysis, in violation of the holding in *Z.U.E. See Petition* at 8. But what the

City points to in the Court of Appeals holding is the problem that the informant failed to convey information probative of criminality, as distinct from "just some suspicious activity" – this is "a crucial difference." *See Apx.* at 228-29 (quoting *State v. Conner,* 58 Wn.App. 90, 96, 791 P.2d 261 (1990)).

What the Court of Appeals was doing was walking through each step of the analysis:

> Although reasonable suspicion requires less than probable cause for an arrest, an informant's tip alleging criminal activity is not always sufficient to satisfy reasonable suspicion. Instead, the State must show the "tip bears some 'indicia of reliability' under the totality of the circumstances." *Z.U.E.,* 183 Wash.2d at 618, 352 P.3d 796. "[T]here [must] either be (1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." *Id*.

State v. Morrell, 16 Wn.App.2d 695, 701, 482 P.3d 295 (2021).

The Court first dispensed with the first prong, whether the circumstances sufficiently showed that the informant himself was reliable. *See Apx.* at 227-28. The critical issue here is not

whether Mr. Gilliver called 911 or was making an eyewitness report – the issue is that the responding officer had no information at all about the informant and never confirmed that she was even speaking to the same person who placed the call. *See RP* at 34-35.

This issue is placed in stark contrast by the difference in the holdings of *State v. Anderson*, 51 Wn.App. 775, 755 P.2d 191 (1988), *State v. Jones*, 85 Wn.App. 797, 934 P.2d 1224 (1997), and *Campbell v. Department of Licensing*, 31 Wn.App. 833, 644 P.2d 1219 (1982). These cases involve substantially the same report – a passing motorist alleging that another driver is drunk. The stop that was upheld, in *Anderson*, was the one involving a known informant. And even there, it was not *just* that he was a reliable source – "reliability by itself generally does not justify an investigatory detention." *Anderson*, 51 Wn.App. at 778-79 (quoting *State v. Seiler*, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980)).

Without information about Mr. Gilliver, reliability could still be established by a tip that bore a sufficient factual assertion

of *criminal* activity and not simply innocent or misconstrued conduct. *Conner*, 58 Wn.App. at 96; *State v. Vandover*, 63 Wn.App. 754, 760, 822 P.2d 784 (1992); *Seiler*, 95 Wn.2d at 48; *State v. Hart*, 66 Wn.App. 1, 8, 830 P.2d 696 (1996). Mr. Gillver's tip was short and conclusory; more is required to provide an indicia of reliability sufficient to justify a seizure.

This Court expressly declined to 'resolve which application of the facts in *Navarette* is more consistent with our cases under Article I, Section 7" of the Washington Constitution." *Id.* at 621, FN 4. In the next breath, the Court "stress[ed]" that Washington Law may require a stronger showing to establish reasonable suspicion than the federal constitutional principles guiding *Navarette*. *Id.*, FN 4.

At each stage of the litigation, albeit to a lesser extent in this *Petition*[2], the City has attempted to import a new special rule of DUI exigency from *Navarette* – an error that Justice

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[2] *See Petition* at 9-10. Compare to *Apx*. at 196

McCloud's concurrence in *Z.U.E.* cautions against. *See Z.U.E.,* 183 Wn.2d at 626 *et. seq*. The very factors relied upon by the City to support this seizure – a citizen eyewitness identified by name and contact information reporting a contemporaneous eyewitness account via 911 – are those that the concurrence cautions would be, "[u]nder a fair reading of the *Navarette* majority… probably permissible… But, under a fair reading of Washington law… not permissible." *Id.* at 630 (McCloud, J., concurring). The *Navarette* majority opinion does not inform the analysis in this case.

The Court of Appeals did not fail to consider exigency. It recognized that injecting "exigency" did not have some talismanic effect that bolstered the remainder of the facts. *Apx.* at 236.

In attempting to distinguish *Z.U.E.*, the City points directly to the problem with Mr. Gilliver's tip. The City notes that the informant in *Z.U.E.* provided no basis of knowledge for the *conclusion* that the defendant was under the age of 18. *See*

Petition at 11 (emphasis added). The City's proffered balancing test would permit a factually unsupported tip to pass muster if the informant was deemed reliable enough. The City argues that, because there is less reason to doubt Mr. Gilliver than the informant in *Z.U.E.*, that less factual basis is required. *Id.* at 12.

What the Court of Appeals took issue with was that Mr. Gilliver provided *no* factual basis of *criminal* conduct. *See Apx.* at 236. In conclusory fashion, the tip asserted Mr. Stearns was intoxicated. While staggering, even followed by moving a vehicle in a parking lot, may certainly be suspicious, it is not criminal and does not justify a seizure. *Id.* at 229. When an Officer then follows the subject without observing a reason to make a traffic stop, this does not justify the seizure either. *Id.* at 232-33.

The City attempts to argue that Officer BrinJones did corroborate criminal activity while following Mr. Stearns. *See Petition* at 16-17. The City again points to various driving acts, none of which violated the law or justified a traffic stop. *Id.* But

the Court of Appeals squarely addressed these contentions as well. The Court found the officer's assertions to be insufficient, and it was no mere disagreement of facts. The Officer admitted that she did not see the violations the City argues as fact and was not pacing Mr. Stearns' speed. *See Apx.* at 232-33; *RP* at 30-33.

The City finally argues that Officer BrinJones made a substantial enough contact with Mr. Gilliver that she observed that he had gathered this tip in a reliable manner. *See Petition* at 18. In support, the City argues that, because the officer contacted Mr. Gilliver, she confirmed how the tip was gathered. *Id.* This contact, however, is a far cry from *State v. Lee*, 147 Wn.App. 912, 915, 199 P.3d 445 (2008) where the officer observed a vehicle approach a woman, who then reported to that officer that the occupants had tried to sell her drugs. That Mr. Gilliver and Mr. Stearns were at the same location is entirely unsurprising – innocuous is a better term. Corroborating this information does no work for the City in justifying a seizure. As the Court of appeals also noted, Mr. Gilliver did not report that there was

aberrant driving; merely aberrant walking. *See Apx.* at 234 (FN 6).

The Court of Appeals' decision is not in conflict with *Z.U.E.* The issue here was a lack of any objective measure by which one might reasonably conclude DUI from the tip alone. Corroboration was required, but in this case, not achieved.

2. No Significant Question of Constitutional Law is Presented

As one commentor notes: "The court has not generally expressed reasons for granting discretionary review. Typically, the opinion merely has recited that discretionary review was granted." Turner, Elizabeth, 3 Wn.Prac. RAP 13.4 (July 2023 update). However, a few decisions discussing RAP 2.3(d) provide some guidance.

Matters involving a direct constitutional challenge are appropriate for discretionary review upon a significant question of Constitutional Law. *State v. Richards*, 537 P.3d 1118 (November, 2023) (vagueness and preemption challenges to

local law). Access to counsel or access to justice issues merit such review as well. *See e.g. State v. Mills,* 85 Wn.App. 286, 289, 932 P.2d 192 (1997) (right to counsel and VRP transcription); *Baer v. City of Auburn*[3], 84 Wn.App. 1077, 1997 WL 22419 (unrep. 1997) (right to counsel); *State v. Stewart*[4], 86 Wn.App. 1041, 1997 WL 292348 (unrep. 1997).

A brief passage in another unreported matter highlights the issue in this case: "…although sufficiency of the evidence may have constitutional implications, here these claims do not involve *significant* questions of constitutional law." *State v. Kibbee*[5], 10 Wn.App.2d 1043, *3, 2019 WL 5188613 (unrep. 2019) (emphasis original).

Mr. Stearns raises a very similar argument. The issues before the Court certainly have Constitutional *implications* in our search and seizure law, but this case does not present a *significant*

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[3] Cited as example only.
[4] Cited as example only.
[5] Cited here as a means to frame the issue and not as authoritative.

question of constitutional law. To the contrary, the legal issues in this case are well-settled and the parties do not dispute the applicable standards or law. *See e.g. State v. Morrell*, 16 Wn.App.2d 695, 701, 482 P.3d 295 (2021).

3. These Issues are Not of Substantial Public Interest

The City argues that everyone has an interest in removing drunk drivers from the road. In support, the City leans on dicta from *Z.U.E.* pertaining to *Navarette* and exigency. *See Petition for Review* at 19 (citing *Z.U.E.,* 183 Wn.2d at 624, itself citing *Navarette*, 134 S.Ct. at 1691-92). This is the same error that the City has made at each stage of the proceeding.

While *Z.U.E.* was an important holding concerning informant tips and the relevant legal structure for analyzing informant tip challenges, *Z.U.E.* had nothing to do with DUI cases. The Court in *Z.U.E.* neither announced a new rule of exigency applicable to DUI cases, nor one bolstering the reliability of 911 callers. The "factor" that *Navarette* turned on

as read by the *Z.U.E.* Court was exigency, not reliability. *Z.U.E.*, 183 Wn.2d at 623-24. Exigency and the seriousness of the alleged activity has always been a part of the analysis under Washington law. *State v. Sieler*, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980) (citing *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243 (1975) and *State v. McCord*, 19 Wn.App. 250, 576 P.2d 892 (1978)); *see also State v. Wakely*, 29 Wn.App. 238, 239, 628 P.2d 835 (1981). The Court of Appeals recognized this and rejected the City's argument that the arresting officer should be given broader latitude. *See Appendix* at 235-36 (COA Decision).

Under RAP 13.4(b), it is the *"petition"* which must merit public interest. *See* RAP 13.4(b)(4) (emphasis added). Mr. Stearns argues that the issues raised by the City in the petition are not of substantial public interest. For example, the City argues that both ordinary citizens and criminal justice participants require clear direction, but fails to explain why this requires new pronouncement from the *Supreme* Court, particularly where the Appellate Court accepted review under

RAP 2.3(d)(1) and not (d)(2) or (3). *See* RAP 13.4(b)(4); RAP 2.3(d).

The issues in the Petition are not of substantial public interest because the case is limited to its facts. Informant tip cases often turn on issues of fact unique to the case, rather than broad principles like conflict of laws or, for example, state-wide difficulties with breath testing, even where the issue was anticipated to arise only 100 times annually. *See City of Mount Vernon v. Mount Vernon Municipal Court,* 93 Wn.App. 501, 508-09, 973 P.2d 3 (1998). Broad applicability is what creates public interest; here, the case turns on unique facts, but settled law.

This Court need not pass upon these issues again because the controlling law is laid down in prior decisions from this Court like *Z.U.E., Seiler,* and *Lesnick.* Even if the issues raised in the Petition were of substantial public interest, there is no need for further direction from the Supreme Court.

E. CONCLUSION

Mr. Gilliver's tip lacked any indicia of reliability. No circumstances bolstered his credibility beyond that of an ordinary unknown citizen. The use of 911 allows for *accountability* – it is no guarantee of *reliability* or even *identity* of the caller. The City's argument that this bare, conclusory tip was enough to justify a seizure does nothing more than turn a citizen's hunch into that of the officer's. The leap from staggering to intoxication is the critical point where a distinguishing factual basis is required. From a description of "staggering" alone, how was the officer to tell whether the Mr. Stearns' movements were from intoxication or because he had a rock in his shoe? To her credit, and as the Court of Appeals recognized (but did not *rely* upon), the Officer realized more was required and followed Mr. Stearns to corroborate the tip.

The City claims that the Officer did corroborate the tip while following Mr. Stearns. The dashcam footage has been viewed by each court in this case – by specific request of the

Court of Appeals in fact. The issue with the City's claims is that the poor driving acts it relies upon are borne out by neither the dashcam nor Officer BrinJones' own testimony at the suppression hearing. She did not see the violations the City claims. If these violations "almost occurred," then axiomatically, they did not occur.

The late Justice Scalia put it best in his dissent in *Navarette*: "Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference." *Apx.* at 236 (*Navarette*, 572 U.S. at 414 (Scalia, J., dissenting)). As Justice McCloud stated in the *Z.U.E.* concurrence it is this same dissent that is more in line with Washington law. Justice Scalia meant without *unreasonable* interference (under the Federal 4th Amendment). The law in Washington is different; our Constitution provides unqualified protection from invasion into private affairs absent authority of law. *WA Const. Art. I §7*.

Mr. Stearns respectfully requests that this Court deny the City's Petition for Review and remand this matter to Chelan County District Court for consistent proceedings.

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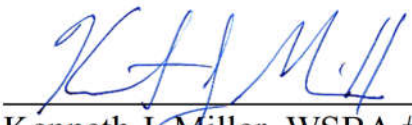
Respectfully submitted this 26th of January, 2024.



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