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No. 94284-6
(COA No. 74131-4-I)

Supreme Court of the State of Washington

Stephen Chriss Johnson,

Petitioner,

v.

State of Washington Department of Licensing and **Pat Kohler,** in her official capacity,

Respondents.

Johnson's Reply to Department of Licensing's Answer to Petition for Review

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1. New Issues Raised in Answer

Under RAP 13.4(d), a party may file a reply to an answer to a petition for review if the answering party seeks review of issues not raised in the petition for review. The reply should be limited to those new issues.

Johnson's Petition raised two issues: 1) whether the Department is acting outside of its statutory authority by refusing to release license suspensions that are based on failure to pay a nonmoving violation; and 2) whether the Department acted outside of its statutory authority by suspending licenses based on failure to pay a criminal fine. Pet. for Rev. at 1.

The Department's Answer states three, different issues for review: 1) whether the Department was ordered to release prior nonmoving violation suspensions; 2) whether Johnson failed to comply with the terms of a citation; and 3) whether Johnson had another plain, speedy, or adequate remedy other than a petition for writ of prohibition. Ans. to Pet. at 2. This Reply will address each in turn.

First, the Department's Issue #1 misstates the relevant issue for this Court's review. Johnson's Petition is about the scope of the Department's statutory authority to maintain prior suspensions, not whether the legislature ordered certain suspensions to be released. Second, the Department's Issue #2 is

reasonably related to Johnson's Issue #2, but the Department's argument raises a new, unrelated issue, asking whether Johnson's petition can be dismissed if only one of the challenged suspensions is valid. It cannot. If either suspension is invalid, Johnson is entitled to the relief of having it removed from his record. Third, the Department's Issue #3 is entirely new. The trial court decided the issue in Johnson's favor, and the Department did not appeal that portion of the trial court's decision and has not demonstrated any reason for this Court to accept review of this issue. This Court should decline to review the additional issues raised by the Department.

2. Reply Argument

2.1 Issue #1 is about the natural consequences of the Department's loss of statutory authority.

Johnson filed a petition for a writ of prohibition, under RCW 7.16.290 et seq. CP 3-5. The purpose of the writ is to "arrest the proceedings" of an administrative agency that is acting outside of its authority. RCW 7.16.290; *Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996). Administrative agencies have only the authority granted to them by statute. *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). A petition for a writ of prohibition requires the court to analyze the scope of the agency's statutory authority.

This case is not about whether the legislature ordered the Department to take some specific action (which would be a question of procedure). This case is about whether the Department continues to have authority to withhold the driving privilege for reasons that no longer appear anywhere in the statutory scheme.

Either the Department has authority to maintain the prior suspensions or it does not. If, as Johnson contends, the Department has lost the authority for these suspensions, then the Department's only valid choice was to release them. By failing to release the now-invalid suspensions, the Department is acting outside of its statutory authority.

No specific mandate from the legislature is necessary to carry out a change in authority. After this Court's 2004 decision in *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004), the legislature amended the license suspension statutes. Laws of 2005, ch. 288. As part of those amendments, the legislature removed the Department's authority for any suspensions relating to infractions committed prior to July 1, 2005.[1]

After the change in authority, the Department released hundreds of thousands of prior suspensions that were no longer

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[1] The Department's statutory authority, set forth in RCW 46.20.291, is modified "as provided in RCW 46.20.289." The legislature amended § 289, thereby also amending the Department's authority.

authorized by statute. Neither the legislature nor the courts issued any mandate to the Department to release the prior suspensions. Yet releasing them was exactly what was required by the change in statutory authority.

The Administrative Office of the Courts expected the same result from the amendments at issue in this case. *See* CP 185.[2] But this time, the Department chose to ignore its lack of authority, making it necessary for Johnson to bring this action for a writ of prohibition to seek redress from the Department's unauthorized acts.

This Court should decline to review the Department's Issue #1 and instead focus on the real question at hand: Does the Department have statutory authority to maintain nonmoving violation suspensions that began prior to June 1, 2013? Johnson maintains it does not. This Court should accept review of Johnson's Issue #1 and reverse the erroneous decisions of the trial court and Court of Appeals.

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[2] As stated in the fiscal note for the amendments at issue in this case, the AOC expected a drastic drop in traffic misdemeanors following the amendments, similar to what occurred post-*Redmond v. Moore*. The cause of the post-*Redmond v. Moore* drop in traffic misdemeanors was the mass release of prior suspensions following the change in the Department's suspension authority. There were far fewer cases of DWLS 3rd because drivers were no longer suspended.

2.2 If either of the challenged suspensions is invalid, Johnson is entitled to relief.

The Department's Issue #2 is reasonably related to Johnson's Issue #2, but the Department's argument raises a new, unrelated issue, asking whether Johnson's petition can be dismissed if only one of the challenged suspensions is valid. It cannot. If either suspension is invalid, Johnson is entitled to the relief of having it removed from his record.

The Department recognizes that Johnson's two suspensions are separate and distinct. *E.g.,* Ans. to Pet. at 4 ("this separate suspension"). The two suspensions are separately listed on Johnson's driving record maintained by the Department. CP 29-30. A conclusion that one suspension is authorized cannot justify the other, separate suspension if that other suspension is **unauthorized.** If either of the suspensions is unauthorized, a writ of prohibition is still the appropriate remedy to put a halt to that suspension. The unauthorized suspension must be released, even if the other, separate suspension remains. This Court should decline to review this new issue.

2.3 The Department failed to preserve the "alternative remedy" issue, which was decided correctly by the trial court in Johnson's favor.

The trial court's summary judgment order expressly held that "a Writ of Prohibition was an appropriate procedure for

Petitioner to seek relief because he lacked an otherwise adequate remedy." CP 255. In its Issue #3, the Department is asking this Court to review that express decision of the trial court, from which the Department did not appeal. The Department is not merely asking this Court to affirm the trial court on alternate grounds; the Department is asking this Court to grant it affirmative relief by modifying the trial court's express determination. The Department's request is beyond the scope of this Court's review under the Rules.

"The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review **only** (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case." RAP 2.4 (emphasis added); *accord* RAP 5.2(f) ("any other party who wants relief from the decision must file a notice of appeal or notice of discretionary review"). The Department did not file a notice of appeal. The Department has not argued that review is demanded by the necessities of the case. The Department has waived its opportunity to challenge the trial court's express determination that Johnson lacked an adequate remedy at law. This Court should decline to review it.

The Department argues that it has not exceeded its authority because it claims to have "subject matter jurisdiction"

over driver's licenses. This argument is without any legal foundation. While courts have general, subject matter jurisdiction under the State Constitution, administrative agencies do not. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 445, 120 P.3d 46 (2005) ("Agencies have only express or implied authority, not inherent authority"); *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). Agencies have only those powers granted to them by statute. *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). Here, the applicable statute is RCW 46.20.291, which the Department studiously avoids discussing because to do so would reveal the Department's lack of authority. By "misinterpreting" the scope of its authority, the Department has exceeded it, and a writ of prohibition is the appropriate remedy.

The Department argues that Johnson had an alternative remedy, claiming that he could have sought an administrative review prior to his suspensions taking effect. However, the Department fails to recognize the limitations of an administrative review under RCW 46.20.245. Johnson **could not** have made the legal arguments the Department proposes. An administrative review is a limited, factual inquiry. There is no opportunity for the driver to present legal arguments because

the review "shall consist solely of an **internal** review of **documents and records."** RCW 46.20.245(2)(a) (emphasis added).

> **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(2)(b) (emphasis added). These are purely factual questions, to be determined on the basis of documents, not legal arguments.

In upholding the validity of the administrative review procedure, this Court explained that the administrative review was specifically designed to correct **ministerial errors:**

> DOL policy states, "A specialist will review all documents received by DOL on the pending action[, c]heck Imaging documents along with the court records, review the record for accuracy and provide a written response of the results. It is the customer [sic] responsibility to provide any other relevant information." In the case of ministerial error, this review process is designed to catch and resolve that error.

City of Bellevue v. Lee, 166 Wn.2d 581, 587-88, 210 P.3d 1011 (2009). "The DOL's suspension 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." *Id.* at 588.

In dissent, Justice Sanders, who would have invalidated the procedure, pointed to issues that a driver would not be entitled to raise in an administrative review. Referring to the notice of failure to comply that is sent from a court to the Department, Justice Sanders observed, "No adequate basis exists under the statute to challenge the validity of such court notification." *Id.* at 591 (Sanders, J., dissenting). Additionally, "a driver facing suspension does not have the right to request something other than the document review prior to DOL's suspending his or her license." *Id.* at 592 (Sanders, J., dissenting). Finally, Justice Sanders observed that the administrative review "gives no opportunity to rebut the basis for the suspension." *Id.*

The Department argues that Johnson could have requested a certificate of adjudication from the district court. In the context of failure to pay a fine, the case is "adjudicated" when the fine is paid in full, the fine is waived, or a payment plan has been established and followed. *See* RCW 46.63.110(6); RCW 46.63.120. The district court could not "adjudicate" the infraction by analyzing the scope of the Department's authority to suspend.

None of the Department's proposed "alternative remedies" addresses the Department's abuse of authority to maintain suspensions that should already be at an end. Johnson had no other adequate remedy at law to address the Department's ultra vires acts. The trial court was correct in determining that the writ of prohibition was the proper procedure. The Department did not appeal that decision and has therefore waived any right to challenge it. This Court should decline to review the Department's Issue #3.

3. Conclusion

The Department's Answer to Johnson's Petition for Review raises new issues but does not demonstrate how any of these new issues meet the criteria for granting review. The Department's new issues are without merit. This Court should accept review of Johnson's issues and deny review of the Department's new issues.

Respectfully submitted this 2th day of June, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 2, 2017, I caused the 7original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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