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SUPREME COURT NO. 96170-1

Division III Court of Appeals No. 34848-2-III

SUPREME COURT  
STATE OF WASHINGTON

JOHN INGERSOLL,

Petitioner

v.

CITY OF MATTAWA,

Respondent

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**ANSWER IN OPPOSITION TO  
PETITION FOR REVIEW**

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## **I. IDENTITY OF RESPONDENT**

Respondent is the City of Mattawa, Washington.

## **II. COURT OF APPEALS DECISION AT ISSUE**

Petitioner, John Ingersoll, is requesting that this Court accept review of an unreported Division III Court of Appeals' decision. The Division III decision at issue is appended to the Petition for Review.

## **III. INTRODUCTION**

The City of Mattawa experienced several areas of concern regarding Mattawa police officer John Ingersoll ("Ingersoll"). Those concerns rose to a sufficient level to support cause to terminate Ingersoll's employment with the City - he was not fit to serve in a position of trust as a police officer. The City took the proper steps to remove Ingersoll from his position as a police officer consistent with due process.

Part of the City's concern supporting cause for termination was Ingersoll's inappropriate behavior and conduct that he displayed when interacting with members of the public. Also, supporting the City's cause for terminating Ingersoll was the results of a "fit for duty" psychological

evaluation conducted by Dr. Mark Mays. Dr. Mays found that Ingersoll suffered from a Personality Trait Disturbance, “. . . a pattern or behavior in which he behaves in impulsive, self-indulgent, and short-sighted ways, a pattern of behavior which makes him more likely than most people, particularly people in law enforcement, to not maintain appropriate limits, maintain consistent and appropriate behavior, show emotional constraint, or provide accurate reports.”

In reviewing whether the City had sufficient cause for terminating Ingersoll, the City’s Civil Service Commission conducted an investigative evidentiary hearing pursuant to its statutory authority under RCW 41.12. During that hearing Ingersoll displayed inappropriate and disturbing conduct and demeanor consistent with the City’s concerns about his interactions with the public and consistent with Dr. Mays’ finding. The Commission observed this conduct in its capacity as the decision-maker and fact-finder on the matter.

Ingersoll now asserts that the Civil Service Commission improperly considered his demeanor during the hearing as substantive evidence. The Civil Service Commission did not, however, consider his conduct as stand-alone substantive evidence, but instead, found that the conduct and demeanor they observed corroborated Dr. Mays’ evaluation

report and thus provided additional reason for the Commission to find that report credible.

#### **IV. COUNTERSTATEMENT OF ISSUE PRESENTED**

Should the Supreme Court accept review of an unpublished Court of Appeals' decision where the Court of Appeals correctly found that the Civil Service Commission could consider Ingersoll's conduct and demeanor at the hearing and conclude that his conduct and demeanor corroborated and bolstered the credibility of other evidence presented to it (the Dr. Mays report)?

#### **V. COUNTERSTATEMENT OF THE CASE**

In June, 2013 the City of Mattawa, through its then-Mayor Judy Esser<sup>1</sup>, made the decision to terminate police officer Ingersoll's employment with the City because he was found to have violated Civil Service Rule X, Section 2, Cause of Disciplinary Action, subsections A, B, C, and K. CP 76 – 81, CP 976 – 977. Those subsections provide:

A: Incompetency, inefficiency, or inattention to or dereliction of duty.

B: Violation of law, or official rules or regulations, or orders, or failure to obey any lawful or reasonable direction when such failure or violation amounts to insubordination or serious breach of discipline.

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<sup>1</sup> Mayor Esser is now deceased.

C: Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of public or a fellow employee, or any other act of omission or commission tending to injure the public service; or any other willful failure on the part of the employee to properly conduct himself; or any willful violation of the provisions of Chapter 41.23 RCW or of these rules and regulations.

K: Any other act or failure to act which in the judgment of the Civil Service Commission is sufficient to show the offender to be an unsuitable and unfit person to be employed in the public service.

Mr. Ingersoll appealed the City's decision to terminate his employment to the City of Mattawa's Civil Service Commission, which is duly authorized, pursuant to express statutory authority, to investigate and conduct a hearing and to take evidence concerning whether the City acted properly in terminating Mr. Ingersoll's employment.

The Civil Service Commission convened a hearing that commenced on October 1, 2013 and was conducted over five days. After deliberation, the Commission issued its written decision on December 3, 2013 upholding the Mayor's decision to terminate. CP 8 – 10. The Commission concluded, among other things, that the "preponderance of the evidence establishes that as of June 3, 2013, Mr. Ingersoll was not fit for duty as a police officer and termination of his employment was appropriate under Civil Service Rule X, Section 2, subsections A, C, and K." CP 10.

The Commission made specific findings as follows:

1. The conduct of Mr. Ingersoll during the hearing showed an immaturity and inconsistency regarding your (sic) ability to control your (sic) actions and emotions. This included comments during witness testimony, attempts to stare down citizens at the hearing and providing testimony totally denying any wrongdoing on his part.
2. Mr. Ingersoll's lack of acceptance that his wife and children were in a safe house, the location of which would not be disclosed, based upon his law enforcement training, should have been an acceptable explanation. The very nature of a safe house is anonymity. The Commission finds Mr. Ingersoll's conduct in attempting to locate the safe house was poor judgment and led to the making of a false missing person report. This conduct is consistent with findings in a fitness-for-duty examination regarding self-indulgent behaviors and inconsistency regarding his position as a police officer.
3. Mr. Ingersoll's conduct in an incident involving two Hispanic gentlemen at Ken's Corner also evidences poor judgment. The Commission finds the incident shows a disregard for the boundaries between his private capacity and that of a police officer. Recognizing a police officer has police powers 24 hours of the day, does not justify seizing property and then leaving the scene of an incident without calling for assistance by an on-duty police officer. This conduct evidences the type of inconsistent police performance referenced in the fitness-for-duty letter of April 3, 2013.
4. Substantial testimony was heard regarding the testing on a DUI case. The Commission does not find the testing protocol to be the relevant issue; however, the Commission does find the testimonies of the other officers present indicate Mr. Ingersoll lacked self-control in dealing with this matter, which again evidences behavior described in the fitness-for-duty exam.



5. The Commission finds the report of Dr. Mays to be credible and the assessment to be consistent with conduct as stated above.

The Civil Service Commission found that the decision was not based on political or religious reasons, that it was made in good faith, and that it was made for good cause. CP 8 – 10. The Civil Service Commission’s decision is substantially supported by the documentary evidence and the evidence adduced during the hearing.<sup>2</sup>

Part of the evidence offered to the Civil Service Commission was an evaluation/report prepared after a psychological (fit for duty) examination Dr, Mark Mays performed on Ingersoll<sup>3</sup>. The doctor concluded:

They lead me to conclude that John Ingersoll has a Personality Trait Disturbance, a pattern or behavior in which he behaves in impulsive, self-indulgent, and short-sighted ways, a pattern of behavior which makes him more likely than most people, particularly people in law enforcement, to not maintain appropriate limits, maintain consistent and appropriate behavior, show emotional constraint, or provide accurate reports. . . .

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<sup>2</sup> The appellant seeks review on the narrow issue of whether the Civil Service Commission could properly consider Ingersoll’s conduct and demeanor during the hearing before when weighing the evidence in this matter. Because the petition for review does not challenge the factual findings of the Commission, the City of Mattawa is omitting a complete recitation of the facts / evidence that was presented to the Commission for the limited purposes of this brief. This factual statement can be supplemented if the Court so requests.

<sup>3</sup> The Mays Report was offered by Ingersoll and admitted into evidence without objection.

CP 1939:8 – 1940:22.

The evidence presented at the hearing demonstrated that Mr. Ingersoll is volatile, unprofessional, and insubordinate. Mr. Ingersoll's interaction with his superiors, his co-workers and with the public is volatile, unpredictable, and unprofessional. This evidence corroborated the findings in Dr. Mays' report. This evidence was further corroborated by Ingersoll's demeanor exhibited during the course of the Civil Service Commission hearing.

Because Ingersoll's demeanor during the hearing corroborated the other evidence and the Mays report, the Civil Service Commission specifically made additional findings based on its direct observation of Mr. Ingersoll during the course of its hearing. The Civil Service Commission found "[t]he conduct of Mr. Ingersoll during the hearing showed an immaturity and inconsistency regarding your ability to control your actions and emotions. This included comments made during witness testimony, attempts to stare down citizens at the hearing and providing testimony totally denying any wrongdoing on his part." Related to this finding the Commission found ". . . the report of Dr. Mays to be credible and the assessment to be consistent with conduct as stated above." CP 10.

The Commission, acting as the trier of fact, is in the best position to observe the demeanor of the witnesses, and in this case, the demeanor

of Ingersoll during the course of this lengthy Civil Service Commission hearing. In so doing, the Commission found that Ingersoll's behavior during the hearing corroborated the Mays report and buttressed its finding that the report is credible.

## **VI. ARGUMENT**

Ingersoll argues that this appeal is not about witness or evidence credibility. At page 7 of the Petition for Review at footnote 2, Ingersoll asserts “[t]o be clear, this case does not concern the other purpose for which demeanor evidence may be properly considered by a trier of fact: to make credibility determinations.” But indeed the other purpose (credibility determinations) is exactly what this case is about. The Commission found that Ingersoll's conduct and demeanor corroborated and lent credibility to Dr. Mays' report.

Ingersoll argues that the Commission considered his demeanor at the hearing as “substantive” evidence. He wants this Court to adhere to the proposition that the Commission found Ingersoll “not fit for duty” because of his demeanor at the hearing, which Ingersoll argues cannot be treated as substantive evidence of the same. The Commission, however, did not treat observations of Ingersoll's hearing demeanor as substantive evidence to support the determination. Instead, the Commission did that, which it is permitted to do, and used the demeanor evidence to assess the

credibility of other evidence presented to it, specifically, the Mays report. This is evident when viewing the Commission's findings in their entirety and, specifically, in light of finding 5, which provides: "The Commission finds the report of Dr. Mays to be credible and the assessment to be consistent with conduct as stated above".

Fact finders, the Civil Service Commission in this instance, when considering the credibility of witnesses or evidence, will test the veracity of the witness or evidence by reference to the objective facts proved independently of that witness or evidence, in particular by reference to other evidence in the case. Here the Civil Service Commission found evidence supporting the credibility of the Mays report. In short, the credibility of a witness or evidence in a case can affect the credibility of another witness or evidence in a case. Here, the credibility assigned to the Mays report was affected by the conduct and demeanor of Ingersoll during the hearing. This type of consideration and formulation of credibility determinations is proper and expected of the fact finder.

Division III held consistent with this rationale as follows:

The parties, quite understandably, struggle to find relevant authority on the hearing room behavior issue. Typically, participants in a trial or hearing are on their best behavior in order to present themselves to the decision-maker in the best possible light. Nonetheless, the whole purpose of live testimony is to allow the decision-maker to assess the credibility of the witness. For that reason, we believe a

participant's behavior during the hearing is always a factor that the decision-maker may consider. In many instances, the demeanor evidence will only serve to aid in the credibility assessment. In other instances, current behavior may shed light on allegations regarding past behavior or, as in this case, the accuracy of a third party's evaluation. Here, Mr. Ingersoll appeared to act consistently with Dr. Mays' evaluation and his actions served to validate the report.

Division III Slip Opinion, Case No. 34848-2-III, appendix A to the Petition for Review, at page 8.

The Commission's consideration of Ingersoll's hearing demeanor to support a finding that the Mays report is credible is not the type of substantive evidence as described in State v. Barry, 183 Wn. 2d 297, 352 P.3d 161 (2015). In Barry the evidence was argued to be substantive evidence of guilt, bearing on the ultimate question to be determined by the jury. Here the demeanor evidence was limited to a credibility determination concerning the Mays report.

Even if the Commission had treated the demeanor evidence as substantive evidence, such an error would be harmless as there was ample evidence within the record for the Commission to reach the same conclusion without the demeanor evidence. This Court should not take review of a matter involving harmless error. The Court in Barry noted in this regard:

. . . [a]dopting the rule Barry and the dissents urge would hold trial courts to an impossibly high standard, requiring us to apply the strict constitutional harmless test to every trial in which a trial court permitted the jury to consider hearsay, improper character evidence, irrelevant materials, or any other form of inadmissible subject matter. Such a rule would effectively nullify our long-standing standard of review for evidentiary errors and hold our trial courts to an impossible-to-satisfy standard of evidentiary perfection. We expressed this concern in *White*, the case in which we announced the first iteration of the nonconstitutional error standard for criminal cases:

[N]ot all hearsay evidence ... is grounds for reversal, even though admitted in error, for the concept of harmless error remains with the courts. A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one. Thus, error without prejudice is not reversible. Expressed differently, error which does not substantially affect the merits of the controversy likewise is not grounds for reversal. 72 Wn.2d at 530-31 (citation omitted).

It is, of course, axiomatic that a jury's verdict must be based on evidence presented at trial, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 1.01 (3d ed. 2008), which the trial court both read aloud and provided to the jury in writing, explicitly says as much. But we will not presume constitutional error simply because the jury may have considered subject matter that, while not evidence, was evident and obvious to them in the courtroom.

## VII. CONCLUSION

Because the Civil Service Commission properly considered hearing demeanor in assessing credibility to assign evidence this Court

should not accept review of the unreported Divisions III decision in this matter. It does not meet any of the requisites that would permit review under RAP 13.4(b)(2)(3) or (4).

If there was any error in this matter, such error is harmless and this Court should not accept review.

Respectfully submitted this 7<sup>th</sup> day of September, 2018



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