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Div. II No. 34261-8-II
Sup. Ct. No. 05-2-09617-4

COOPER, J. ALLEN
DEC 11 11:13 AM '06
JW

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ANDREW L. MAGEE, Defendant-Appellant,

v.

STATE OF WASHINGTON, Plaintiff-Respondent

APPELLANT REPLY BRIEF

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I ASSIGNMENT OF ERROR

Mr. Magee respectfully requests that the assignment of error contained in section I of his Opening Brief be incorporated by reference.

II ISSUES PRESENTED FOR REVIEW

Mr. Magee respectfully requests that the issues presented for review contained in section II of his Opening Brief be incorporated by reference.

LEGAL ERROR

Mr. Magee respectfully requests that the Legal Error cited in section II of his Opening Brief be incorporated by reference.

RAP 10.3(b)

Respondent has included a Statement of the Case in their brief (BR 2-5) indicating to the Court that they wish the Court to consider this appeal based on what is stated as fact.

RAP 10.3 limits Respondent Statement of the Case

to:

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

RAP 10.3(b)

1. Respondent states as fact that, “Trooper Randall found the defendant on the right shoulder of the road, his car facing *eastbound* on the *westbound* lanes of State Route 512.” BR 3 (emphasis added)

Respondent presents to this Court that this is a factually correct statement, and is the basis for their argument in opposition to granting Mr. Magee’s appeal.

Respondent, however, diametrically opposes *itself* when, it is then argued, that the evidence in this case showed that, “He [Mr. Magee] drove his car *westbound*, the wrong direction, on the *eastbound* lanes of State Route 512.” BR 7 (emphasis added)

Respondent, again, produces the same self-defeating and disabling contradictory mis-statement of facts in its brief when it is argued, “The evidence in this case showed that defendant drove his car *westbound*, the wrong direction, on the *eastbound* lanes of State Route 512. BR 9 (emphasis added)

The directions of East and West are directly opposite. On one hand, Respondent alleges as fact that the evidence presented by the Trooper puts Mr. Magee *going* (although only parked) eastbound, and the wrong way against westbound traffic.

On the other hand, Respondent then *argues* that just the opposite was true. Both cannot be true,

invalidating Respondent's basis for denying Mr. Magee's appeal.

2. Respondent states, "Trooper Randall approached the defendant who admitted that he had driven the wrong way on the highway in order to meet Mr. Hershey to help him with his car." BR 4

Respondent further states, "The defendant [Appellant] *further* acknowledged that driving the wrong direction on State Route 512 was a 'very dangerous thing to do' and that he understood why Trooper Randall was citing him for negligent driving." BR 4

Respondent's presentation of the record is misleading. Mr. Magee never made any admission to the District Court, rather, this was a general reference by the Trooper in her testimony. Respondent, then misleads this Court further by stating that Mr. Magee made *further* acknowledgments. This is contradicted by the record of the Troopers testimony, wherein it states, ". . . [W]hen I

contacted you, you told me and you admitted to me that is was a very dangerous thing to do and when I cited you for neg. driving you understood why I was citing you for that . . .” CP 28

Further contradicting Respondents representation to this Court, and consistent with the Troopers testimony as to Mr. Magee having only acknowledged *that it was a very dangerous thing to do*, the Trooper made no record of any suggested-initial admission by Mr. Magee, (as alleged by Respondent,) of driving the wrong way. In fact, the only admission referred to by the Trooper contained in her comment section certified as true and correct under penalty of perjury on the date of the alleged incident, and that which is consistent with her testimony clarifying just what Mr. Magee is alleged to have said – states, “I [Trooper Randall] explained to him the danger of driving the wrong way on a hwy & he [Mr. Magee] *said* he understood.” CP 21 BR A-6

It is determined from what the State of Washington provides Traffic/Law enforcement official in pre-formatted citation forms that no admission to the alleged offense could have occurred.

On the citation form issued to Mr. Magee, it is pre-printed by the State that, “*without admitting* to having committed each of the above offenses, by signing this document I acknowledge receipt of this notice of infraction and promise to respond as directed on this notice.” CP 19, Appellant Opening Brief (AB) A-4, BR A-4 (emphasis added)

Mr. Magee signed the citation at the request of the Trooper under the condition that he had made no admission. The citation is then signed by the Trooper, wherein her signature makes certain that, “I certify under penalty of perjury . . . my report written on the back of this document or attached to this infraction is true and correct.” CP 19, AB A-4, BR A-4

The citation, (albeit unlawfully issued) precludes from submitting to the District Court that Mr. Magee admitted to having committed the alleged offense. Respondent asserts, misleadingly, that the Trooper indicated that Mr. Magee did make an admission to the alleged offense. If the Trooper were to do so, she would be declaring that her statement on the citation was *untrue*, as opposed to true and correct under penalty of perjury.

Consistent with no admission regarding the offense being made by Mr. Magee, the report to which the citation refers to contains no admission. If the Trooper were to allege an admission otherwise, as Respondent has represented to this Court did occur, the Trooper would necessarily, according to the pre-printed language provided by the State, invalidate the issuance of the citation.

3. Respondent states as fact, without citing any language, and provides as a basis for this Court to oppose Mr. Magee's appeal that, "the defendant [Mr. Magee] admitted he had crossed into the *oncoming* lanes of traffic for the on ramp to State Route 512, but stated that he signaled before pulling into the oncoming lane and then signaled again to pull back over to the shoulder. Id." BR 5

Venturing to surmise that Respondent means CP 31-2, the record reveals that Mr. Magee said nothing of the sort. Furthermore, what Respondent presents to this Court is factually impossible, and irreconcilable with the predicate facts as stated by Respondent as discussed *supra*, (*i.e.*, *whether Respondent has Mr. Magee going Eastbound/Westbound.*)

What Mr. Magee said to the District Court was, "At all times when I came back into the lane of the onramp, I did signal to go into the ramp and then onto

that lane, and then did signal to pull over, and at all times I did have my flashers on.” CP 31

Mr. Hershey’s car had been pulled over on the onramp.¹ Mr. Magee drove up the onramp going with the flow of traffic, (although there was none, it was Saturday morning) *i.e.*, the correct direction.² Mr. Magee turned on his emergency flashers, and signaled to pull over, and did so behind Mr. Hershey’s car. Then Mr. Magee, to be in front of Mr. Hershey’s car, signaled to return to the on ramp lane, and did so, going the same direction as traffic would flow, *not* against the flow of traffic as Respondent has mistakenly asserted. Having traveled the correct direction to be just past Mr. Hershey’s car, Mr. Magee then turned onto the shoulder to be in front of Mr. Hershey’s car. This is consistent with what Mr. Magee actually told the District Court, and

¹ Please see map of State Highway 512 before the Court as BR A-4.

² Please see footnote 1, *supra* – on ramp depicted on right side of map going from E Pioneer, and eventually entering State Highway 512.

establishes Respondent's unspecified reference to the record as incorrect and impossible.

IV ARGUMENT

Mr. Magee respectfully requests that the Argument contained in section IV of his Opening Brief be incorporated by reference.

DISPOSITIVE UNCONTESTED ISSUE ON APPEAL

A. Mr. Magee's Opening Brief identifies and contains eight (8) Issues Presented for Review.³ Mr. Magee lists and presents to this Court as the very first issue, "Whether [the] citation was lawfully issued." AB-i Mr. Magee then presents to this Court the argument on that issue, and enumerating it as the first argument.

AB17-19 Specifically, it is argued that RCW 46.63.030 – Notice of Infraction – Issuance – Abandoned Vehicles,

³ 1. Whether citation was lawfully issued. 2. Whether detention was lawful. 3. Whether Superior Court's Affirmation of District Court recognized proper RCW. 4. Whether Mr. Magee was denied due process. 5. Whether District Court violated IRLJ 3.1(b). 6. Whether Mr. Magee, under the facts, could be cited for a moving violation. 7. Whether it was possible for Mr. Magee to have done what was alleged. 8. Whether Respondent's violation of Procedural Rules were fatal to opposition of Mr. Magee's appeal.

has specific predicate requirements that had not been met for the citation in question to be lawfully issued.

Respondents brief is silent in response to this argument. Pursuant to RAP 12.1(a), Mr. Magee submits and moves the Court to determine that Respondent has presented to the Court an uncontested response to this issue on appeal, and abandoned and waived any contention of this issue.

While diminishing in no way the remaining issues to be discussed, Mr. Magee moves the Court to accept his argument on this issue as true and correct and unopposed, and grant his appeal.

B. For the same reasons contained in section IV Argument – Dispositive Uncontested Issue on Appeal, *supra*, (in this document,) Mr. Magee moves the Court to accept his argument on the issue enumerated as number six (6) in his Opening Brief (Whether Mr. Magee, under the facts, could [should] be cited for a moving violation

v. parking violation) as true and correct and unopposed,
and grant his appeal.

REPLY TO REMAINING RESPONSES

Herein, Mr. Magee, while averring all arguments
of Respondent, responds to the following specific
arguments contained in the BR:

1.

C. ARGUMENT.

1. There was Sufficient Evidence for the Court to have
found that the Defendant Committed Negligent Driving
in the Second Degree.

A. Respondent submits to this Court that the
District Court, “did not find a distinction between the
danger created by driving against the flow of traffic on
the highway or driving against the flow of traffic on the
shoulder. CP 32” BR 6

The argument submitted by Respondent is
repudiated by the case law, and statutory law presented to
this Court contained in Mr. Magee’s Opening Brief under

section three (3) of his argument on pages twenty-three through twenty-eight (23-28) AB 23-8

B. Respondent, without citing any record, submits to this Court that at the District Court, “the evidence in this case showed . . . He [Mr. Magee] drove his car westbound.” BR 7

As contained in Mr. Magee’s Opening Brief, the evidence presented by the Trooper states exactly the opposite, “ ‘you [Trooper] in fact never saw me [Mr. Magee] do what you are accusing me of?’ ” with the response of, “ ‘No’ ” provided by the Trooper. AB 21, CP 26 Furthermore, Mr. Magee had the Trooper point out that, “ ‘only having observed my car *parked* and *only parked*, you [Trooper] *never* witnessed my car driving on the 512 correct?’ ” with the Trooper responding in the affirmative, “ ‘Not until I advised you to leave . . .’ ” AB 21, CP 26 (emphasis added)

C. Respondent submits to this Court that Mr. Magee “admitted that he was driving his car and that he was aware that he was driving against the flow of traffic on State Route 512. CP 28” BR 7

Mr. Magee has addressed whether an admission could be determined to have been made when he presented his Statement of the Case section, *supra*, pages 3-6 in this document, and would respectfully refer the Court to that section.

D. Respondent submits to this Court that the alleged statements of “callers,” (referred to by Respondent as “the 911 callers’ statements,” RB 7) were not hearsay “in light of defendant’s statements to the trooper at the scene,” (BR 7) when the Trooper referred to them at the District Court.

There is no legal authority cited to support what would otherwise be Respondents argument. Mr. Magee would respectfully direct this Court to footnote 3, page

22 of his Opening Brief wherein a detailed argument refutes Respondent's unsupported assertion that the hearsay (in fact, double-hearsay) statements were not hearsay.

E. Respondent asserts and submits to this Court that under RCW 46.61.525(2), Mr. Magee was not exercising reasonable care regarding what the Trooper, and the District Court, and Respondent have misguidedly speculated occurred and was not witnessed. Respondent presents only the following argument in support of the language of RCW 46.61.525(2) stating:

The defendant or Mr. Hershey could have easily called the Washington State Patrol, the local Police Department, or a tow truck to come and assist Mr. Hershey with his car. Unlike the defendant, a police agency would have been able to coordinate traffic or alert traffic to the dangerous situation of a car moving the wrong direction on a highway access ramp, or officers could have blocked traffic from that lane while they restarted his car. Police vehicles and tow trucks are equipped with emergency lights to alert motorists. Law enforcement officers and tow truck drivers have training in how to safely handle these situations.

RB 8⁴

Respondent cites absolutely no legal authority supporting this argument, and submits it as the sole basis as to why this Court should not grant Mr. Magee his appeal.

The Legislature of the State of Washington has spoken to the contrary when it enacted RCW 46.61.590 – Unattended motor vehicle – Removal from highway, which states simply - and without qualification as to the difference between Mr. Magee and anyone else assisting Mr. Hershey and the removal of his car – the following:

It is unlawful for the operator of a vehicle to leave the vehicle unattended within the limits of any highway unless the operator of the vehicle arranges prompt removal of the vehicle.

RCW 46.61.590

⁴ Please note that this statement belies and undermines Respondents alternative argument(s) contained in their brief. Namely, Respondent therein states that Mr. Magee was in fact on a “highway access ramp,” not in the lanes of traffic as stated otherwise by Respondent. As such, Respondent is validating Mr. Magee’s argument(s) regarding the distinction(s) made between lanes of traffic on a highway, shoulders of highways, and off/on ramps.

Mr. Hershey called Mr. Magee to assist in removing his vehicle to be in compliance with the law. Mr. Magee went to provide the assistance needed to remove the vehicle, and did so safely on the on ramp shoulder going from E Pioneer Street in Puyallup onto State Route 512. Respondent's argument, unsupported by authority is contradicted by the language of RCW 46.61.590.

F. Respondent submits to this Court that *Campbell v. Department of Licensing*, 31 Wn.App. 833, 644 P.2d 1219 (1982) does not apply to the allegations against Mr. Magee. Initially, Respondent argues - but does not cite specific language - that *Campbell* is distinguishable because, "The court held that the *stop* was not lawful." RB 9 (emphasis added) Believing that this distinguishes *Campbell*, Respondent goes on to argue that, "defendant was already stopped . . . Trooper Randall did not stop the

defendant – he was already on the side of the road.”⁵ RB

10

Respondent’s characterization of *Campbell* is inaccurate, and the subsequent argument critically flawed, for in fact, *Campbell* states that based on parallel facts as those here, that, “It follows that the officer’s *stop and detention* was unlawful.” *Campbell v. Department of Licensing*, 31 Wn.App. 833 AB 20 (emphasis added)

When a person is parked (not driving, much less negligently) and a Trooper approaches them with their blue lights on, that person is legally stopped from proceeding if he/she so desires. Furthermore, as was the case with Mr. Magee, he was then detained.

Respondent states also that, “Trooper Randall did not merely contact the defendant on the sole basis of the 911 call. Rather, Trooper Randall observed that the

⁵ Respondent states again that Mr. Magee was parked on the side of the road, *i.e.*, the shoulder. If so, and under the law, there is a distinction between the shoulder, the lanes, etc., and that distinction was contradicted by the District Courts statement on the record (as both Mr. Magee and Respondent has cited here and in Mr. Magee’s Opening Brief.)

defendant's vehicle was facing the wrong direction on the shoulder when she arrived at the scene . . .”⁶

In fact, when the Trooper was asked, “only having observed my car parked and only parked, you never witnessed my car driving on the 512 correct?” the Trooper responded, “Not until I advised you to leave the same way that you came.” – *i.e.*, No. CP 26

Specifically, and as previously submitted, the Trooper was then asked, “Ok so you are referring to something you did not witness.” and the Trooper responded, “Correct.” CP 26-7 The Trooper's testimony determines that she had no corroboration from anything she witnessed, and was relying entirely on the alleged, double-hearsay “calls.”

G. Regarding Respondent's argument to distinguish *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003), Mr. Magee relies upon his argument in

⁶ Please refer to footnote 5, *supra*, again, Respondent places Mr. Magee on the shoulder of State Route 512.

his Opening Brief wherein it is made clearly that if there are multiple theories, *i.e.*, violations under the RCW, of what a person could be culpable of, remand is mandated.

2. The Trial Court properly imposed a lawful sentence, and the defendant never requested a deferred finding at the conclusion of the hearing.

Mr. Magee relies upon his argument in his Opening Brief. It is clearly indicated that a deferred finding/dismissal with costs, and the action of reviewing and determining “is available if you [Mr. Magee] make a personal appearance” AB A-9 Mr. Magee did make a personal appearance, and the District Court failed to review Mr. Magee’s matter to determine if this option were available to him.

3. The Defendant was provided with all proper discovery.

Mr. Magee relies upon his argument in his Opening Brief. Mr. Magee would also add that it is referred to by Respondent that the alleged double-hearsay

statements were those of “witnesses.” RB 15 If so, and if the Trooper were to introduce their testimony before the District Court, their alleged statements become the testimony of witnesses called at that hearing, presented via the Trooper. Mr. Magee’s discovery demand requested the contact information of the alleged witnesses, and they were not provided as is required under IRLJ 3.1(b), thereby precluding their testimony from being introduced.

4. The State’s Response to the Defendant’s Motion for Discretionary Review was timely filed, and even if the State’s Response was untimely, such issue is moot as this Court has accepted Discretionary Review.

Mr. Magee relies upon his argument in his Opening Brief, and attached Appendices, which establish the method used to deliver – late - their response, in violation of the Court Rules; that it was delivered late, and in violation of the explicit language of the letter sent from this Court to both parties, dictating that if as such,

sanctions will be imposed. Furthermore, Mr. Magee respectfully defers to the Court regarding the effect of the subsequent sworn declaration of Respondent, and its veracity regarding how and when Mr. Magee was delivered a Response.

5. The Defendant has failed to provide a sufficient record to find that the Superior Court abused its discretion in allowing late filing of the State's Response Brief below.

Mr. Magee relies upon his argument and attached Appendices in his Opening Brief, and the Designated Court Papers, and the record of this Court.

Mr. Magee in his Opening Brief before this Court discusses the failure of Respondent to comply with the standard *Respondent* set before the Superior Court (by way of its letter dated July 26, 2005 (AB A-4) filed with the Superior Court in two ways:

First, Mr. Magee refers to Respondents failure before the Superior Court while presenting an argument

regarding moving this Court to preclude “the filing of a Response to Motion for Discretionary Review.” AB 39

Mr. Magee refers to Respondents failure before the Superior Court, “In support of this motion” as “a pattern of behavior by Plaintiff-Respondent.” AB 40 There is no record needed, for it is acknowledged through the letter (AB A-4), and the acknowledged grossly late filing date of Respondent before the Superior Court that there is a pattern of behavior of violating court rules by Respondent.

Secondly, Mr. Magee does present to this Court for review the decision of the Superior Court not to enforce RALJ 7.2(b) and RALJ 10.3 in light of Respondent’s documented gross violation. Mr. Magee submits in addition to the argument contained in his AB, that his Motion to Set Matter before Superior Court (Unopposed) (CP 46-52), and Motion for Reconsideration (CP 66-80) and the facts and procedure discussed therein regarding

Respondent's failure(s) constitute a sufficient record to find that the Superior Court abused its discretion.

V CONCLUSION

For the reasons stated above, and in Mr. Magee's Opening Brief, Mr. Magee respectfully requests that this Court grant Mr. Magee's appeal, reversing the decision of the Court Commissioner, and reversing the decision of the Superior Court, and reversing the finding of the District Court, and to order this matter dismissed.

Respectfully submitted this 1st day of December 2006



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