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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, APPELLANT

v.

DON PATRICK DODSON, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 04-1-01353-6

OPENING BRIEF

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Table of Contents

A. APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. The Superior Court erred when it found that Pierce County did not have jurisdiction when an essential element of the crime occurred exclusively in Pierce County..... 1

 2. The Superior Court erred when it found as a matter of law that concurrent jurisdiction does not exist..... 1

 3. The Superior Court erred when it awarded costs to the defendant below. 1

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court properly find that it had jurisdiction to hear the case? 1

 2. Did the Superior Court err when it awarded costs to the defendant? 1

C. STATEMENT OF THE CASE 1

 1. Facts Adduced at the Pretrial Motions 1

 2. Facts adduced at trial 5

 3. Facts relevant to the appellate review done by Superior Court..... 7

D. ARGUMENT..... 8

 1. JURISDICTION WAS PROPERLY ESTABLISHED WHEN AN ESSENTIAL ELEMENT OF THE CRIME OCCURRED IN PIERCE COUNTY 8

 2. THE TRIAL COURT PROPERLY FOUND THAT THE AREA WHERE THE ARREST OCCURRED WAS IN AN AREA OF SHARED JURISDICTION, AND THEREFORE PIERCE COUNTY HAD JURISDICTION TO HEAR THE CASE..... 9

3. BECAUSE THE SUPERIOR COURT ERRED IN
DISMISSING THIS CASE, THE COURT'S ORDER
AWARDING COSTS TO THE DEFENDANT WAS
ALSO IN ERROR.....13

E. CONCLUSION. 13-14

Table of Authorities

Federal Cases

<u>Fort Leavenworth R.R. Co. v. Lowe</u> , 114 U.S. 525, 5 S. Ct. 995, 29 L.Ed.264 (1885).....	9
<u>North Dakota v. U.S.</u> , 495 U.S. 423, 110 S. Ct. 1986, 109 L.Ed.2d 420 (1989).....	9-10
<u>United States v. Brown</u> , 552 F.2d 817, 820 (8 th Cir. 1977).....	10
<u>United States v. Grant</u> , 318 F.Supp.2d 1042 (D. Montana 2004)	9
<u>United States v. Raffield</u> , 82 F.3d 611 (4 th Cir. 1996).....	10, 11
<u>Washington Et. Al. v. Confederated Bands and Tribes of the Yakima Indian Nation</u> , 439 U.S. 463, 99 S. Ct. 740, 58 L.Ed.2d 740 (1978)	10

State Cases

<u>Cambell v. Commonwealth of Virginia</u> , 39 Va. App. 180, 571 S.E.2d 906 (2002).....	10, 11
<u>State v. Lane</u> , 112 Wn.2d 464, 468, 771 P.2d 1150 (1989).....	8, 9

Rules and Regulations

RALJ 9.3(a)	13
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A. APPELLANT'S ASSIGNMENTS OF ERROR:

1. The Superior Court erred when it found that Pierce County did not have jurisdiction when an essential element of the crime occurred exclusively in Pierce County.
2. The Superior Court erred when it found as a matter of law that concurrent jurisdiction does not exist.
3. The Superior Court erred when it awarded costs to the defendant below.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly find that it had jurisdiction to hear the case?
2. Did the Superior Court err when it awarded costs to the defendant?

C. STATEMENT OF THE CASE.

1. Facts Adduced at the Pretrial Motions

Sergeant Gregory Mason, a Staff Sergeant with the Army Military Police at Fort Lewis, was supervising a traffic stop at 41st Division Drive,

directly underneath Interstate 5, at 2:40 a.m. on June 15, 2003. CP¹ (TRP 2/23/04 pages 14-28, 29). While supervising the traffic stop, he noticed DON PATRICK DODSON, hereinafter “defendant,” exiting I-5 utilizing the entrance ramp. CP (TRP 2/23/04 page 28).

Sergeant Mason jumped from his patrol car, ran towards defendant’s car, while yelling at the other military police officers to stop the defendant. CP (TRP 2/23/04 page 30). He and another officer ran towards defendant’s vehicle shining their flashlights in an attempt to stop the defendant. Id. Defendant stopped his car, and when Sergeant Mason contacted the defendant, he immediately noticed that defendant’s speech was slurred and that he was confused and disorientated. Id. Sergeant Mason had defendant get out of the car, and observed that defendant was unstable on his feet and showed signs of intoxication. CP (TRP 2/23/04 31-32).

Sergeant Mason had defendant sit on the hood of the military police car, while he called for the Washington State Patrol. CP (TRP 2/24/04 pages 31-32). Sergeant Mason testified that he contacted the State

¹ Citations to the Clerk’s Papers will be to “CP.” The citations to the transcripts of the Superior Court actions on RALJ appeal will be to “RP,” followed by the date of the hearing. The trial transcript was designated as Clerk’s Papers, but was sent under a separate cover, without numbering by the Clerk. For the Court’s convenience, the “CP” designation for the trial transcripts will be followed by the transcript page number and date. For example, the citation to page 6 of the trial transcript will be to “CP (TRP 11/24/04 page 6)”.

Patrol based on his orders from superiors and a memorandum of understanding between Fort Lewis and the Washington State Patrol. CP (TRP 2/23/04 pages 32-34, 35).

Defendant told Sergeant Mason that he was going to leave and began to walk back towards his vehicle. CP (TRP 2/23/04 page 37). Sergeant Mason told defendant that if he did not remain on the hood of his vehicle that he would have to handcuff him and make him wait for State Patrol's arrival. Id. The defendant agreed to wait and Sergeant Mason did not handcuff him. Id. Sergeant Mason testified that he had the authority to apprehend and detain defendant awaiting State Patrol's arrival. CP (TRP 2/23/04 page 38).

Washington State Patrol Sergeant Woodrow Perkins was driving on 41st Division Drive at approximately 2:40 a.m. when he noticed several military police vehicles on the outside lane. CP (TRP 2/23/04 page 68). He observed defendant's car parked facing the wrong direction on the onramp to southbound lane of I-5. Id. As he approached the scene, Sergeant Mason flagged him down. Id. The defendant was later placed under arrest for driving under the influence of intoxicants. CP (TRP 2/23/04 page 75).

Lee Burnett, a real estate officer at Fort Lewis, testified that he went out with Sergeant Mason to ascertain the exact level of jurisdiction

the military had in this matter. CP (TRP 2/23/04 pages 47-49). He determined that the incident occurred in concurrent jurisdiction for both Washington State and Federal Government for adults and juveniles. CP (TRP 2/23/04 pages 51-52). He made his determination based on his knowledge of real property transfers, a Washington Statute, and maps and letters provided to him by the Army Corps of Engineers. CP (TRP 2/23/04 pages 52-58). The letters from the Army Corps of Engineers were not produced at trial, but a map was entered as an exhibit, which indicated that the on ramp where the incident occurred was concurrent jurisdiction. CP².

The trial court found that Sergeant Mason did not make a formal arrest of defendant for the purpose of exercising criminal jurisdiction over him, and any detention of defendant was done pursuant to the military purpose exception of the Posse Commitatus Act. CP (TRP 2/23/04 pages 92-93). He noted that the military expectation allows for arrest for off-post criminal activity which adversely affects the welfare of persons and the efficiency of operations on post. CP (TRP 2/23/04 pages 92-94). Both concerns were present. Id. The trial court further noted the doctrine of citizen's arrest, which would support as valid, an arrest made by a civilian. CP (TRP 2/23/04 page 94). The court finally concluded that the area in

² The administrative record has been sent by the Clerk under a separate cover.

which the arrest occurred was an area of shared jurisdiction, and the court had proper jurisdiction to hear this matter. Id.

2. Facts adduced at trial³

Sergeant Gregory Mason's testimony was essentially the same as the testimony from the pretrial motions. He added the fact that when he saw the defendant approaching the wrong way down the on-ramp, he became very concerned for the safety of his officers. CP (TRP 2/24/04 pages 89, 91). Sergeant Mason testified that he told Sergeant Perkins what he had observed, and turned the case over to Sergeant Perkins. CP (TRP 2/24/04 page 92). Sergeant Mason then returned to his original investigation. Id.

Sergeant Perkins approached defendant who was seated on the hood of his car, and introduced himself. CP (TRP 2/24/04 page 100). Sergeant Perkins identified the defendant as Don Dodson. CP (TRP 2/24/04 page 103).

Sergeant Perkins ultimately arrested the defendant for driving under the influence of intoxicants. Id. Defendant was advised of his Constitutional rights and placed in the back of Sergeant Perkins's patrol

³ The defendant did not challenge the sufficiency of the evidence in this case below, and sufficiency of the evidence is not an issue in on which review was granted. Additional facts introduced at trial regarding the defendant's intoxication, which was not the subject of the appeal, are not included in the State's statement of facts.

car. Id. Sergeant Perkins contacted dispatch and requested another officer to come transport defendant. CP (TRP 2/24/04 page 120). He then turned defendant over to Washington State Patrol Trooper Owens to be transported, while Sergeant Perkins remained at the scene to process defendant's car. CP (TRP 2/24/04 pages 107-108).

Trooper Owens drove defendant to Fort Lewis to administer a BAC test. CP (TRP 2/24/04 pages 123-124). At the Fort Lewis police station, Trooper Owens read defendant his constitutional rights, and the implied consent warnings for a BAC test. CP (TRP 2/24/04 pages 125-126, 127-128). Defendant indicated he understood both his rights and the Implied Consent Warnings for Breath. Id. Trooper Owens administered the BAC test. CP (TRP 2/24/04 pages 136-146).

Washington State Patrol Trooper Denny Stumph, a breath test technician, testified about the operation and maintenance of the Breath Alcohol Concentration DataMaster machine ("BAC"). CP (TRP 2/24/04 154-168). Trooper Stumph testified that he or another certified technician, Ruth Cramer, regularly tested the machine that was used to test defendant. CP (TRP 2/24/04 pages 168-174).

3. Facts relevant to the appellate review done by Superior Court

On December 22, 2005, the defendant filed an opening brief⁴.

Defendant's opening brief did not include any argument relating to the existence of concurrent jurisdiction. CP 4-17. On June 9, 2006, the court heard oral argument, and for the first time, the defendant argued to the court that concurrent jurisdiction between State and Federal government did not exist. RP 1-19. The defendant cited authority to the court by name only, not by citation. RP 5, 9. The defendant refused to provide any citations to the State regarding the authority provided to the court. RP 22. The court found that concurrent jurisdiction did not exist as a matter of law and that the incident occurred on Fort Lewis jurisdiction. RP 18.

On June 23, 2006, the court heard the State's motion for reconsideration. CP 20-65; RP 20. The court denied the motion for reconsideration. CP 138-139; RP 30. The court entered findings of fact and conclusions of law over the State's objection, and imposed costs against the State in the amount of \$2,432.00 for transcripts, and \$200.00 in attorney fees. CP 138-139, 142-143.

⁴ The defendant's opening brief is entitled "memorandum of authorities."

The State filed a Notice for Discretionary Review on March 20, 2006. CP 144-147. Discretionary review was granted, and this appeal follows.

C. ARGUMENT.

1. JURISDICTION WAS PROPERLY ESTABLISHED
WHEN AN ESSENTIAL ELEMENT OF THE CRIME
OCCURRED IN PIERCE COUNTY.

The State of Washington may exercise jurisdiction over a criminal offense if an essential element of the offense occurred within the State but outside the land ceded to the federal government where the offense culminated. State v. Lane, 112 Wn.2d 464, 468, 771 P.2d 1150 (1989).

In Lane, the defendants were charged in Pierce County Superior Court with aggravated murder in the first degree. Id. at 466. Lane and his co-defendants drove to the victim's home in Tacoma, Washington, where they abducted the victim and put her in the trunk of her car. Id. at 466. The defendants then drove the victim to a wooded area of Fort Lewis, where they struck the fatal wound. Id. at 467. The Pierce County Superior Court found that the State of Washington had jurisdiction to hear the case because an element of the crime committed, premeditation, was committed in State jurisdiction; therefore, State court had the authority to hear the case. Id. at 470.

In this case, the crime of DUI was committed, at least in part, in State jurisdiction. Even if this court were to find that concurrent jurisdiction does not exist, the State still had jurisdiction over this case because an essential element of the crime—driving—occurred within the State. The defendant had to drive on I-5, which is exclusive State jurisdiction, in order to get to the onramp. Sergeant Mason observed the defendant driving down the onramp from Fort Lewis to I-5. CP (TRP 2/23/04 pages 28-29). The only way a vehicle could get to the position to be driving down the onramp would be directly from I-5 itself.

The Superior Court, acting as the reviewing court, did not address how this case differs from Lane. Rather, the court held as a matter of law that concurrent jurisdiction does not exist, and that the jurisdiction for the case was exclusively with the federal government, not the State.

2. THE TRIAL COURT PROPERLY FOUND THAT THE AREA WHERE THE ARREST OCCURRED WAS IN AN AREA OF SHARED JURISDICTION, AND THEREFORE PIERCE COUNTY HAD JURISDICTION TO HEAR THE CASE.

As a matter of law, concurrent jurisdiction does exist. See United States v. Grant, 318 F.Supp.2d 1042 (D. Montana 2004); Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 5 S. Ct. 995, 29 L.Ed.264 (1885); North Dakota v. U.S., 495 U.S. 423, 110 S. Ct. 1986, 109 L.Ed.2d

420 (1989); Washington Et. Al. v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 99 S. Ct. 740, 58 L.Ed.2d 740 (1978). In United States v. Raffield, 82 F.3d 611 (4th Cir. 1996), the court stated that federal law does not preclude the State and federal government from entering into a relationship of concurrent jurisdiction. Id. at 613. In Raffield, the defendant was convicted of DUI on a United States Forest Service road. Id. at 611-613. The defendant was charged in State court, and sought to have the charges dismissed on the basis that he was in federal jurisdiction. Id. at 612-613. Congress can acquire exclusive or partial jurisdiction over lands or waters within a state by the state's consent or cession. Id. at 612 (citing United States v. Brown, 552 F.2d 817, 820 (8th Cir. 1977)).

In Cambell v. Commonwealth of Virginia, 39 Va. App. 180, 571 S.E.2d 906 (2002), the defendant was convicted as being a habitual driving offender in State court. Id. at 184. The defendant had approached the guardhouse at a military facility entrance and was asked for identification. Id. at 185. When the defendant could not produce any identification, he was denied entry to the facility. Id. The defendant then parked on the shoulder, where he was contacted by State law enforcement, who ultimately arrested the defendant for driving with a suspended license. Id. At trial, the defendant claimed that he was arrested in federal jurisdiction. Id. The court held that the State had consented to only cede "concurrent jurisdiction" to the United States to prosecute crimes

committed on land that had been transferred to the federal government. Id. at 187. The court stated that “among other things, concurrent jurisdiction includes ‘jurisdiction of the courts of Virginia over persons, transactions, matters of property on such lands. . ..’” Id. (citing Code § 7.1-18.1(c)).

In this case, Lee Burnett testified that the land where the incident occurred was in concurrent jurisdiction. CP (TRP 2/23/04 page 51). There was no evidence presented to the trial court that suggested a lack of state jurisdiction or concurrent jurisdiction. The only testimony presented to the trial court were State witnesses who testified that the State had jurisdiction to hear the case. The trial court clearly accepted the testimony and found that the area where the incident occurred was shared jurisdiction. CP (TRP 2/23/04 page 94).

Similar to the facts in Raffield, in this case the State and federal government entered into a relationship of concurrent jurisdiction. CP (TRP 2/23/04 page 51). Lee Burnett testified at trial that there is concurrent jurisdiction in certain areas in and around Fort Lewis including the area where the offense was committed. CP (TRP 2/23/04 page 55). Sergeant Mason testified that based on his orders and a memorandum of understanding between Fort Lewis and Washington State, any incidents involving I-5 was best left to the Washington State Patrol. CP (TRP 2/23/04 page 35). Further, Mr. Burnett testified that, based on his experience and knowledge as the real estate officer for Fort Lewis, the

area where defendant was stopped was within concurrent military and state jurisdiction. CP (TRP 2/23/04 pages 48, 50). Mr. Burnett testified that he was familiar with the area of jurisdiction for the military around Fort Lewis. CP (TRP 2/23/04 page 48). Mr. Burnett also testified that he based his determination of jurisdiction on the maps and real estate records for military lands on file held by the Army Corps of Engineers. CP (TRP 2/23/04 pages 53-54).

The State was not required at trial to produce the deed and documents deeding Fort Lewis to the Federal government in 1917. However, the State produced a witness, Lee Burnett, who stated that the area in which the defendant was stopped was not exclusively federal jurisdiction.

The defendant did not provide any written authority to refute that testimony. The trial court clearly found Burnett's testimony credible. The State can find no authority prohibiting the federal government from retroceding concurrent jurisdiction to the State. Moreover, in a pretrial hearing below, a map was introduced which indicated that the ramps to and from I-5 were "concurrent federal legislative jurisdiction." CP (Administrative Record from 07/06/06).

Because the Superior Court has held, as a matter of law, that concurrent jurisdiction does not exist, the State provided documentation of the retrocession of exclusive jurisdiction to the State government in its motion for reconsideration. CP 70-123. Trial testimony supported the

State's contention that the ramp on which the defendant was driving was concurrent jurisdiction with the State and federal government. The trial court properly determined that it had jurisdiction to hear the case.

3. BECAUSE THE SUPERIOR COURT ERRED IN DISMISSING THIS CASE, THE COURT'S ORDER AWARDING COSTS TO THE DEFENDANT WAS ALSO IN ERROR.

The party who substantially prevails on appeal shall be awarded costs on appeal. RALJ 9.3(a). However, as argued above, the Superior Court erred when it dismissed this case. Because the court erred in dismissing this case, the court's award of costs to defendant was also in error. CP 142-143. The Superior Court's order for costs should be vacated.

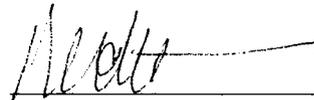
D. CONCLUSION.

The State respectfully requests that this Court reverse the Superior Court's ruling dismissing the case and to affirm the trial court's finding

that jurisdiction was properly established. The State further requests that this court reverse the Superior Court's order awarding costs to the defendant and to affirm the defendant's conviction.

DATED: February 2, 2007.

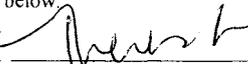
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-5-07 
Date Signature

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