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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
)	Respondent,) No. 77629-6
)	
vs.)	(Court of Appeals No. 54905-7-I)
)	
MARK PHILLIP NELSON,)	PETITIONER'S ANSWER TO
)	STATE'S MOTION TO
)	SUPPLEMENT THE RECORD
)	FOR REVIEW
)	
)	

1. IDENTITY OF RESPONSIVE PARTY

Petitioner Mark Nelson herein answers the State's Motion to Supplement the Record for Review, Or in the Alternative, to Rescind Decision to Review as Improvidently Granted, filed on May 11, 2006.

2. STATEMENT OF RELIEF SOUGHT

A) To deny the State's Motion to Supplement the Record for Review, Or in the Alternative, to Rescind Decision to Review as Improvidently Granted.

1 B) To grant appellant Nelson's Motion to Strike State's Attempt to Supplement Record,
2 filed on May 5, 2006.¹

3
4 3. RELEVANT FACTS

5 Mr. Nelson's appeal arises from a King County District Court prosecution for the charge
6 of Driving With a Suspended License in the First Degree, or DWLS1. Represented by trial
7 counsel, a different lawyer than his appellate counsel, Mr. Nelson's moved to dismiss the
8 charges based on the state's failure to provide him with constitutionally-required notice. CP 79-
9 80, 84-92. Based on the record before this Court, the trial court denied the motion and Mr.
10 Nelson subsequently stipulated to the facts. He was convicted of DWLS1.

11 On April 18, 2006, the State mailed to this Court a number of documents it had obtained
12 from the Department of Licensing four years after the trial court ruled on Mr. Nelson's motion
13 and convicted him of DWLS1. Sixteen out of the nineteen appendices attached by the State to its
14 May 11, 2006 "Respondent's Brief" were never introduced into the trial record or considered by
15 the trial court. Mr. Nelson was never able to discuss, let alone challenge the application of this
16 evidence to his trial court motion.

17 Because the State failed to properly make a request for additional evidence pursuant to
18 the applicable court rule, RAP 9.11, Mr. Nelson's appellate counsel filed a Motion to Strike on
19 May 5th, 2006.

20 On May 11, 2006, the State filed a Motion to Supplement the Record for Review, Or in
21 the Alternative, to Rescind Decision to Review as Improvidently Granted. Again, the State
22 failed to make this request under RAP 9.11.

23 ¹ The two pleadings speak to the same issue, namely, the State's continued failure to make a proper RAP 9.11
motion. As such, Nelson is not filing a separate reply to the State's "Answer to Petitioner's Motion to Strike," filed
on Thursday, May 25, 2006.

1 These records – which do not and never did form a part of the trial record – indicate that
2 when Mr. Nelson was in custody at NRF, the DOL communicated with him about a revocation
3 initiated for a refusal to submit to a breath test, not the HTO proceeding. (State’s Supp. App. 6.)
4 Mr. Nelson, represented by his private counsel from the December 2000 DUI case, avoided a
5 revocation of his license based on an alleged refusal to submit to a breath test. (State’s Supp.
6 App. 10 and State’s Supp. App. 3.)

7 There is absolutely nothing in the State’s supplemental appendices to contradict the fact
8 that DOL mailed the HTO revocation letter only to a stale residential address where he could not,
9 and did not, receive it. CP 33-35. Even though the DOL knew Mr. Nelson was jailed at NRF, it
10 only mailed him the notice letter to the Kirkland address. RP 7, 9-10.²

11
12 4. GROUNDS FOR RELIEF AND ARGUMENT

13 A. Appeals Are Decided On the Record That The Parties Litigated In The Trial
14 Court, Not On What Appellate Counsel Wished They Had Litigated.

15 It is axiomatic that appeals are decided solely on the record that the parties litigated in the
16 trial court. “If the evidence is not in the record it will not be considered.” State v. Wilson, 75
17 Wn.2d 329, 332, 450 P.2d 971 (1969); State v. Leach, 113 Wn.2d 679, 693, 782 P.2d 552
18 (1989). The State was represented by a competent trial deputy when this prosecution was
19 brought in King County District Court. The State had a full and fair opportunity in District Court
20 to present all evidence that it believed was relevant to the issue of Mr. Nelson’s license
21 revocation as a HTO. Mr. Nelson’s trial counsel appropriately raised a constitutional due

22 ² As discussed in petitioner Nelson’s reply brief, the information in the State’s supplemental appendices actually
23 strengthens his argument that DOL knew him to be in custody at NRF, could have given him notice of the HTO
proceedings there, and chose not to. State Supp. App. 6. (DOL official writes Nelson at NRF about non-HTO
revocations); State Supp. App. 7. (DUI trial court informs DOL that Nelson is “in custody” upon conviction); State
Supp. App. 14; (Substance Abuse Treatment Report informs DOL that Nelson was in inpatient treatment at NRF
from 1/4/01 to 5/4/01).

1 process as to the revocation, which specifically alleged that the revocation was devoid of due
2 process because the Department's attempt at notice – to a jailed man – was constitutionally
3 deficient.

4 Perhaps because of Mr. Nelson's success in avoiding one license revocation (for the
5 refusal) – a success due to Mr. Nelson's exercise of his right to be heard – the DOL chose not to
6 inform him of its intent to initiate an entirely different revocation, the HTO proceeding.
7 Speculation aside, the respondent State now seeks to redo what its trial deputy chose not to do in
8 the trial court. The State has failed to set forth any reasons why this court should permit the
9 State to change the record of the case after the appeal has been accepted.

10 B. The State Continues To Cite To The Wrong Rule.

11 The State continues to cite to RAP 9.10, but that rule does not govern their request.
12 Pursuant to RAP 9.10, a party may *supplement* the appellate record with evidence already part of
13 the trial record. State v. Murphy, 35 Wn.App. 658, 662, 669 P.2d 891 (1983). The State asks
14 this Court for something entirely different. The State has requested that this Court take
15 additional evidence. RAP 9.11 governs, but the State has failed to discuss the requirements of
16 this rule.

17 A trial court record belongs to no one. It simply is the sum-total of what both litigants
18 put forth as evidence in front of the trial judge. In that sense, the State is correct in saying that
19 “the only record that can supplement the record Nelson has provided to support his arguments
20 was never a record in the courts below.” State Motion to Supplement the Record for Review at
21 5. This is exactly why their motion is not a motion to supplement, but a motion to take
22 additional evidence. RAP 9.11.

1 C. RAP 9.11 Requires This Court to Reject the State's Motion.

2 RAP 9.11 severely restricts the submission of additional evidence not in the trial record.
3 Harbison v. Garden Valley Outfitters, Inc., 69 Wn.App. 590, 849 P.2d 869 (1979) (affidavit not
4 considered by the trial court cannot be introduced on appeal.) The record may not be
5 supplemented with documents which were available at trial if the offering party made no effort
6 to admit the documents at trial and if the documents are not necessary to resolution of the appeal.
7 Shreiner v. City of Spokane, 74 Wn.App. 617, 621, 874 P.2d 883 (1994).

8 Perhaps recognizing its inability to meet the requirements of RAP 9.11, the State declines
9 to address them. Mr. Nelson's complete DOL records were just as easily accessible to the
10 District Court trial deputy as they apparently were to the State's appellate counsel some four
11 years later. There is no equitable reason to excuse the State's failure to present this evidence to
12 the trial court. RAP 9.11(a)(3). With the filing of the DWLS1 criminal charge against Mr.
13 Nelson, the State took upon itself the burden of establishing that the HTO revocation of Mr.
14 Nelson's driver's license comported with due process. This latest effort at taking additional
15 evidence is nothing more than a distraction from what is inescapable: that the HTO revocation
16 occurred in violation of Mr. Nelson's constitutional due process rights.

17 There are no "do-overs" in criminal prosecutions. Washington State appellate courts
18 have upheld countless criminal convictions where a defense trial lawyer failed to challenge
19 evidence, failed to make a timely objection, or failed to adequately substantiate a motion. In the
20 trial court below, the State had the full and fair opportunity to present evidence and chose not to
21 do so.

22 The State should not be permitted to revamp the factual record in an appeal that has been
23 ongoing for almost four years. Allowing the State to do so would deprive Mr. Nelson of the

1 ability to challenge evidence the State seeks to use against him. Moreover, the State offers no
2 excuse for its failure to provide any or all of this information when the case was in District
3 Court.

4 The State's suggestions that Mr. Nelson is somehow at fault or has misled them or the
5 Court is absurd. The burden was on the State to prove that the HTO revocation complied with
6 due process. Mr. Nelson's trial counsel raised this issue and appropriately preserved it by way of
7 a legal brief and supporting evidence. It is not Mr. Nelson's counsel's fault that the State of
8 Washington – the party who jailed Mr. Nelson for the DWLS1 charge, the party who was
9 obligated to provide at the trial court level evidence to suggest that the revocation was
10 constitutionally sound – failed to research the issue or grasp that Mr. Nelson was making a
11 constitutional due process challenge to the underlying HTO revocation.³

12 The State had a full and fair opportunity to litigate in district court the factual and legal
13 issues presented by Mr. Nelson's challenge to the revocation. The State cannot now complain
14 about the manner in which it decided to proceed. The State's attempt to supplement the record
15 of this court is not supported by the law or the facts of this case.

16 Lastly, as discussed in Petitioner Nelson's Reply Brief, none of this new evidence is
17 outcome determinative. RAP 9.11(a)(2). The trial court rejected Mr. Nelson's due process claim
18 because it believed that statutory non-compliance was indispensable to a due process challenge,
19 not because it believed that DOL made contact with Mr. Nelson at NRF about a totally different
20 revocation. RP 12-13. (Again, nothing in the State's supplemental records contradicts that DOL

21 ³ The respondent State pleads: "While it may be true that the State could have subpoenaed DOL records before trial
22 for the motion to dismiss, there was no recognizable reason to do so. It would have seemed a useless act under a
heavy caseload." State's Answer to Petitioner's Motion to Strike at p.5. This is but a perpetuation of their original
23 misunderstanding of the legal issue this case presents. "If DOL's notice of revocation does not comply with the
statutory standards, it is invalid. To establish a violation of due process, the defendant must at least allege DOL
failed to comply with the statute..." State's Answer to Petitioner's Motion to Strike at 6. As U.S. Supreme Court
precedent demonstrates, statutory compliance is necessary, but not necessarily sufficient, for constitutional due
process. Dusenbery v. United States, 534 U.S. 161, 122 S. Ct. 694, 151 L.Ed 2d 597 (2002).

1 failed to mail the HTO revocation letter to Mr. Nelson while he was in custody at NRF.) This
2 information would not have persuaded the trial court to rule in Mr. Nelson's favor -- but not
3 because of a factual dispute, but rather because of a misunderstanding of the legal standard.
4 Now on appeal, this evidence actually helps Mr. Nelson with his due process argument. The
5 Petitioner's appendices demonstrate that DOL knew him to be in custody, could have provided
6 him with actual notice had it mailed the HTO letter to NRF, but chose not to use a reliable
7 contact address. The HTO revocation went into effect by default, not because Mr. Nelson chose
8 not to ask for a hearing, but because he was never notified of his right to a hearing. CP 35.
9 Again, simply mailing a duplicate notice -- one to NRF and one to Kirkland -- would have
10 avoided this situation.

11 Petitioner Nelson's May 5, 2006 Motion To Strike The State's Attempt To Supplement
12 The Record should be granted and the State's May 11, 2006 Motion to Supplement the Record
13 for Review should be denied.

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16 Dated this 26th day of May 2006.

17 Respectfully submitted,

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20 _____
Mick Woyñarowski, WSBA #32801
Attorney for Petitioner Nelson

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AS ATTACHMENT
TO E-MAIL

RECEIVED

CERTIFICATION OF MAILING

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BY C. J. MERRITT

I certify under penalty of perjury that on this date, I placed in the U.S. Mail, an envelope addressed to counsel for Respondent State, Deanna ^{CLERK}Jennings Fuller, at

King County Prosecutor's Office
516 3rd Avenue, Suite W554
Seattle, WA 98104-2385

that contained a copy of the Petitioner's Answer to State's May 11th, 2006 Motion to Supplement the Record for Review. In addition, I emailed a copy of this motion to the same attorney at her office at Deanna.Fuller@metro.kc.gov



5/26/06

FILED AS ATTACHMENT TO E-MAIL

Mick Woynarowski
At Seattle, Washington

Date (May 26, 2006)