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FILED
MAY 22 2006

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STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

)
)
) Respondent,)

No. 77629-6

vs.)

(Court of Appeals No. 54905-7-1)

MARK PHILLIP NELSON,)

)
)
) Petitioner.)

STATE'S ANSWER TO
PETITIONER'S "MOTION TO
STRIKE STATE'S ATTEMPT TO
SUPPLEMENT RECORD"

1. IDENTITY OF RESPONSIVE PARTY

Respondent, State of Washington, answers Petitioner's Motion to Strike State's Attempt to Supplement Record, as designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

To deny Petitioner's "Motion to Strike the State's Attempt to Supplement the Record."

3. FACTS RELEVANT TO ANSWER TO MOTION

Petitioner Nelson has boldly asserted throughout the proceedings of this case at all levels that he was denied due process because the Department of Licensing ("DOL") failed to send

1 notice of revocation to a temporary address and instead, sent it to Nelson's address of record (as
2 required by statute). He has asserted that DOI, was cavalier in its treatment of him and never
3 responded to his specific letter of inquiry that he sent soon after his December 2005
4 incarceration. He claims DOL completely ignored his inquiry and concerns. But the records
5 obtained by the State in preparation for this Court's review refute the truthfulness of his
6 assertions. Yet, Nelson seeks to hide the records from the court. He has filed a Motion to Strike
7 State's Attempt to Supplement the Record. The court has permitted the State until today to file
8 any answer to that motion.

9 On May 11, 2006, the State filed a motion to supplement the record together with its
10 response brief, under the time set by RAP 9.10. Copies of nineteen of the documents were
11 included as appendices in the response brief on May 11, 2006.

12
13 4. GROUND FOR RELIEF AND ARGUMENT

14 RAP 9.10 provides, in relevant part,

15 **CORRECTING OR SUPPLEMENTING RECORD**
16 **AFTER TRANSMITTAL TO APPELLATE COURT.**

17 If a party has made a good faith effort to provide those portions of
18 the record required by rule 9.2(b), the appellate court will not
19 ordinarily dismiss a review proceeding or affirm, reverse, or
20 modify a trial court decision or administrative adjudicative order
21 certified for direct review by the superior court because of the
22 failure of the party to provide the appellate court with a complete
23 record of the proceedings below. *If the record is not sufficiently
complete to permit a decision on the merits of the issues
presented for review, the appellate court may, on its own
initiative or on the motion of a party (1) direct the transmittal of
additional clerk's papers and exhibits or administrative records
and exhibits certified by the administrative agency, . . .*
(Emphasis added.)

1 The party . . . permitted to supplement the record on review must
2 file either a designation of clerk's papers as provided in rule 9.6 or
3 a statement of arrangements as provided in rule 9.2 within the time
4 set by the appellate court.

5 RAP 9.2 provides, in part, that . . . Any party may supplement the
6 designation of clerk's papers and exhibits prior to or with the filing
7 of the party's last brief. Thereafter, a party may supplement the
8 designation only by order of the appellate court, upon motion. . .

9 At all times throughout the proceedings described above, the State has accepted the
10 truthfulness of Nelson's and his counsel's assertions that the DOL never responded to his above-
11 described January 3, 2001 inquiry to the DOL. However, the State learned in late March, 2006
12 that the DOL in fact responded in writing to Nelson's inquiry, mailed to him at the temporary
13 facility. The State then requested and received a certified copy of Nelson's DOL records from
14 the years 2000 through 2001 approximately March 24, 2006. As soon as reviewed, the State
15 notified Nelson's counsel and sent a copy to him, on April 4, 2006. The certified documents
16 were sent to the court under cover letter dated April 18, 2006. Subsequently, the State filed a
17 Motion to Supplement the Record under RAP 9.10, with its final brief, on May 11, 2006.

18 In support of his motion to strike, Nelson characterizes the State's effort to provide a
19 complete record for this Court as ". . . a desperate, last minute effort." (Pet. Motion p. 4)
20 Moreover, he asserts that the State could always have subpoenaed the relevant DOL records for
21 trial or at any time thereafter, and instead chose to only seek them for this Court's review. He
22 implies that, if they are necessary now, they should have been provided long ago by the State.

23 Petitioner misses the mark for several reasons. First, the motion to supplement is not a
desperate, frivolous effort. It is necessary because of Nelson's posture in this appeal and the
grounds upon which this court has granted review. The issue is whether due process was denied
Nelson by DOL when it sent notice of revocation of his license to his address of record rather

1 than a temporary rehabilitation facility under circumstances Nelson describes as having been
2 done in complete disregard of his request and in sending the notice to a known, stale address.
3 There is nothing to support a description of the address of record as stale or "known as stale".
4 He asserts "DOL's failure to communicate with the petitioner at [NERF] ; and describes himself
5 as a jailed person who has informed the government that he has no other address; he complains
6 that ... "The disregard shown for the petitioner's request that the DOL, communicate with him at
7 NRF . . . and so forth. These comments are all taken from his brief in support of his Motion for
8 Discretionary Review. If the comments and assertions are considered by Nelson to be relevant to
9 his briefing, then the corollary information is equally legitimate.

10 The record supplementation is necessary to correct these and other misleading
11 characterizations by Nelson that can affect this Court's understanding of the true facts relevant to
12 the issues presented. The rules of this Court are consistent with the State's effort in ensuring the
13 Court is provided an accurate record by which to render a fair, informed and intelligent decision.

14 **RAP 1.2 provides: INTERPRETATION AND WAIVER OF RULES BY COURT**

15 **(a) Interpretation.** These rules will be liberally
16 interpreted to promote justice and facilitate the decision of cases on
17 the merits. Cases and issues will not be determined on the basis of
18 compliance or noncompliance with these rules except in
19 compelling circumstances where justice demands, subject to the
20 restrictions in rule 18.8(b).

21 . . .
22 **(c) Waiver.** The appellate court may waive or alter the
23 provisions of any of these rules in order to serve the ends of
justice, subject to the restrictions in rule 18.8(b) and (c).

The intention of this court's review then is the same as the State's and RAP 9.10 should
therefore be liberally construed to permit the State's supplementation of the record, however
inartful its initial filing may be construed when it was first sent under cover letter only. But, a

1 formal motion under RAP 9.10 was included with the State's last brief, in accordance with a fair
2 interpretation of the rule. The rules favor granting the State's motion to supplement the record.
3 Only in this way can the court reach a just decision on the merits.

4 Secondly, while it may be true that the State could have subpoenaed DOL records before
5 trial for the motion to dismiss, there was no recognizable reason to do so. It would have seemed
6 a useless act under a heavy caseload. Nelson was being tried for Driving While License
7 Suspended/Revoked in the First Degree, RCW 46.20.342. The proof required to find him guilty
8 would be presented to the trier of fact by admitting the Certified Copy of Driving Record
9 (CCDR), a certified copy of the notice of revocation sent to Nelson, and testimony from the
10 arresting officer. The arresting officer would, inter alia, establish the identity of the driver as
11 Mark Phillip Nelson, date of birth, and driver's license number, and so forth. The CCDR that the
12 officer requested would be admitted as evidence to the court of the fact of license
13 suspension/revocation on the date of arrest. The copy of the notice sent him would establish due
14 process in the notification process, as required by statute. Under established case law, that is all
15 the evidence necessary to prove beyond a reasonable doubt that the defendant Nelson was
16 driving while license suspended/revoked on the charged date.

17 Nelson's motion to dismiss would not have provoked the State to doubt the truth of what
18 Nelson alleged -- that he was at NERF when his notice of revocation was mailed to his address
19 of record, and that DOL did not contact him at the temporary rehabilitation facility, though he
20 had asked them to. The facts presented were unusual, but those facts would not be apparent as
21 having an effect on the State's proof under existing law.

22 The reason that the State would not have concerned itself at trial with requesting or
23 subpoenaing further DOL records was (1) it really had no reason to distrust the truthfulness of

1 Nelson's assertions, particularly since it did not seem relevant to DOL having sent formal notice
2 to the address of record as required; and (2) statutory and case law would not require it. State v.
3 Smith; 144 Wn.2d 665, 30 P.3d 1245 (2001), held that whenever a person's driving record, as
4 maintained by the department, brings him within the definition of an habitual traffic offender, as
5 defined in RCW 46.65.020, the DOL **shall** forthwith notify the person of the revocation in
6 writing by certified mail at **his address of record** as maintained by the DOL. RCW 46.65.065
7 unequivocally directs DOL to send a notice of revocation to the driver's **last address of record**.
8 **If DOL's notice of revocation does not comply with the statutory standards, it is invalid.** To
9 establish a violation of due process, the defendant must at least allege DOL failed to comply with
10 the statute and this failure deprived the defendant of notice or the opportunity to be heard.

11 Moreover, it is well settled that **actual notice** is not required. RCW 46.20.205(1)(b);
12 State v. Vahl, 56 Wash. App. 603, 784 P.2d 1280 (1990); State v. Perry, 96 Wash. App. 1, 975
13 P.2d 6 (1999).

14 Thus, the State would not have needed additional records to prove the case against
15 Nelson, as evidenced by the conviction here, and the King County Superior Court's rejection of
16 his appeal. Both courts are well acquainted with the proof requirements outlined above. The
17 evidence at the time complied with the known standards for proof beyond a reasonable doubt
18 that the defendant was properly notified of his revocation as an habitual traffic offender, that
19 actual notice was not required; that the statute required that notice be sent to Nelson's last known
20 address of record, and it was; and finally, that Nelson drove on the charged date.

21 When this Court granted discretionary review (and the Court of Appeals had not), it
22 seemed prudent to explore more fully the due process concerns Nelson continued to press. *What*
23 *did DOL do in response to Nelson's inquiry? Why didn't DOL simply answer his inquiry? Would*

1 *it have been so difficult? Though due process does not require it, did DOL really simply*
2 *disregard his inquiry altogether, as he asserts? Would these circumstances affect the due*
3 *process issue? Should they?*

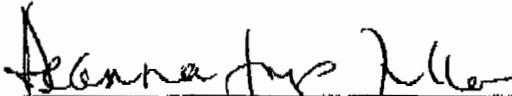
4 In light of these questions, DOL records were obtained. The DOI records do change the
5 character and tenor of Nelson's due process challenge. This Court should have the materials
6 submitted by the State that supplement the misleading, incomplete records presented to the trial
7 court and each of the appellate courts to date, in order to reach a just decision on the merits, as its
8 intention should be. If filing of the certified records from DOL falls short in any way, this
9 Court's altering of strict compliance for filing the records and acceptance of them under RAP 1.2
10 and RAP 9.10 will promote justice and facilitate the decision of the case on its merits.

11 Nelson's motion to strike the State's attempt to supplement the record should therefore be
12 denied.

13 Dated this 22d day of May 2006.

14 Respectfully submitted,

15 NORM MALENG
16 King County Prosecuting Attorney

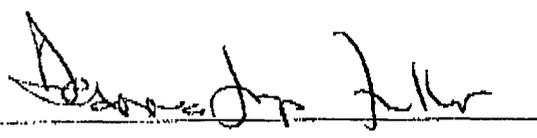
17 
18 DEANNA JENNINGS FULLER, WSBA #7914
19 Senior Deputy Prosecuting Attorney
20 Attorneys for Respondent

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CERTIFICATION OF MAILING

I certify under penalty of perjury that on this date, I placed in the U.S. Mail, an envelope addressed to counsel for Petitioner Nelson, Mick Woynarowski, at The Defender Organization, 810 Third Avenue, #800, Seattle, WA 98104, that contained a copy of the State's Answer to Petitioner's Motion to Strike State's Attempt to Supplement the Record.



5-22-06

Deanna Jennings Fuller
At Seattle, Washington

Date (May 22, 2006)

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WASHINGTON STATE SUPREME COURT

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For STATE v. Mark Phillip Nelson

Cause No. 77629-6

Reference Court of Appeals No. 54905-7-I