

No. 80653 - 5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LORETTA ERIKSEN,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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PETITION FOR REVIEW OF DECISION OF THE SUPERIOR
COURT FOR WHATCOM COUNTY

THE HONORABLE CHARLES SNYDER

William Johnston
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A. Identity of Moving Party

Loretta Eriksen, petitioner herein, asks this court to accept review of the Superior Court decision terminating review designated in Part B of this petition.

B. Superior Court Decision

Loretta Eriksen asks review of the decision of the Superior Court of Whatcom County Appeals filed on August 22, 2007, affirming the conviction of the petitioner. A copy of the decision is attached to this petition as Appendix 1.

C. Issues Presented for Review

Whether the rationale of inherent tribal authority enunciated in the Washington Supreme Court decision of State v. Schmuck, 121 Wn2d 373, 850 P.2d 1332 (1993) authorizes tribal police to engage in fresh pursuit of motorists for traffic infractions after they leave the tribal reservation?

D. Statement of the Case

The facts pertinent to this appeal were developed in the hearing on defendant's motion to dismiss heard on January 26, 2006; see transcript of eighty-one (81) pages and in the hearing on her motion for reconsideration heard on February 16, 2006; see transcript of eighteen (18) pages.

On August 10, 2005, Lummi Police Officer Michael McSwain, driving an officially marked police car, was traveling eastbound on the Slater Road when he observed a vehicle later determined to be driven by Loretta Eriksen traveling westbound. The Eriksen vehicle was traveling with its bright lights on. McSwain

flashed his lights to communicate to the westbound vehicle that its bright lights were on. Because in response the westbound vehicle did not dim its bright lights, McSwain "slowed down so that I could make the turn and contact the vehicle for failure to do this;" transcript of January 26, 2006 hearing, page 5, lines 22-25, page 6 lines 1-2.

As McSwain slowed, the westbound vehicle approached and drifted across the centerline. The vehicle drifted back into the westbound lane and at that point McSwain observed a second vehicle following closely behind the first vehicle, see transcript of January 26, 2007 pages 8 and 9.

McSwain then turned his vehicle around and headed westbound on Slater and activated his overhead lights. The Eriksen vehicle as well as the second vehicle pulled into the mini market at the intersection of Elder and Slater. McSwain pulled in directly behind the Eriksen vehicle with all of his lights on and directed at her vehicle. see transcript of January 26, 2007 page 10, lines 1-12.

Eriksen was subsequently determined not to be a tribal member and held and ultimately turned over to the Whatcom County Sheriff for prosecution for DUI.

Evidence presented at the suppression hearing established that Lummi Law Enforcement considers both lanes of Slater Road west of the intersection of Slater and Haxton Roads to be within the confines of the Lummi Reservation. Accordingly, Lummi Law Enforcement stops traffic in both lanes for traffic offenses. Ty Whitcomb, a licensed surveyor with Whatcom County Engineering Office, opined that the boundary line between the Lummi Reservation and

Whatcom County was the middle of the Slater Road west of its intersection of the Haxton Road.

The parties agreed on appeal before the Superior Court that this factual difference was immaterial as petitioner was stopped off reservation in Whatcom County; see Brief of Respondent State of Washington; page 5, lines 21-23.

E. Argument Why Review Should Be Accepted

Loretta Eriksen requests that this court accept review of the decision of the Superior Court of Whatcom County because her petition meets the criteria of RAP 13.4(3). This case presents the question of whether the decision of the Washington Supreme Court in State v. Schmuck, 121 Wn2d 373, 850 P.2d 1332 (1993) has been incorrectly applied to extend its application to permit tribal police to pursue motorists off reservation property for traffic infractions. The net effect of the decision of the Superior Court for Whatcom County expands the holding of the Schmuck decision beyond its facts and authorizes Lummi Tribal Police to pursue motorists, who commit infractions on the tribal reservation, off reservation until such time as the tribal police are able to stop the motorists.

The Lummi Tribal Police number almost thirty officers. They are the third largest law enforcement agency in Whatcom County after the Bellingham Police Department and the Whatcom County Sheriff. Lummi Law Enforcement Officers are not deputized as Whatcom County Deputy Sheriffs, as are many law enforcement officers in Whatcom County. Nor is there a mutual aid pact in existence between the Lummi Tribe and the Whatcom County Sheriff or other Whatcom County Law Enforcement Agencies.

It was conceded before the Superior Court that Lummi Law Enforcement Officers are not qualified to assume the powers authorized by the statute, RCW 10.93.120, which permits fresh pursuit.

That statute provides as follows:

10.93.120. Fresh pursuit, arrest

(1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.

(2) The term "fresh pursuit," as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

Because it is clear and unquestioned that Lummi Law Enforcement lacks the power to arrest under Washington law and, as a result, lacks the authority of the fresh pursuit statute to pursue off reservation to make arrests for traffic infraction or crimes under Washington law,¹ the state asserted before the Superior Court that the inherent power of the tribe to protect itself as enunciated in State v. Schmuck, 121 Wn2d 373, 850 P.2d 1332 (1993) provides authority to support the apprehension, detention and arrest of the Eriksen off reservation by Lummi Law Enforcement.

The state cited in the Superior Court the following quotation in Schmuck as supporting a decision in this case authorizing tribal law enforcement to pursue

¹ The state concedes this point in its brief in the Superior Court at page 6, lines 43-47 and page 7, lines 1-13.

motorists off reservation for traffic offenses committed in any way on the reservation:

Finally, the State Patrol urges this court to base a tribal officer's authority to detain on a citizen's arrest theory. We decline their invitation. There would be a serious incongruity in allowing a limited sovereign such as the Suquamish Indian Tribe to exercise no more police authority than its tribal members could assert on their own. Such a result would seriously undercut a tribal officer's authority on the reservation and conflict with Congress' well-established policy of promoting tribal self-government. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Potentially, DWI drivers would simply drive off or even refuse to stop if pulled over by a tribal officer with only a citizen's arrest capability.

We conclude an Indian tribal officer has inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while on the reservation until he or she can be turned over to state authorities for charging and prosecution. We hold Tribal Officer Bailey, as a police officer employed by the Suquamish Indian Tribe, had authority to stop and detain Schmuck, who was allegedly driving while intoxicated on the Reservation, until he could be turned over to the Washington State Patrol for charging and prosecution.

The facts in Schmuck involved a DUI stop on the reservation. All of the driving took place within the reservation and the stop was effected on the reservation. The state is arguing for an application of Schmuck on wholly different facts- the basis for the pursuit was a traffic infraction and the stop was effected off the reservation. Schmuck does not support such an application to the facts of this case.

The state cited two federal cases in its brief before the Superior Court as supporting an interpretation of Schmuck to authorize tribal police to pursue motorists who commit traffic infractions on reservation off reservation. The first

was Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). In petitioner's view, Santa Clara Pueblo v. Martinez provides a rationale for not authorizing tribal law enforcement to pursue motorists off reservation as well as the Sheriff's decision not to deputize tribal law enforcement or permit tribal law enforcement participation in a Mutual Aid Pact. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978) provides tribes with blanket immunity for their actions. Thus, tribal police could pursue a motorist off reservation, cause an action that injures an innocent third party and then assert the tribal sovereign immunity as a defense for the negligence of its law enforcement officers. This immunity issue was undoubtedly a part of the decision making process behind the Whatcom County Sheriff's decision not to cross deputize Lummi Law Enforcement.

The state's citation of Settler v. Lameer 507 F.2d 231 (1974) in the Superior Court is also misplaced. Settler upheld the power of tribal law enforcement to arrest tribal members off reservation for violation of tribal fishing regulations which involved off reservation fishing sites. It provides no authority to authorize the arrest or detention of non-tribal members off reservation.

The State in this case is arguing for a precedent, which would authorize tribal law enforcement to engage in hot pursuit off reservation. Because it is undisputed that Lummi Law Enforcement officers do not have authority to arrest under Washington law, RCW 10.93.120 is dispositive. That statute provides as follows:

10.93.120. Fresh pursuit, arrest
(1) Any peace officer who has authority under Washington law to make an

arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.

(2) The term "fresh pursuit," as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

In sum, the state is misapplying the precedent of Schmuck to a wholly different factual setting. The Superior Court's opinion does not provide any consideration to the impingement on state sovereignty to control access to its own roads by its expansion of the holding in Schmuck. The Superior Court's creation of tribal sovereignty under federal law provides tribal law enforcement with the authority it would possess if tribal law enforcement officers were deputized by the Sheriff or entered into a mutual aid pact with the Sheriff, which the Sheriff has adamantly refused to do.

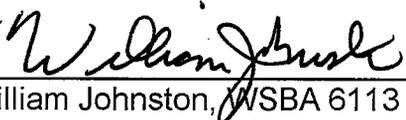
F. Conclusion

The issue presented in this case is unique and of great constitutional significance. It also has significant local impact in Whatcom County where in addition to the Lummi Nation, the Nooksack Tribe also has a law enforcement arm. These tribal officers now interpret the Superior Court decision to authorize their fresh pursuit of motorists off reservation on Washington state roads. The district and municipal courts of Whatcom County are bound by this decision.

Eriksen urges this court to accept review of this case and to hold that tribal law enforcement do not have the authority to engage in hot pursuit of motor

vehicles off reservation in the absence of their deputization by the Whatcom County Sheriff or their participation in an Mutual Aid Pact under State law. The Superior Court's expansion of the inherent power of the Lummi Nation comes at the expense of the sovereignty of the State of Washington to control access and use of its roads by those qualified police officers authorized to do so by Washington State law. This court should reverse the decision of the District Court and remand with instructions to enter an order suppressing any and all evidence derivative of the unlawful stop of Ms. Eriksen.

Dated this 29 th day of October, 2007.



William Johnston, WSBA 6113
Attorney for Petitioner Loretta Eriksen

1 THE COURT: My reading of *Smuck* and my reading
2 of other cases leads me to believe at this point that
3 on this record, there is not sufficient basis for a
4 citizen's arrest, a car crossing a center line.
5 Certainly, an officer could pull a person over for a
6 civil infraction or something to that extent, but I
7 don't think that it constitutes a breach of the peace
8 that leads us to a citizen's arrest. My sense is that
9 one is off the table, and I think in view of the
10 policies enunciated in *Smuck*, that would be more
11 consistent with that, as well; that the basis for the
12 Lummi officer operating here should be that he is a
13 law enforcement officer of a sovereign entity, not
14 that he is just a citizen who sees something that
15 evening he should arrest for, and frankly, I don't
16 think that it reaches to the level of the necessary
17 breach of the peace. So I think that when you get
18 down to the color of law argument, it's not sufficient
19 for that.

20 The question then becomes is this person
21 actually acting in the context of a citizen's arrest.
22 I think not. I think this officer was acting in the
23 belief that he was detaining someone under his
24 authority as a tribal police officer, detaining them
25 for the appropriate authority to appear, and so

1 therefore, I don't think that it constitutes a
2 citizen's arrest. He's operating under color of law,
3 and in so doing detaining this person.

4 Now, as to the more interesting question which
5 is that of the boundary, I think what I would have to
6 say about the process is that Judge Grant's taking of
7 testimony probably is not consistent with the way
8 reconsideration is generally done, and with the way
9 the rule anticipates reconsideration, and I think the
10 case that Ms. Stodola cites has a very good argument
11 on that point and says reconsideration is not to give
12 you a chance to return and argue new ideas as they
13 come up with new evidence, but to ask the court to
14 reconsider what it has already decided based on the
15 material that it used to make that decision and go to
16 the court and say to the judge, you missed it. You
17 were wrong on the law. I think that's what
18 reconsideration is about.

19 Having said that and having had an opportunity
20 now to see Mr. Whitcom's letter, his testimony really
21 doesn't say much more, other than add some detail to
22 the context of what the letter says. So I think what
23 Judge Grant had before him was the opinion of the
24 county at the first hearing, that the boundary of the
25 reservation is -- follows the -- somewhere near the

1 north end of Slater Road, the north side of Slater
2 Road until Haxton, and then crosses over, and
3 somewhere becomes about the center line of Slater
4 Road. To me, other than -- unless the section line
5 has a jog in it where that intersection is, that has
6 to be a gradual process, and so perhaps the
7 information that Mr. Whitcom brought to Judge Grant
8 the second time around, and that's Exhibit 2, and I
9 also haven't seen the map that was drawn in the
10 courtroom, it's not easy for me to visualize where
11 that, how that transition takes place. Does it begin
12 before Haxton Way and then finishes up on the west
13 side of Haxton Way, or does it start at about Haxton
14 Way, and then on an angle goes across the road as it
15 goes farther west?

16 MR. JOHNSTON: I think they moved the road
17 over.

18 THE COURT: I've been there, and the road
19 doesn't jog over like that. The road essentially is
20 straight, and so what happens is the road must be
21 running at an angle to that township line, and
22 township lines don't have jogs in them either. To my
23 understanding, they're straight. There's an angle
24 somewhere, and the acuteness of that angle, and how
25 far it takes for that boundary to move from the north

1 shoulder of Slater Road into the center of the road is
2 unknown to me, and I would assume that once you get on
3 it, you can stay on the center line. The road must
4 curve someplace and angle off itself, otherwise the
5 township line would bisect it, and then none of Slater
6 Road would be on the reservation at some point in
7 time, because you're working at an angle here. I
8 don't have the benefit of that to see it, and I
9 frankly think having read the testimony that even with
10 sort of a hand drawn map in Judge Grant's courtroom,
11 that that's not sufficient to determine those
12 particular issues. That would require a survey and
13 expert testimony as to where the corners are, and how
14 those corners relate to each other and where the road
15 is placed based upon an actual survey, on-the-ground
16 survey, an as-built of the road, a lot of things that
17 weren't presented to Judge Grant.

18 So I think what Judge Grant was working from in
19 terms of my analysis of whether there was substantial
20 evidence, he was working from the opinion of the
21 county that somewhere west of Haxton Way, the north
22 boundary of the reservation is actually, physically
23 closer to the center line of Slater Road, and that
24 east of Haxton Way, it is closer to or runs along the
25 north shoulder of Slater Road.

1 It's also not absolutely clear from the
2 testimony and the transcript where in that area the
3 vehicle crossed the center line. I do believe from
4 what I could read that it was west of Haxton Way.
5 Whether it was 10 feet west of Haxton Way, a quarter
6 mile west of Haxton Way, and how that relates to the
7 boundary I don't think is clear to this court, and I
8 don't think that Judge Grant had clear enough evidence
9 from the defendant as to those exact locations of
10 those lines and the roadway to be absolutely certain
11 that where this person crossed the center line was or
12 was not within or without those boundaries, the
13 reservation boundaries.

14 Against that we have the testimony of the
15 officer, and here's where I disagree with
16 Mr. Johnston. It isn't hearsay, because it is, I
17 believe, under 803(a)20 an example of the reputation
18 within the community, particularly, the tribal police
19 community, concerning the boundaries of the
20 reservation. The officer testified that this is their
21 training. They have maps. They're given this
22 information, and that the Lummi tribal police agency
23 operates on that belief, that Slater Road is within
24 the boundaries of the reservation, and they have done
25 so, and that that's how they enforce the law.

1 That's a reputation within that community,
2 within the Lummi law enforcement community, and in
3 fact, the Lummi tribal community as to the boundary,
4 and I think under 803(a)20, that's just as admissible
5 as the letter from Mr. Whitcom that says here's where
6 we think the boundary is, and so you have a disputed
7 point.

8 When I read Judge Grant's, his statements in
9 the transcript, it's clear to me that he didn't say
10 I'm taking judicial notice of where the boundary was.
11 He said I'm taking judicial notice that there's a
12 dispute over this, and there have been discussions
13 about this over time. I believe he utilized the
14 evidence before him, and I would say that there is
15 substantial evidence for him to have decided that
16 the -- for purposes of this case in that hearing that
17 the boundary of the reservation is either the northern
18 shoulder of Slater Road or somewhere within the
19 midline of Slater Road.

20 It's clear to me also that there's substantial
21 evidence that at some point, this vehicle crossed the
22 center line, and even taking Mr. Whitcom's position in
23 the light most favorable to the defendant, I think it
24 says that from Haxton Way west that the boundary is
25 the center line, and so anything that crosses over

1 that center line would be onto reservation property,
2 and it may be that even in the other lane, they were
3 within reservation property. It's unclear to me
4 exactly where that change is made, but it does appear
5 to me that at some point, once you get across -- at
6 any point once you cross the center line, you're
7 clearly within reservation property, and if you're on
8 the other side of the center line, you may or may not
9 be, depending on where you are on the roadway. So I
10 think there's substantial evidence for Judge Grant to
11 say that the incident occurred or some portion of the
12 incident occurred within the boundaries of the
13 reservation.

14 Okay. That being said, then the question
15 becomes what's the authority of the law enforcement
16 officer from Lummi Law and Order to act in this case,
17 and I think that if I look at Smuck, that dependent
18 clause that I quoted to you awhile back is
19 sufficiently ambiguous that Smuck really doesn't tell
20 us whether that means that there is the right to, to
21 detain off reservation if the violation occurs on the
22 reservation, or if the detention must occur on the
23 reservation. Smuck doesn't give us that answer.

24 So then I think we have to look at the purposes
25 of the sovereignty that has been granted, and the way

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sovereignty has been negotiated between the federal government and the tribes in the Point Elliot Treaty and in other cases that have come down, how that is to be interpreted.

It's the court's belief that tribal sovereignty is fairly substantial, and in these areas where law enforcement sovereignty has been granted specifically to the tribe, it seems to me that the tribe has pretty much a full level of authority when it comes to enforcing laws on the reservation with regard to members of the tribe.

With regard to non-tribal members, they do have full authority to detain them on the reservation and hold them at any point for law enforcement, and detention means that they can -- I think effectively detention means they can stop them, and if necessary by use of appropriate force, keep them there.

MR. JOHNSTON: That's what Smuck says, yes.

THE COURT: So that being the case, then if that is going to be an effective policy, and if the policy of the government and the theories that we see in the cases are that that sovereignty needs to be protected and needs to be given full force and effect, in order to do so, it seems to me that there is some inherent power that's involved in the detention, and

1 that inherent power is the ability to restrict
2 freedom. Whether that extends off the reservation or
3 not has, I don't think, been resolved yet.

4 It is the court's belief, however, for that
5 power, that inherent power to be effective and to be
6 exercised in the way that the federal government
7 anticipates and that the federal courts have
8 anticipated, which is to protect the members of the
9 tribal society and the tribal land, that it does
10 require there to be a reasonable level of ability for
11 the tribal officers to detain off reservation if it's
12 clear that the incident that they are detaining for
13 occurred on the reservation. Otherwise, I think we
14 get to the problem that the Fresh Pursuit Statute
15 addresses which is difficult in that the idea of a
16 Fresh Pursuit Statute is to prevent this sort of thing
17 happening between cities and counties and various
18 cities of jurisdictions where they bounce right up
19 against each other, so that this doesn't happen in
20 those cases where somebody can just cross the line and
21 be Scott-free. That policy is within and clearly
22 enunciated in Washington law in the Fresh Pursuit
23 Statute.

24 That policy then is not inconsistent with the
25 finding that there's inherent power upon tribal

1 authorities to be able to do that detention off the
2 reservation within a reasonable way and period of
3 time, and in this case I would find that that was it.
4 It's not as though he could take down the driver's
5 license of someone and go detain the person six or
6 eight hours later in Blaine if he chose to do so. He
7 has to do it at that point in time.

8 He followed them. He turned around, put on the
9 lights, and they stopped at the first available place,
10 apparently, and he exercised his authority to detain
11 and was doing so under color of law as a Lummi tribal
12 officer.

13 So I'm going to say that the detention was
14 valid on the basis that there must be some level of
15 inherent authority for the tribal officers to do that
16 off the reservation in order to make their ability to
17 detain on the reservation a functional policy.

18 So I'm going to rule in that way, I think, if
19 that's clear. Does that give you the decision you're
20 asking for?

21 MR. JOHNSTON: That's clear. I think you
22 stated it in your remarks, Your Honor. You're
23 deciding it based on the tribal jurisdiction, and not
24 the citizen's arrest theory.

25 THE COURT: Right, and I think that's exactly

1 what it comes down to.

2 Do you want this copy back of Mr. Whitcom's
3 letter?

4 MR. JOHNSTON: Maybe I should file that. I'll
5 see if I could get that filed so it's part of the
6 record.

7 THE COURT: Probably be good to have it as part
8 of the record.

9 It is a fascinating question. It reminds me
10 about the one about where is the 49th parallel.

11 MR. JOHNSTON: I won that one. That was the
12 *Sea King*.

13 THE COURT: Yes, I know you did.

14 MR. JOHNSTON: Unfortunately, life isn't worth
15 much if you don't have a little humor, but the *Sea*
16 *King* lived to invade our waters again successfully for
17 a short period of time before the Canadians were
18 persuaded to take possession of the boat, and Canadian
19 justice ended the threat to our crabbing industry.

20 THE COURT: All right.

21 MS. STODOLA: Thank you very much.

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CERTIFICATE OF COURT REPORTER

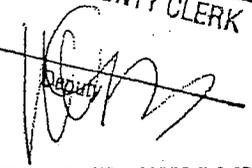
STATE OF WASHINGTON)
) ss.
COUNTY OF WHATCOM)

I, RHONDA G. JENSEN, a certified shorthand reporter, County of Whatcom, State of Washington, do hereby certify that the foregoing pages comprise a true and correct transcript of the proceedings had in the within-entitled matter, reported by me by stenotype on the day herein written and thereafter transcribed into printing by computer-aided transcription.

DATED this 18th day of Sept 2007.

Rhonda G. Jensen
Rhonda G. Jensen

FILED IN OPEN COURT
8/22/07
WHATCOM COUNTY CLERK

By 
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

STATE OF WASHINGTON,)
)
Appellant,)
)
vs.)
)
LORETTA ERIKSEN,)
)
Respondent.)

Sup. Ct. No.: 06-1-00516-6
Dist. Ct. No.: AC25060

ORDER AFFIRMING DISTRICT COURT
JUDGMENT AND DISMISSING
RALJ APPEAL

THIS COURT HAVING CONSIDERED the appeal in this matter, and having considered oral arguments presented to the court on August 22, 2007;

NOW, THEREFORE, it is hereby ORDERED that the judgment of the District Court is AFFIRMED, the appeal is DENIED, and the matter REMANDED to the District Court for proceedings consistent with the order.

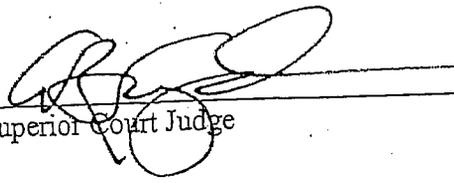
IT IS FURTHER ORDERED that this order shall become final in this matter, and shall become a mandate pursuant to RALJ 9.2, should no further proceedings occur in this court within 30 days after its entry with the clerk of the Superior Court.

ORDER DISMISSING DISTRICT COURT APPEAL

Whatcom County Pros. Attorney
311 Grand Avenue, Suite 201
Bellingham, Washington 98225

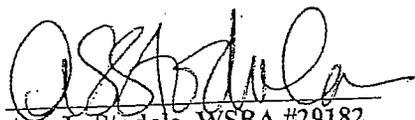
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SIGNED THIS 22 day of August, 2007.



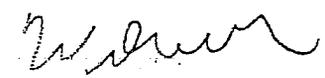
Superior Court Judge

PRESENTED BY:



Ann L. Stodola, WSBA #29182
Deputy Prosecuting Attorney

APPROVED AS TO FORM:



Attorney for Appellant/Appellant

ORDER DISMISSING DISTRICT COURT APPEAL

Whatcom County Pros. Attorney
311 Grand Avenue, Suite 201
Bellingham, Washington 98225