

ROOM 946
COPY RECEIVED

JUN 26 2008

GERALD A. HORNE
PIERCE COUNTY PROSECUTING ATTORNEY

ORIGINAL

81746-4

Div. II No. 34261-8-II

Superior. Ct. No. 05-2-09617-4

FILED
JUN 30 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON
ajr

THE SUPREME COURT OF THE STATE OF WASHINGTON

ANDREW L. MAGEE, Defendant-Appellant,

v.

STATE OF WASHINGTON, Plaintiff-Respondent

PETITION FOR REVIEW

Andrew L. Magee, WSBA# 31281
Attorney for Andrew L. Magee
44th Floor
1001 Fourth Avenue Plaza
Seattle, Washington 98154
(206) 389-1675

FILED
COURT OF APPEALS
DIVISION II
08 JUN 26 PM 4: 12
STATE OF WASHINGTON
BY _____
DEPUTY

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I IDENTITY OF PETITIONER	1
II CITATION TO COURT OF APPEALS DECISION	1
III ISSUES PRESENTED FOR APPEAL	1

1. Whether the traffic citation in question was (A) issued unlawfully, in violation of Article 1, § 3 of the Constitution of the State of Washington, and of the United States Constitution, rendering it wholly void and defective, and (B) removing any basis for jurisdiction in the District Court, and making any proceeding and finding thereafter that Mr. Magee had committed the alleged infraction a denial of compulsory due process, and a violation of IRLJ 2.2, and;

2. Whether the detention to issue the void and defective citation was lawful, and a violation of Article 1, § 3 of the Constitution of the State of Washington, and the United States Constitution, and;

3. Whether the Superior Court's Affirmation of District Court recognized proper Revised Code of Washington section, and was in violation of the law set forth by the Supreme Court of the State of Washington and a

violation of Article 1, § 3 of the State of Washington Constitution, and the United States Constitution, and ;

4. Whether the District Court violated IRLJ 3.1(b) regarding Discovery, and Article 1, § 3 of the Constitution of the State of Washington, and the United States Constitution, and;

5. Whether Mr. Magee, under the facts, could be cited for a moving violation as a matter of substantial public interest, and;

6. Whether it was physically possible for Mr. Magee to have done what was alleged.

IV	STATEMENT OF THE CASE	2
V	ARGUMENT	7
VI	CONCLUSION	19

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<i>Campbell v. Department of Licensing</i> , 31 Wn.App. 833, 644 P.2d 1219 (1982)	13
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003)	5, 15, 20
<i>State v. Leach</i> , 113 Wn.2d 679, 782 P.2d 552 (1989)	12
Statutes:	
RCW 46.61.525	3, 4
RCW 46.61.575	6, 14
RCW 46.63.030	7, 8, 11
RCW 46.64.015	8, 10, 11
RCW 10.31.100	9, 11
RCW 46.61.150	14
RCW 46.61.155	14
Constitution of the State of Washington:	
Article 1, section 3	1, 2, 9, 17, 19, 20

I IDENTITY OF PETITIONER

Andrew L. Magee, acting as Petitioner, (and on his own behalf,) respectfully submits this Petition for Review.

II CITATION TO COURT OF APPEALS DECISION

Petitioner respectfully requests that the Court grant review of the Opinion filed by Division II of the Court of Appeals on April 1, 2008 (A-1,) and the denied Motion to Reconsider of May 27, 2008 (A-2,) which was acknowledged to raise a substantial issue (A-3).

III ISSUES PRESENTED FOR REVIEW

1. Whether the traffic citation in question was (A) issued unlawfully, in violation of Article 1, § 3 of the Constitution of the State of Washington, and of the United States Constitution, rendering it wholly void and defective, and (B) removing any basis for jurisdiction in the District Court, and making any proceeding and finding thereafter that Mr. Magee had committed the

alleged infraction a denial of compulsory due process, and a violation of IRLJ 2.2, and;

2. Whether the detention to issue the void and defective citation was lawful, and a violation of Article 1, § 3 of the Constitution of the State of Washington, and the United States Constitution, and;

3. Whether the Superior Court's Affirmation of District Court recognized proper Revised Code of Washington section, and was in violation of the law set forth by the Supreme Court of the State of Washington and a violation of Article 1, § 3 of the State of Washington Constitution, and the United States Constitution, and ;

4. Whether the District Court violated IRLJ 3.1(b) regarding Discovery, and Article 1, § 3 of the Constitution of the State of Washington, and the United States Constitution, and;

5. Whether Mr. Magee, under the facts, could be cited for a moving violation as a matter of substantial public interest, and;

6. Whether it was physically possible for Mr. Magee to have done what was alleged.

IV STATEMENT OF THE CASE

1. While parked on the shoulder lane to the on-ramp lane of State Highway 512 from Pioneer Street in Puyallup giving a "jump-start" to another car, Mr. Magee

was approached (and detained) by a Washington State Trooper. That Trooper issued a citation to Mr. Magee for the moving/traffic violation of Negligent Driving in the Second Degree (RCW 46.61.525).

Mr. Magee requested a hearing in Pierce County District Court to contest the infraction. At that hearing, the Trooper confirmed - repeatedly - on the record that she issued the citation without witnessing what Mr. Magee was alleged to have done, nor was the citation issued at the request of any law enforcement officer who did. This was confirmed on the record by the District Court, stating, "I'm convinced that she [Trooper] did not see you driving except for at her instruction." (CP-30, Appellants Opening Brief, p. 18)

2. The Trooper came to where Mr. Magee was helping his friend allegedly based on "reports" that a car had been driving the wrong way on the freeway between Benston and Pioneer Avenue. (Those reports, although

timely and properly requested under the rules of discovery, were not produced to Mr. Magee.) It was alleged in no way that those reports provided any factual information from which the Trooper could assess that it was Mr. Magee's and his car that was "reported" to be driving the wrong way, nor was it alleged (*supra*) that the Trooper observed no driving at all by Mr. Magee.

3. When Mr. Magee appeared in District Court to contest the otherwise unlawfully issued and wholly-void infraction for Negligent Driving in the Second Degree, it was alleged that he committed a specific violation, namely RCW 46.61.525 – Wrong Way on Freeway.

As Mr. Magee explained to the District Court, and as the Trooper confirmed, Mr. Magee was parked on the shoulder of an on-ramp lane. The District Court – having acknowledged that the Trooper did not know or see what Mr. Magee was issued the citation for (*supra*) – proceeded find that Mr. Magee "must" have committed

the infraction under multiple theories and violation(s) of multiple different sections of the RCW, and in doing so, the District Court violated the law under *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003).

4. Pursuant to, and compliant with IRLJ 3.1(b) – providing for proper discovery, Mr. Magee was denied production of the “reports” the Trooper referred to as the basis for detaining Mr. Magee and issuing him the otherwise unlawfully issued and wholly invalid citation. Inasmuch as Mr. Magee took, and still maintains the position that he did not ever drive the wrong way anywhere, versus merely park his car, this discovery would have exonerated him, and therefore, Mr. Magee’s due process rights under IRLJ 3.1(b) were violated.

5. The fact of the matter, as acknowledged by all parties is that Mr. Magee was only ever observed parked in his car on the shoulder of the on-ramp lane. Under the law, Mr. Magee could not have been issued a moving

violation, but rather, and at best (inasmuch as he remained in attendance with his car,) could only have been issued a non-moving, parking violation, namely, RCW 46.61.575 (Additional Parking Regulations) for having his car parked, outside of traffic (on the shoulder) other than in the same direction as the flow of traffic.

6. The Court of Appeals, based it's holding, in part, on a physically impossible set of fact(s). Specifically, the Court of Appeals describes Mr. Magee's acknowledgement of what he did do that day as having pulled back into the lane of travel of the on-ramp from *behind* his friend's car against the flow of traffic, and then pull his car onto the shoulder with his car now in *front* of his friend's car, and pointed in the opposite direction, and still against the flow of traffic. Because traffic can only flow in one direction, the Court of Appeals' conclusion of fact is impossible.

V ARGUMENT

A.

1. The Court of Appeals' Opinion states that, "Magee is essentially arguing that there was insufficient direct evidence from the fact that his car was parked on the shoulder of SR 512 facing the wrong way to find that he committed second degree negligent driving."

(Opinion, p.5) (emphasis added)

In fact, Mr. Magee argued that RCW 46.63.030, by law, precludes the Trooper from issuing the citation in the first place, for as admitted at the hearing by both the Trooper, and affirmed by the District Court Judge, Mr. Magee was not witnessed by the Trooper committing the violation alleged to have occurred, and for which he was issued a citation.

RCW 46.63.030 states:

(1) A law enforcement officer has the **authority to issue a notice of traffic infraction** (a) **When the infraction is committed in the officer's presence**; (b) When the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed.

RCW 46.63.030(1)(a)(b) (emphasis added)

This standard, moreover, establishing that the Trooper was without lawful authority, and unlawfully issued Mr. Magee the citation in question is repeated in RCW 46.64.015 – Citation and notice to appear in court -
- Issuance - - Contents - - Arrest - - Detention, wherein it states:

. . . An officer may **not** serve or **issue any traffic citation** or notice for any offense or violation except either when the offense or violation is committed in his or her presence . . .

RCW 46.64.015 (emphasis added)

This law specifically associates the issuance, (and unlawfully issuance of a citation,) with appearing in court on the matter, and establishes that a person may **not** be

made to appear in court when the citation is defective and issued in violation of the law.

The RCW repeats, again, this statutory, and due process principle under RCW 10.31.100, wherein it states:

(6) An officer may act upon the request of a law enforcement officer **in whose presence a traffic infraction was committed**, to stop, detain, arrest, **or issue a notice of traffic infraction** to the driver who is believed to have committed the infraction. . . .

RCW 10.31.100(6) (emphasis added)

The RCW, therefore, leaves no doubt under which conditions a traffic citation, as in the present case, may **not** be issued, and may **not** be the basis for bringing a person to court, as was done here. The Trooper, therefore, violated the law in issuing Mr. Magee the citation, and violated Mr. Magee's constitutional due process rights under Article 1, § 3 of the Constitution of the State of Washington.

B.

Mr. Magee's constitutional compulsory due process rights were further violated by being summonsed to the District Court by-way-of the unlawfully issued citation. As cited *supra*, RCW 46.64.015 – Citation and notice to appear in court -- Issuance -- Contents -- Arrest – Detention, renders unlawful the demand that Mr. Magee would have to come to court and defend against the allegations made against him. RCW 46.64.015 states specifically that, “An officer may **not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence**”

The embodiment of Mr. Magee's compulsory due process rights under RCW 46.64.015 have, therefore, been violated under the facts under which the citation and notice were issued. The result was that Mr. Magee was essentially subjected to an inquisitorial process, having to disprove any one of a number of situations which there

was no witness/evidence to establish what had taken place.

The Infraction Rules for Courts of Limited Jurisdiction (IRLJ), further establishing constitutional due process, addresses, under Title 2 – Preliminary Proceedings, the requirements, and under what conditions an infraction case may be initiated; IRLJ 2.2 – Initiation of Infraction Cases, states:

(a) Generally. An infraction case is initiated by the *issuance*, service, and filing of a notice of infraction in accordance with this rule. . . .

IRLJ 2.2(a) (emphasis added)

As established as law (and policy) by the legislature, RCW 46.63.030, RCW 46.64.015, and RCW 10.31.100, preclude, by law, *issuance* of the notice of infraction that IRLJ 2.2 requires for the initiation of an infraction case, and the demand that Mr. Magee appear in District Court.

The hearing held wherein Mr. Magee was found to have committed the infraction, was held in violation of the Court rules governing that hearing, and under defective notice, in violation of Mr. Magee's constitutional due process rights.

By-way-of the notice of infraction being issued unlawfully, rendering it wholly defective as an allegation and notice, the hearing, and the holding thereof, is an issue of constitutional due process, and a challenge to the sufficiency of the citation is reviewable even though raised for the first time on appeal. (*See State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989)).

In the eyes of the law, Mr. Magee could not have been issued the citation and notice of infraction by the Trooper. Under its own rules, the District Court could not, therefore, initiate a hearing in which Mr. Magee could have been found to have had committed the alleged infraction.

It is respectfully requested, therefore, that this Petition for Review be granted, and that the Supreme Court reverse the Court of Appeals affirmation of the Superior and District Court.

2. Mr. Magee's constitutional rights were further violated when the Trooper detained Mr. Magee for allegedly driving the wrong way on the freeway when, by admission on the record, the Trooper never saw Mr. Magee do what he was detained for.

Under *Campbell v. Department of Licensing*, 31 Wn. App. 833, 644 P.2d 1219 (1982), it is established that, "In the absence of any corroborative information or observation, a police officer [Trooper] is not authorized to stop a vehicle on the sole basis that a passing motorist points to a vehicle and announces that it is being driven [the wrong way] by a drunk driver." *Campbell v. Department of Licensing*, 31 Wn. App. 833

Inasmuch as the Trooper has admitted that she did not see Mr. Magee do anything else other than be parked, and, in consideration that the “reports” that the Trooper used as a basis to arrive at the scene not being produced on discovery, nor was it alleged that Mr. Magee or his car was described in those reports, all that the Trooper could have done is issue a parking ticket. Specifically, RCW 46.61.575 – Additional Parking Regulations, states that, “. . . every vehicle stopped or parked upon a one-way roadway shall be so stopped or parked parallel to the curb or edge of the roadway, in the direction of authorized traffic movement,” and also states that it applies, “with respect to highways under his or her [secretary of transportation] jurisdiction.” RCW 46.61.575

3. Mr. Magee was alleged to have violated RCW 46.61.150 (Wrong Way on Freeway.) The RCW, however, also includes RCW 46.61.155 (Wrong Way on Freeway Access.) Mr. Magee, however, was only

observed parked on the shoulder of the on-ramp lane. In making its finding, the District Court used two (at least) alternative theories for violation of RCW 46.61.150.

The District Court stated, “Perhaps there is a marked difference between [1] being on the shoulder or [2] being on the onramp or [3] being on actual 512.” CP 32 And the District Court goes on to state, “I’m not finding a distinction between [1] driving on the shoulder and [2] driving on the actual paved highway of 512 or [3] even on onramp.” CP 32

The Supreme Court of Washington, however, held under *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003) that, “in cases such as the present one, where a *general* verdict is rendered in a *multi-theory* case and one of the theories is later invalidated, remand must be granted . . .” *Davis v. Microsoft Corp.*, 149 Wn.2d at 539 (emphasis added)

The District Court, therefore, and acting as plaintiff, committed legal error when it followed the path that *Davis* reverses. The District Court divided what Mr. Magee was alleged to have done between multiple sections of the RCW, and found them to be *generally* the same, and assumed that Mr. Magee must have violated one of the sections. The District Court did this in violation of the law set forth by The Supreme Court under *Davis*.

4. Exercising his constitutional due process right to a fair trial, pursuant to IRLJ 3.1, Mr. Magee timely and properly requested any and all discovery prior to his hearing. The Trooper alleges that there were reports that a car was driving the wrong way on the freeway, and that was a basis for issuing Mr. Magee the citation. Those reports, while referred to and objected to at the hearing before the District court, were not produced.

Mr. Magee has taken the position from the outset that not only under the law was the citation unlawfully issued, and that he was unlawfully summonsed to court, but more importantly, that he in fact did not do what was alleged. Mr. Magee was even willing to describe what in fact he did do on the day in question on the record before the District Court (section 6, *infra*).

Discovery was demanded, for these *reports* would have exonerated Mr. Magee, and Mr. Magee was denied them in violation of his constitutional due process rights.

5. As discussed briefly, *supra*, Mr. Magee was *never* witnessed, and never conceded to doing anything else other than being parked. At best, therefore, Mr. Magee committed a non-traffic infraction. There was no evidence, as required by law, to stop Mr. Magee, nor issue him a citation for the alleged offense. Mr. Magee, however, was stopped, and was issued a citation, and was summonsed, again, in violation of his compulsory due

process rights under Article 1, § 3 of the Constitution of the State of Washington.

6. In it's opinion, the Court of Appeals states as fact that Mr. Magee:

testified that when he crossed the oncoming lanes of traffic for the on-ramp to SR 512, that he made sure to signal before pulling into the oncoming lanes and signaled again when he drove a short distance (the wrong way) to the shoulder and parked facing Hershey's [the person whom Mr. Magee was giving the jump start to] car, which was parked in the same direction with the flow of traffic.

(Opinion, p. 2-3)

The Court of Appeals, in its Analysis, goes on to say that:

Magee specifically testified that [Hershey] had called me and [his car] wouldn't start so I did pull in front of him to give him a jump-start. 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[s] I did have my flashers on. CP at 31

(Opinion, p.5, footnote 5)

What the Court of Appeals has concluded/presumed, and as described, is physically impossible. First the Court

says Mr. Magee pulled into the lane of the on-ramp against the flow of traffic, and then turned around and pointed the opposite direction to be nose-to-nose to give Mr. Hershey his jump-start, and, albeit that he was now pointed in the opposite direction, that it was again against the flow of traffic.

Traffic could only be said to be going one direction, but the Court of Appeals basis it's opinion on the impossible fact of Mr. Magee being pointed in two opposite directions, but against the flow of traffic both times.

VI CONCLUSION

Mr. Magee respectfully requests that review be granted, and that the affirmation by the Court of Appeals of the Superior Court and of the District Court be reversed because:

1. Mr. Magee's compulsory due process rights under the Constitution of the State of Washington,

Article 1, § 3, were violated when he was unlawfully issued the citation, and;

2. Mr. Magee's compulsory due process rights under the Constitution of the State of Washington, Article 1, § 3, were violated when he was unlawfully stopped and detained, and;

3. The Court of Appeals holding, affirming the District Court's generalizing three separate statutes under the RCW to find Mr. Magee as having committed an offense is in direct contradiction of the law set forth by The Supreme Court of Washington under *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003), and;

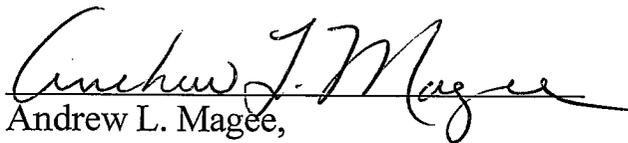
4. Mr. Magee's compulsory due process rights under the Constitution of the State of Washington, Article 1, § 3, were violated when timely and properly discovery, which would have exonerated him, was not produced, and;

5. Mr. Magee was issued a traffic (moving violation) citation, when he was only ever observed parked, and that allowing law enforcement to do so is an issue of substantial public interest that should be determined by The Supreme Court, and;

6. The Court of Appeals' central analysis, from which it based its holding, was based on an impossible factual conclusion.

APPENDIX

Respectfully submitted this 26th day of June, 2008



Andrew L. Magee,
WSBA# 31281
44th Floor
1001 Fourth Avenue Plaza
Seattle, Washington 98154
(206) 389-1675

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

ANDREW MAGEE,
Petitioner.

No. 34261-8-II

ORDER STRIKING ATTACHMENTS AND
CALLING FOR A RESPONSE

FILED
COURT OF APPEALS
09 MAY -8 AM 10:50
STATE OF WASHINGTON
RECEIVED

RESPONDENT moves to strike the attachments to Petitioner's motion for reconsideration of the opinion filed April 1, 2008, in the above-entitled matter. Upon consideration by the court, the motion is granted and the attachments to the motion are stricken.

PETITIONER'S motion for reconsideration of the opinion appears to raise a substantial issue and a response would assist the Court in resolving the motion. The Court directs the Respondent to file a response to the motion for reconsideration within twenty (20) days of this order. Accordingly, it is

SO ORDERED.

DATED this 8th day of May, 2008.

FOR THE COURT:

E. G. Brigham
CHIEF JUDGE

Kathleen Proctor
Michelle Hyer
Pierce County Prosecuting Atty Ofc
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2171

Andrew L. Magee
Attorney at Law
1001 Fourth Ave Plaza 44th Fl
Seattle, WA, 98154

FILED
COURT OF APPEALS
DIVISION II

08 APR -1 AM 8:38

STATE OF WASHINGTON

BY

DEPT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANDREW L. MAGEE,

Petitioner.

No. 34261-8-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — Following a civil infraction hearing, the district court found that Andrew L. Magee committed second degree negligent driving. On appeal, Magee challenges the trial court's reliance on a portion of the trooper's testimony that relayed non-testifying motorists' telephonic reports that they had seen a car driving the wrong way on State Route (SR) 512, the sufficiency of the evidence, and the district court's failure to defer findings with costs. Because there was sufficient evidence showing Magee committed the infraction, we affirm.

FACTS

On April 9, 2005, Kenneth Hershey called Magee and asked him for help jump starting Hershey's car, which was parked on the shoulder of the on ramp to SR 512 in Puyallup, Washington. Following motorists' reports of seeing a car driving the wrong way on the freeway, Washington State Trooper D.D. Randall was dispatched to SR 512, between Benston Drive and

East Pioneer Avenue. At the scene, Randall found Magee's car parked on the shoulder of the road; the car was facing the opposite direction of oncoming traffic; and was parked "nose-to-nose" with his friend Hershey's car. Clerk's Papers (CP) at 28. Randall cited Magee for second degree negligent driving pursuant to RCW 46.61.525.¹

Magee contested the traffic infraction and requested a hearing. At the hearing,² Trooper Randall testified that she did not witness Magee drive in the wrong direction on the highway but that she had observed Magee's car parked on the shoulder facing the wrong way.

Hershey testified that he was with Magee before Trooper Randall arrived and that he did not see Magee drive the wrong way on SR 512. Magee testified that he did not drive against traffic on SR 512 and that he did not cross the oncoming lanes of SR 512. However, Magee also testified that when he crossed the oncoming lanes of traffic for the *on ramp* to SR 512, that he made sure to signal before pulling into the oncoming lanes and signaled again when he drove a

¹ RCW 46.61.525 provides:

(1)(a) A person is guilty of negligent driving in the second degree if, under circumstances not constituting negligent driving in the first degree, he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property.

(b) It is an affirmative defense to negligent driving in the second degree that must be proved by the defendant by a preponderance of the evidence, that the driver was operating the motor vehicle on private property with the consent of the owner in a manner consistent with the owner's consent.

(c) Negligent driving in the second degree is a traffic infraction and is subject to a penalty of two hundred fifty dollars.

(2) For the purposes of this section, "negligent" means the failure to exercise ordinary care, and is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do something that a reasonably careful person would do under the same or similar circumstances.

² District courts may preside over traffic infraction hearings without a prosecutor's presence. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 434-35, 28 P.3d 744 (2001).

short distance (the wrong way) to the shoulder and parked facing Hershey's car, which was parked in the same direction with the flow of traffic.

The district court³ found that Magee committed second degree negligent driving because the position of his car was such that "unless [Magee's car was] airlifted, [Magee was] going the opposite direction of . . . the natural flow of traffic." CP at 32. The district court further found that it was not relevant whether Magee was driving on the shoulder or the paved highway because driving the wrong way "endangers people. Reasonably prudent persons . . . don't drive the wrong way, even on an onramp." CP at 32. Pursuant to RALJ 2.4, Magee appealed to the superior court. RCW 46.63.040(1).

The superior court affirmed the district court's ruling, holding that there was sufficient evidence to support the district court's finding that Magee committed the infraction. It further held that there were no due process or discovery violations. We granted Magee's motion for discretionary review.

ANALYSIS

HEARSAY

Magee asserts that, in finding that he had committed second degree negligent driving, the trial court improperly relied on Trooper Randall's testimony relating telephonic reports from motorists who reported having seen a car driving the wrong way on SR 512. Magee argues that this testimony was hearsay and could not be considered for the truth of the matter asserted: that

³ The Washington legislature established limited jurisdiction courts to hear and determine violations of law designated as traffic infractions. RCW 46.63.040(1).

he was driving the wrong way on the freeway. We agree. Randall's testimony regarding motorists' reports was hearsay and the trial court erred when it denied Magee's timely hearsay objections. ER 801(c); ER 802; *see State v. Chapin*, 118 Wn.2d 681, 685-86, 826 P.2d 194 (1992) (hearsay is inadmissible in criminal cases unless an exception applies); *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 641, 980 P.2d 311 (1999) (hearsay is inadmissible in civil cases unless an exception applies).

The rules of evidence apply to traffic infraction cases. ER 1101(a) provides "[e]xcept as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington." Moreover, IRLJ 3.3(c) provides that "[t]he Rules of Evidence and statutes that relate to evidence in infraction cases shall apply to contested hearings." The hearing in Magee's case was a contested hearing and, thus, the rules of evidence applied.

But an error in admitting evidence does not require reversal unless it prejudices the defendant. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994). Where the error arises from a violation of an evidentiary rule, that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

In this case, Magee objected several times to the trooper's testimony about the witnesses' reports to the 911 dispatcher that they had seen a car driving the wrong way on SR 512. A

review of the record shows that the trooper's testimony was intertwined with and heavily relied on this inadmissible hearsay evidence to which Magee timely objected.⁴

However, Magee testified at the hearing. In his testimony, Magee admitted that he briefly drove against traffic to turn his car around but that he used his signals when he did so.⁵ Thus, although the trial court improperly admitted the trooper's testimony relating hearsay reports of other motorists as evidence that Magee drove the wrong way on the freeway, Magee's in-court admission rendered the error harmless. *Nghiem*, 73 Wn. App. at 413.

SUFFICIENCY OF THE EVIDENCE

Magee next argues that (1) Trooper Randall did not have the authority to issue a citation because the infraction was not committed in the trooper's presence, and (2) the trooper unlawfully detained him for a traffic violation because the trooper did not see him commit the violation. Magee is essentially arguing that there was insufficient direct evidence from the fact that his car was parked on the shoulder of SR 512 facing the wrong way to find that he committed second degree negligent driving.

⁴ The statements were made during 911 calls and relayed to the trooper by the dispatcher. The statements were relevant and admissible to explain why the trooper went to where Magee's and Hershey's cars were located but not for the truth of the matter asserted: that Magee was driving the wrong way on the freeway. The trial court did not admit the statements under an exception to the hearsay rule, such as an excited utterance, ER 803(a)(2), or present sense impression, ER 803(a)(1). Accordingly, the statements were hearsay to which Magee properly objected. Because they are not substantive evidence, we do not consider them in evaluating Magee's challenge to the sufficiency of the evidence.

⁵ Magee specifically testified that
[Hershey] had called me and [his car] wouldn't start so I did pull in front of him to give him a jump-start. 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 time[s] I did have my flashers on.

CP at 31.

Second degree negligent driving is a traffic infraction and not a criminal offense. *State v. Farr-Lenzini*, 93 Wn. App. 453, 467, 970 P.2d 313 (1999). Accordingly, the trial court must find that a preponderance of the evidence supports the conclusion that the defendant committed the charged infraction. RCW 46.63.060(2)(f);⁶ *Farr-Lenzini*, 93 Wn. App. at 467. A person commits the infraction of second degree negligent driving when he “operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property.” RCW 46.61.525(1)(a).

“Negligence” is defined to mean “the failure to exercise ordinary care, and is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do something that a reasonably careful person would do under the same or similar circumstances.” RCW 46.61.525(2).

Evidence of the infraction is sufficient if, viewed in the light most favorable to the State and making all reasonable inferences therefrom, it permitted the trier of fact to find by a preponderance of the evidence that Magee drove negligently. IRLJ 3.3(d), 5.2; *Farr-Lenzini*, 93 Wn. App. at 467; *State v. Roberts*, 73 Wn. App. 141, 143-44, 867 P.2d 697; *review denied*, 124 Wn.2d 1022 (1994). Circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

⁶ RCW 46.63.060(2)(f) provides:

A statement that at any hearing to contest the determination the state has the burden of proving, by a preponderance of the evidence, that the infraction was committed; and that the person may subpoena witnesses including the officer who issued the notice of infraction.

Here, Trooper Randall saw Magee's car parked facing the opposite direction of the natural flow of traffic. The district court noted that unless Magee's car was airlifted, this circumstantial evidence established that Magee had to be driving the wrong way to get his car in that position. In finding that Magee had committed the infraction of second degree negligent driving, the district court concluded that driving the wrong way, "even on an onramp," endangered people; that reasonably prudent people do not drive the wrong way on the highway or the on ramp; and that it would have been more helpful for Magee to call a tow truck to help Hershey. CP at 32.

As discussed above, standing alone, Magee's testimony was sufficient to support the district court's finding that Magee drove against traffic and, thus, operated his car "in a manner that is both negligent and endangers or is likely to endanger any person or property." RCW 46.61.525(1)(a). His argument to the contrary fails.

ALTERNATIVE OR DEFERRED FINDING WITH COSTS

Magee next argues that he was denied procedural due process because the district court did not review his case to determine his eligibility for a dismissal with costs or a deferred finding.

In this case, the district court mailed Magee a letter outlining the procedure for contesting the citation and advised Magee that he had various options including a hearing in person, by mail, or *dismissal with costs* and *a deferral of the finding that he committed the infraction*. During oral argument, this court asked that the parties provide citation to authority granting any

court the ability to defer a finding while at the same time requiring the defendant to pay costs.

They cited none.

After we filed this opinion, however, we discovered that, although the legislature clearly restated its disapproval of this practice in criminal prosecutions,⁷ it did not repeal RCW 46.63.070, which allows the trial court adjudicating a civil infraction to employ such procedure.

RCW 46.63.070 provides in relevant part:

[I]n hearings conducted pursuant to subsections (3) and (4) of this section, the court may defer findings, or in a hearing to explain mitigating circumstances may defer entry of its order, for up to one year and impose conditions upon the defendant the court deems appropriate. Upon deferring findings, the court may assess costs as the court deems appropriate for administrative processing. If at the end of the deferral period the defendant has met all conditions and has not been determined to have committed another traffic infraction, the court may dismiss the infraction.

RCW 46.63.070(5)(a). Thus, the legislature has apparently determined that, in a criminal case, a trial court has the authority to impose costs on a *convicted* defendant only. *State v. Buchanan*, 78 Wn. App. 648, 651, 898 P.2d 862 (1995). Under former RCW 10.01.160(1) (2005), “[c]osts may be imposed *only upon a convicted* defendant.” (Emphasis added.) See RCW 10.01.050 (“No person charged with any offense against the law shall be punished for such offense, unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of

⁷ The legislature recently amended former RCW 10.01.160(1) (2005), but did not alter the law that costs may be imposed only upon a convicted defendant.

The court may require a defendant to pay costs. *Costs may be imposed only upon a convicted defendant*, except for costs imposed upon a defendant’s entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

Laws of 2007, ch. 367, § 3 (effective date July 22, 2007) (first emphasis added).

the case and of the person.”). And that a court may not defer a finding on condition that a criminal defendant pay costs it has no authority to impose. But when the charge at issue is a civil infraction, under RCW 46.61.525(1)(c), a trial court may defer a finding and impose conditions on an alleged violator including payment of costs.⁸

Notwithstanding Magee’s argument to the contrary, even RCW 46.63.070 does not *require* that a trial court defer a finding, it merely gives the court discretion to do so when adjudicating liability on an infraction. The possibility of a deferred finding is but one option the infraction court may entertain and, like probation in a criminal case, the existence of the possibility of leniency does not create a right in the defendant to such treatment. *See State v. Davis*, 43 Wn. App. 832, 835, 720 P.2d 454 (“Probation is a matter of grace, privilege, or clemency granted to the deserving and withheld from the undeserving within the discretion of the trial judge.”) (citing *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972); *State v. Murray*, 28 Wn. App. 897, 900, 627 P.2d 115, *review denied*, 95 Wn.2d 1029 (1981)), *review denied*, 106 Wn.2d 1017 (1986). Accordingly, Magee was not denied due process by the trial court’s decision to enter a finding rather than deferring it.

⁸ RCW 46.63.070, allowing deferral of a finding for a fee, apparently reflects a legislative policy decision allowing such practice in adjudicating civil infractions, chapter 46.61 RCW, while prohibiting it in adjudicating criminal charges, RCW 10.01.050. *See State v. Smith*, 93 Wn.2d 329, 339, 610 P.2d 869 (a reviewing court cannot substitute its judgment for that of the legislature), *cert. denied*, 449 U.S. 873 (1980).

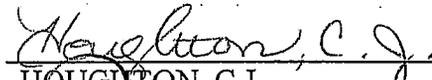
No. 34261-8-II

And because Magee's testimony is sufficient to support the district court's ruling that he "committed" the infraction of second degree negligent driving, we affirm.

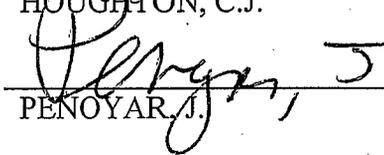


QUINN-BRINTNALL, J.

We concur:



HOUGHTON, C.J.



PENOYAR, J.