

82671-4

NO. 60359-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

ABDINASIR OSMAN,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WESLEY SAINT CLAIR

REPLY BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN -5 PM 3:06

ORIGINAL

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A. **ISSUE PRESENTED**

Has Osman identified any basis to affirm the RALJ court's reversal of the District Court's finding that the lost portion of the record was neither material nor significant?

B. **STATEMENT OF THE CASE**

The relevant facts of this case are set forth in the Amended Brief of Appellant and will not be repeated here except as necessary for argument. See Amended Brief of Appellant, at 1-6.

C. **ARGUMENT**

1. **IT IS APPROPRIATE TO GIVE DEFERENCE TO THE DISTRICT COURT'S DETERMINATION OF MATERIALITY AND SIGNIFICANCE**

Osman contends that the District Court's determination of materiality and significance under RALJ 5.4 should be reviewed *de novo*. He argues that *de novo* review is appropriate where the lower court applies a court rule to a specific set of facts. See Brief of Respondent at 11-2. It would be a waste of time and judicial resources, however, to remand to give the District Court the opportunity to make the materiality and significance determination subject to *de novo* review by the Superior Court. For the reasons

set forth in the Amended Brief of Appellant, the District Court is in a better position to judge whether a portion of a hearing it presided over was material or significant. If the District Court is entitled to no deference, there is no legitimate reason to remand to have the District Court make that determination.

Osman contends, however, that RALJ 5.4 simply does not permit remand to the District Court for a materiality determination. Osman argues RALJ 5.4 confers no more authority on the District Court than is necessary to determine whether a portion of the record is actually lost or missing and not whether such a portion is "significant or material." But to convey Osman's proposed meaning, RALJ 5.4 would need to say only that the District Court has "the authority to determine whether or not portions of the electronic record have been lost or damaged." Thus, that reading of RALJ 5.4 renders the words "significant or material," as used in the second sentence of RALJ 5.4,¹ superfluous. Court rules "must be interpreted so that 'no word, clause or sentence is superfluous, void or insignificant.'" State v. Dassow, 95 Wn. App. 454, 458, 975 P.2d 559 (1999) (citing State v. Raper, 47 Wn. App. 530, 536, 736

¹ "The court of limited jurisdiction shall have the authority to determine whether or not significant or material portions of the electronic record have been lost or damaged, subject to review by the superior court upon motion."

P.2d 680 (1987)). The District Court has the authority to determine materiality and significance, and deference should be given to the District Court's decision.

2. THE DISTRICT COURT PROPERLY FOUND THE MISSING PORTION OF THE RECORD TO BE NEITHER MATERIAL NOR SIGNIFICANT

Osman also argues that due to the nature of the District Court's CrRLJ 3.5 and 3.6 rulings, the District Court erred in finding the missing portion of the record neither material nor significant.

Osman first contends that there is an inherent contradiction in the District Court's admission of his claim that he had two beers and was okay to drive and the District Court's suppression of his refusal of the breath alcohol test. There is no contradiction, however. The Court's finding that Osman understood his Miranda warnings (as required for the admission of statements elicited through custodial interrogation) is consistent with the Court's finding that he did not understand his Implied Consent Warnings (as required for admission of Osman's refusal to take the breath alcohol test). Miranda warnings are worded with plain and simple language that can be more easily comprehended than the Implied Consent Warnings, which focus on the more complicated criminal and

administrative consequences of taking or refusing a breath alcohol test. The Court's docket entries reflect this consistency.²

Moreover, Osman's claim that he had only two beers and was okay to drive was self-serving and cumulative. "It is not unlawful for a person to consume intoxicating liquor and drive a motor vehicle. The law recognizes that a person may have consumed intoxicating liquor and yet not be under the influence of it." Washington Pattern Jury Instructions: Criminal 92.10 (2005). Osman's admission is also cumulative of the deputy's observations: strong odor of intoxicants on Osman's breath; red, watery, and bloodshot eyes; slurred speech; slow lethargic movements; that Osman was unsure on his feet and had to use the car to steady himself; that Osman exhibited all six clues on the horizontal gaze

² The Docket entry in question reads:

COURT FINDS DEFENDANT WAS READ HIS RIGHTS IN THE FIELD AND UNDERSTOOD HIS RIGHTS IN THE FIELD. STATEMENTS MADE THERE AFTER ARE ADMISSIBLE. STATEMENTS MADE ARE A WAIVER BY CONDUCT THAT INCLUDES THE FACT THAT HE STATED HE HAD 2 BEERS AND WAS OKAY TO DRIVE.

COURT FINDS THAT THE DEFENDANT WAS READ HIS RIGHTS AT THE SEATAC FACILITY AND THAT HE INVOKED HIS RIGHTS AND ANY STATEMENTS MADE AFTER THE SECOND READING OF RIGHTS ARE SUPPRESSED.

COURT FINDS IMPLIED CONSENT WARNINGS FOR BREATH WERE READ TO DEFENDANT IN THE FIELD AND AT THE SEATAC FACILITY. COURT IS NOT SATISFIED THAT DEFENDANT UNDERSTOOD HIS RIGHTS. THEREFORE, BAC REFUSAL IS SUPPRESSED.

CP 8.

nystagmus test; and that Osman was argumentative. Even if this Court were to find that 1) Osman's claim was not self-serving and 2) the statement was not properly admitted, any error in admitting the statement would be harmless in the context of the other evidence of alcohol consumption. Osman's arguments do not show that the missing portion of the record is material or significant.

Osman also argues that because he disputed understanding much of what the officer told him and because he claimed that his friend offered to translate (contrary to the officer's testimony), the District Court's missing findings must be material or significant. However, implicit in the District Court's admittance of Osman's claim that he had only two beers is a rejection of Osman's testimony that he was not read his rights at the scene. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, whether or not Osman's friend offered to translate is irrelevant. The mere existence of an offer to translate does not mean that Osman did, or did not, understand the warnings given him. The nature of the District Court's rulings does not render the missing portion of the record material or significant.

Osman finally contends that the missing portion of the record is significant based on the trial court's admission of "Exhibit D." Exhibit D is a judgment and sentence concerning one of the defendant's prior crimes. CP 170. Osman contends that the missing portion of the record is material because the court's docket entry shows that Exhibit D was admitted over defense objection, and the record does not show what that defense objection was.

But the question of what the defense objection was is immaterial, not significant. The admission of Exhibit D was done as part of the court's process of determining the preliminary facts as to whether the evidence in question could be admitted at trial. Because the District Court was determining a preliminary question of fact, the evidence rules did not apply to that decision. ER 1101(c)(1) ("The rules ... need not be applied in the following situations: (1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a)."); ER 104(a) ("Preliminary questions concerning ... the admissibility of evidence shall be determined by the court In making its determination it is not bound by the Rules of Evidence except those with respect to privileges."). Thus,

the question of what evidentiary objection was raised by the defense to Exhibit D cannot be a material part of the record below.

D. CONCLUSION

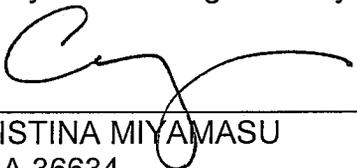
Osman has failed to identify a basis to affirm the RALJ court's reversal of the District Court's finding that the lost portion of the record was neither material nor significant. For the foregoing reasons, and the reasons stated in the Amended Brief of Appellant, this court should reverse and remand for RALJ appeal.

DATED this 5th day of June, 2008.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____

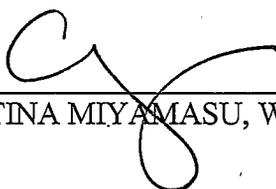

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Certificate of Service by Messenger

Today I caused to be served: REPLY BRIEF OF APPELLANT and
CERTIFICATE OF SERVICE via ABC Legal Messenger upon Christine Jackson;
Attorney for the Defendant; 810 Third Avenue, Suite 800, Seattle, WA 98104, in
State v. Abdinasir Osman, Cause Number 60359-1-I, in the Court of Appeals,
Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.

Done this 5th day of June, 2008, in Seattle, Washington.



CHRISTINA MIYAMASU, WSBA #36634

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