

NO. 87823-4

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

VICKI LEE ANNE PARKER, and JAMES S. JOHNSON,

Appellants,

v.

KIM WYMAN, in her capacity as Thurston County Auditor, and
CHRISTINE SCHALLER-KRADJAN, MARIE CLARKE, and
VICTOR MINJARES,

Respondents

and

MARIE C. CLARKE,

Appellant,

v.

KIM WYMAN, THURSTON COUNTY AUDITOR, AND
CHRISTINE SCHALLER-KRADJAN, CANDIDATE FOR
THURSTON COUNTY SUPERIOR COURT, POSITION 2,

Respondents.

RESPONDENT KIM WYMAN'S RESPONSE TO BRIEF OF
AMICUS CURIAE

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I. INTRODUCTION

The State of Washington has filed an amicus curiae brief in support of the Appellants' position that superior court judges must be residents of the county or counties that elect them.

The state concedes that the standard of review is whether the trial courts ruling is arbitrary, capricious or contrary to law. The State does not argue that Judge Olsen's ruling was arbitrary and capricious. By misconstruing the meaning of "contrary to law," the state has expanded the scope of review beyond what is allowed by RCW 29A.68.011 and *Hatfield v. Greco*, 87 Wn.2d 780, 557 P.2d 340 (1976).

The State argues that the Legislature can add to the qualifications for superior court judges that are set forth in Const. art. IV, § 17, but totally ignores well established case law that holds that absent an express grant of power, the qualifications set forth in the Constitution are exclusive.

The State argues that RCW 42.04.020, a statute that makes no mention of superior court judges, adds a residency requirement for superior court judges. However, the State makes no attempt to explain the absence of a residency requirement in Chapter 2.08 RCW, a statute that specifically deals with superior courts.

II. ARGUMENT

A. The Trial Court's Decision was Not Arbitrary, Capricious or Contrary to Law

The State concedes that the ruling of the trial court is not appealable as a matter of right and that the appropriate standard of review is whether the trial court's ruling is arbitrary, capricious or contrary to law. The State argues that in determining whether the trial court's decision is contrary to law, the court "must also consider that a statute is presumed constitutional and parties challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt." Amicus Br. at 3-6.

The State, like the Appellants, misrepresents the holding of the trial court. The trial court *did not* find that RCW 42.04.020 was unconstitutional, but rather held that it *did not apply* to superior court judges. CP 61.

More importantly, the State misconstrues the meaning of "unlawful" as that term is used in the constitutional certiorari context. The Court in *Federal Way School District v. Vinson*, 172 Wn.2d 756 (2011) discussed the scope of review in a case of constitutional certiorari:

'[I]llegality' is a 'nebulous term.' *Wash. Pub. Emps. Ass'n v. Wash. Pers. Res. Bd.*, 91 Wn. App. 640, 652, 959 P.2d 143 (1998) (quoting *King County v. Wash. State Bd. of Tax Appeals*, 28 Wn. App. 230, 242, 622 P.2d 898 (1981)). In

the constitutional certiorari context, illegality refers to an agency's jurisdiction and authority to perform an act. *Id.*; *Saldin*, 134 Wn.2d at 292. “[A]n alleged error of law is insufficient to invoke the court's constitutional power of review.” *Wash. Pub. Emps. Ass'n*, 91 Wn. App. at 658.

Id. at 770.

Since the State does not claim that the trial court lacked jurisdiction and authority, they must demonstrate that the trial court's decision was arbitrary and capricious.

The scope of court review should be very narrow, ... and one who seeks to demonstrate that action is arbitrary or capricious must carry a heavy burden.” *Id.* at 695. Arbitrary and capricious action is “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. *Foster*, 83 Wn. App. at 347 (quoting *Kerr-Belmark Constr. Co. v. City Council*, 36 Wn. App. 370, 373, 647 P.2d 684 (1984)).

Id. at 769.

The trial court based its decision on the unambiguous language in art. IV, § 17 of the Constitution and well established case law. The State and Appellants do not argue that Judge Olsen's decision was willful and unreasoning. They disagree with her conclusion that RCW 42.04.020 does not apply to superior court judges, but make no attempt to argue that Judge Olsen's ruling was arbitrary, capricious or that Judge Olsen lacked jurisdiction. Therefore, the State and the Appellants have failed to meet the applicable standard of review.

B. Const. art. IV § 17 is Unambiguous

Article IV, § 17 of the Washington State Constitution states that, “No person shall be eligible to the office of judge of the supreme court, or judge of the superior court, unless he shall have been admitted to the practice in the courts of record of this state or of the territory of Washington.” Neither the State nor the Appellants claim that these words in Const. art. IV, § 17 are ambiguous.

“Where the words of a constitution are unambiguous and in their commonly received sense lead to a reasonable conclusion, it should be read according to the natural and most obvious import of the framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.” *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969) (citing *State ex rel. Torreyson v. Grey*, 21 Nev. 378, 32 P. 190 (1893)).

The State argues that there is no express prohibition in Const. art. IV that would prevent the Legislature from adding to the qualification for superior and supreme court judges that are specifically set forth in art. IV, § 17. This conclusion flies in the face of well established case law on this issue.

“Where the constitution has set forth the qualifications for an office, either general or specific, in the absence of an express grant of

power to the Legislature, there is an implied prohibition against the imposition of additional qualifications by the Legislature.” *Gerberding v. Munro*, 134 Wn.2d 188, 204, 949 P.2d 1366 (1998) (quoting *In re Bartz*, 47 Wn.2d 161,164, 287 P.2d 119 (1955)).

Neither the State nor the Appellants claim that there is an express grant of power to the Legislature to add to the qualifications stated in Const. art. IV, § 17. Neither the State nor the Appellants dispute Judge Olsen’s conclusion that there are numerous instances of explicit grants of Legislative power in Const. art. IV, but there are none in Const. art. IV, § 17. CP 59.

Because the meaning of Const. art. IV, § 17 is clear and there is no express grant of power to the Legislature to add to the qualification set forth in Const. art. IV, § 17, admission to the practice of law in Washington is currently the only qualification for the position of superior court judge.

C. The State and Appellants Fail to Explain Why There is No Residency Requirement in Chapter 2.08 RCW Superior Courts

The State acknowledges that this Court could avoid the necessity of addressing the constitutionality of RCW 42.04.020 by merely requiring superior court judges to be electors of the state, rather than of a specific County. This conclusion is based on the recognition that superior court

judges are both state and county officers. The State also acknowledges that where possible, statutes will be construed so as to avoid any unconstitutionality. Amicus Br. 8.

The State's analysis could have stopped there, but went on to argue that RCW 42.04.020 should be read in context with all related statutes which disclose legislative intent. Amicus Br. 9. Respondent Wyman agrees that the Court should consider all related statutes to discern legislative intent. *Trakfone Wireless v. Dept. of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010).

However, the State has failed to consider all related statutes. The State discusses RCW 29A.20.21 (qualifications for filing) and RCW 42.12.010 (vacancies), neither of which specifically refers to superior court judges. The State and Appellants totally ignore Chapter 2.08 RCW which specifically deals with superior courts.

It seems clear that if you were trying to determine whether RCW 42.04.020 applied to superior court judges and you were looking for related statutes, you would start with the RCW chapter on superior courts. Neither the State nor the Appellants make any attempt to explain why there is a residency requirement for court of appeal judges in Chapter 2.06 and a requirement in RCW 3.34.60 for district court judges to be electors of their district, but there is no residency or elector requirement for

superior court judges in Chapter 2.08 RCW which specifically deals with superior courts.

The Legislature clearly knew how and where to set forth qualifications for judges and did so in the chapters of the RCW relating to the court of appeals and the district courts. If the Legislature intended to add to the qualification of superior court judges set forth in the Constitution, the appropriate place to add those qualifications would be in Chapter 2.08 RCW which specifically deals with superior courts.

The Legislature could not possibly have intended to add to the constitutionally mandated qualification of superior court judges through generic statutes that never specifically mention superior court judges. This conclusion is supported by the fact that no residency requirement is found in Chapter 2.08 RCW. Furthermore, neither the State nor the Appellants have produced any legislative history that supports their position that the Legislature intended through RCW 42.04.020 to add to the requirements set forth in Const. art. 4, § 17.

III. CONCLUSION

The question before this Court is not whether superior court judges should be required to be residents of the county or counties where they are elected. That currently is a question for the voters. The question before this Court is whether Const. art. IV, § 17 sets forth the exclusive

qualifications for superior and supreme court judges. If the Legislature wants to add county residency to those qualifications, they need to amend the Constitution to do so.

Respectfully submitted this 12th day of October, 2012.

JON TUNHEIM

THURSTON COUNTY
PROSECUTING ATTORNEY

A handwritten signature in black ink, appearing to read "David Klumpp", written over a horizontal line.

DAVID KLUMPP, WSBA No. 10910

Chief Civil Deputy

Attorney for Respondent Wyman

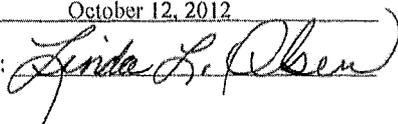
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Olympia, Washington.

Date: October 12, 2012

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Attached for filing in the above-referenced matter is the Respondent Kim Wyman's Response to Brief of Amicus Curiae.

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