

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CORTNEY L. BLOMSTROM,)	
BROOKE M. BUTTON,)	Supreme Court No. 91642-0
CHRISTOPHER V. COOPER,)	
)	Superior Court Nos. 15-2-00725-9, 15-
Petitioners,)	2-00828-0, 15-2-00674-1
)	
vs.)	MOTION TO EXCLUDE
)	AND TO STRIKE
The Honorable GREGORY J. TRIPP,)	
in his official capacity as a Spokane)	
County District Court Judge, and the)	
SPOKANE COUNTY DISTRICT)	
COURT,)	
)	
Respondents.)	

I. MOTION

The petitioners, through their attorney, Michael L. Vander Giessen, move this court under RAP 9.11(a) to exclude the declaration of Paul Abbott, and to strike all references to it made in the State of Washington's amicus curiae brief.

II. FACTUAL DECLARATION

On April 24, 2017, the State filed Mr. Abbott's declaration and an amicus curiae brief that references it. (Decl. of Paul Abbott, Apr. 21, 2017; Br. of Amicus Curiae State of Wash.)

Mr. Abbott's declaration attempts to prove the existence of new facts concerning ignition interlock devices based on the Department of Licensing's records. (Abbott Decl. ¶¶ 5-7.) Specifically, Mr. Abbott's declaration alleges the number of all ignition interlock restrictions existing in 2016, the number of all ignition interlock restrictions imposed in 2016, the number of pretrial ignition interlock restrictions imposed in 2016, and the number of ignition interlock licenses issued in 2016. (*Id.*) Such data postdates the pretrial ignition interlock restriction imposed in Button's case. (*See Button* Dist. Ct. VRP at 1-2, Mar. 2, 2015; Mot. for Discretionary Review App. at 7-8.)

On May 23, 2017, the petitioners attempted to move this court under RAP 9.11(a) to exclude Mr. Abbott's declaration and to strike all references to it made in the State's amicus curiae brief. On June 6, 2017, the clerk notified the petitioners that their motion was not properly before this court. The petitioners hereby renew their motion using the proper procedure.

Jun. 6, 2017 Spokane, Washington
Date and Place


Michael L. Vander Giessen
WSBA No. 45288
Attorney for Petitioners

III. LEGAL MEMORANDUM

Mr. Abbott's declaration constitutes new evidence subject to RAP 9.11(a)'s requirements. RAP 9.11(a) provides,

The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a) is concerned with whether this court “may take and consider additional evidence on the merits.” *In re Adoption of B.T.*, 150 Wn.2d 409, 414, 78 P.3d 634 (2003). Evidence is “[s]omething (including testimony, documents and tangible items) that tends to prove or disprove the existence of an alleged fact.” *Black’s Law Dictionary* 635 (9th ed. 2009).

RAP 9.11(a) has been applied to various forms of new evidence, including, for example, an auditor’s report addressing light rail ridership published after the trial court granted summary judgment, *Freeman v. State*, 178 Wn.2d 387, 405-06, 309 P.3d 437 (2013), evidence of a family’s public assistance history and history behind the father’s original child support obligation, *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 629 n.1, 152 P.3d 1005 (2007), a city manager’s letter purportedly showing the city council’s inconsistent legal positions on its legislative intent and interpretation of its tax ordinances, *City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 447-48, 656 P.2d 1035 (1982), a declaration from a proposed witness contradicting the sheriff’s testimony on employment matters in an administrative hearing, *In re Decertification of Martin*, 154 Wn. App. 252, 268, 223 P.3d 1221 (2009), documents pertaining to a ballot authorizing construction of an arena, a contract for development of the arena, and a newspaper article quoting the arena’s general manager, *Schreiner v. City of Spokane*, 74 Wn. App. 617, 620, 874 P.2d 883 (1994), and an affidavit from a bank official discussing settlement proceeds kept in a money market account, *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 941, 813 P.2d 125 (1991).

Mr. Abbott’s declaration is testimony that attempts to prove the existence of new facts concerning ignition interlock devices based on the Department of Licensing’s records. (Abbott Decl. ¶¶ 5-7.) Specifically, Mr. Abbott’s declaration alleges the number of all ignition interlock

restrictions existing in 2016, the number of all ignition interlock restrictions imposed in 2016, the number of pretrial ignition interlock restrictions imposed in 2016, and the number of ignition interlock licenses issued in 2016. (*Id.*)

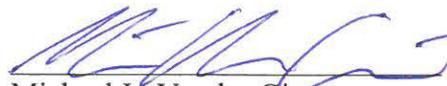
This court should reject Mr. Abbott’s declaration, and all references to it made in the State’s amicus curiae brief, because the facts it seeks to bring to this court’s attention do not help this court resolve the issues before it. *See B.T.*, 150 Wn.2d at 415 (rejecting a party’s new evidence because “the facts it seeks to bring to our attention do not help us resolve the issues before us”); RAP 9.11(a)(2) (requiring the proponent of new evidence to show “the additional evidence would probably change the decision being reviewed”). Such data postdates the pretrial ignition interlock restriction imposed in Button’s case. (*See Button* Dist. Ct. VRP at 1-2, Mar. 2, 2015; Mot. for Discretionary Review App. at 7-8.) But even if such data fit the timeframe of Button’s case, it does not help this court resolve the fundamental question of whether warrantless, suspicionless breath tests occur without authority of law under article I, section 7 when ordered as conditions of pretrial release.

IV. CONCLUSION

Therefore, under RAP 9.11(a), this court should grant the petitioners’ motion to exclude the declaration of Paul Abbott, and to strike all references to it made in the State of Washington’s amicus curiae brief.

DATED this 6th day of June, 2017.

Respectfully submitted,



Michael L. Vander Gressen
WSBA No. 45288
Attorney for Petitioners

Declaration of Service

I, Michael L. Vander Giessen, declare under penalty of perjury under the laws of the state of Washington that on June 6, 2017, I e-mailed a copy of the foregoing Motion to Exclude and to Strike to:

- (1) Brian C. O'Brien, Gretchen E. Verhoef, and Samuel J. Comi on behalf of the respondents;
- (2) Pamela B. Loginsky on behalf of the Washington Association of Prosecuting Attorneys;
- (3) April S. Benson and Leah E. Harris on behalf of the State of Washington;
- (4) Ryan B. Robertson, George L. Bianchi, Jonathan D. Rands, Howard S. Stein, and Jason S. Lantz on behalf of the Washington Foundation for Criminal Justice; and
- (5) James E. Lobsenz, Nancy L. Talner, Theresa H. Wang, and Lance A. Pelletier on behalf of the American Civil Liberties Union of Washington.

Jun. 6, 2017 Spokane, Washington
Date and Place



Michael L. Vander Giessen
WSBA No. 45288
Attorney for Petitioners