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Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 67908-2

Title of Case: Tim Eyman, App/cross-resp. vs. Michelle Mcgehee/redmond City Clerk, Resp/cross-app.

File Date: 02/19/2013

SOURCE OF APPEAL

Appeal from King County Superior Court

Docket No: 11-2-32979-8

Judgment or order under review

Date filed: 10/11/2011

Judge signing: Honorable Laura Inveen

JUDGES

Authored by Ronald Cox

Concurring: James Verellen

Dissenting: Stephen J. Dwyer

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TIM EYMAN,)	No. 67908-2-I
)	
Appellant/Cross)	DIVISION ONE
Respondent,)	
)	
v.)	
)	
MICHELLE McGEHEE,)	PUBLISHED
)	
Respondent/Cross)	FILED: February 19, 2013
Appellant.)	
)	
)	

Cox, J. ? A city clerk has a mandatory duty under the statutes governing the filing of initiative petitions to transmit such petitions to the county auditor for determination of sufficiency.¹ But, a court may review the substance of an initiative petition to determine whether it is valid.² Such a determination is ?exclusively a judicial function.?³ Despite a city clerk?s mandatory duty, however, a court may decline to grant a writ of mandamus if it determines that ordering compliance is a useless act because an initiative is invalid.⁴

1 See RCW 35A.01.040(4); 35A.29.170.

2 Philadelphia II v. Gregoire, 128 Wn.2d 707, 714, 911 P.2d 389 (1996).

3 Id.

4 SEIU Healthcare 775NW v. Gregoire, 168 Wn.2d 593, 602-03, 229 P.3d 774 (2010) (quoting City of Tacoma v. Rogers, 32 Wn.2d 729, 733, 203 P.2d 325 (1949); Vashon Island Comm. for Self-Gov?nt v. Wash. State Boundary

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Here, the city clerk failed to transmit to the county auditor a filed initiative petition, as the governing statutes mandate, without first obtaining a judicial determination of the validity of the initiative. Upon the commencement of this action by a sponsor of the initiative, the superior court properly determined that the initiative is invalid and mandamus would not lie. We affirm.

The material facts are not in dispute. In September 2010, the City of Redmond adopted an ordinance establishing a system of automated traffic safety cameras, consistent with RCW 46.63.170. This statute authorizes municipalities to use automatic traffic safety cameras and to issue consequent notices of traffic infractions.

In March 2011, the Redmond mayor and city council received a letter notifying them that a group of town citizens were collecting signatures to put an initiative on the ballot. The initiative was designed to challenge the automated traffic safety camera system.

On September 6, 2011, this court decided *American Traffic Solutions Inc. v. City of Bellingham*.⁵ That case held that an initiative regarding automated traffic cameras was invalid and exceeded the scope of the initiative power.⁶

On September 14, the initiative sponsors turned in 6,050 voter signatures in support of the Redmond initiative, Proposition 1. They later contacted the City Review Bd., 127 Wn.2d 759, 765, 903 P.2d 953 (1995)).

⁵ 163 Wn. App. 427, 260 P.3d 245 (2011), review denied, 173 Wn.2d 1029 (2012).

⁶ Id. at 434.

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to ask when the proposed initiative would be transmitted to the county auditor.

They learned that the city clerk had decided, presumably on the advice of counsel, not to transmit the petition to the county auditor.⁷

This action against Michelle McGehee, in her capacity as the Redmond clerk, followed. A proponent of the initiative sought a writ of mandamus requiring McGehee to transmit the initiative to the county auditor.

After a hearing on October 11, 2011 on an order to show cause, the superior court entered an order denying the request for relief. The court gave an oral decision and entered an order that mandamus would not lie.

This appeal by a proponent of the initiative and cross-appeal by the city clerk followed.

MOOTNESS

A threshold issue that neither party addresses is whether this case is now moot. Because the November 2011 election has passed, effective relief may no longer be provided by the courts. But the questions here deal with issues that are of continuing and substantial public interest. Accordingly, we reach the merits.

?Generally, where the substantial question in a case is moot, an appeal

will be dismissed. However, when matters of continuing and substantial public interest remain, a court may exercise its discretion and decide an appeal.⁸

7 Appellant's Opening Brief at 1-2; Brief of Respondent-Cross Appellant Michelle McGehee at 8.

8 *Save Our State Park v. Hordyk*, 71 Wn. App. 84, 89, 856 P.2d 734 (1993) (citing *Purchase v. Meyer*, 108 Wn.2d 220, 230, 737 P.2d 661 (1987));

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Here, one question is the extent of a county clerk's duty to transmit an initiative petition to the county auditor. Another is whether a clerk may usurp the exclusive judicial function of determining whether an initiative is valid. These are both issues of substantial and continuing public interest. As in *Philadelphia II v. Gregoire*,⁹ which dealt with the duty of the attorney general to certify a statewide initiative, these issues are of a public nature. Thus, it is "desirable to provide guidance [to municipalities] for future actions."¹⁰

CLERK'S CLEAR LEGAL DUTY

McGehee, the Redmond city clerk, argues that she did not have a duty to transmit Proposition 1 to the county auditor. We hold that in her role as the city clerk, McGehee had a clear legal duty to transmit the initiative petition to the county auditor.

"The primary goal of statutory construction is to carry out legislative intent."¹¹ If statutory language is clear on its face, that plain meaning must be given effect.¹² Courts should generally "accord terms their most plain and

Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972);
Washam v. Pierce County Democratic Cent. Comm., 69 Wn. App. 453, 457-58, 849 P.2d 1229 (1993)).

9 128 Wn.2d 707, 911 P.2d 389 (1996).

10 *Id.* at 712.

11 *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

12 *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

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ordinary meaning" when interpreting a statute.¹³ Thus, when a statute contains the word "shall," courts have typically interpreted this as a mandated duty.¹⁴ A trial court's interpretation of a statute is a question of law this court reviews de novo.¹⁵

In Philadelphia, the supreme court examined whether the attorney general of Washington could refuse to prepare a ballot title and summary for a proposed initiative.¹⁶ The supreme court analyzed the following statutory language:

“Within seven calendar days after the receipt of an initiative or referendum measure the attorney general shall formulate and transmit to the secretary of state the concise statement.”¹⁷ It held that this language required the attorney general to prepare the ballot title and summary. “Use of the term “shall” by the Legislature indicates that the Attorney General must prepare a ballot title and a summary regardless of the contents of the initiative. The statutory term “shall” is presumptively imperative unless a contrary intent is apparent.”¹⁸

The court held that reviewing the substance of a proposed initiative is

¹³ Save Our State Park, 71 Wn. App. at 91 (quoting Dennis v. Dep’t of Labor & Indus., 109 Wn.2d 467, 479-80, 745 P.2d 1295 (1987)).

¹⁴ Philadelphia II, 128 Wn.2d at 713 (“The statutory term “shall” is presumptively imperative unless a contrary legislative intent is apparent.”).

¹⁵ Locke v. City of Seattle, 133 Wn. App. 696, 704, 137 P.3d 52 (2006).

¹⁶ Philadelphia II, 128 Wn.2d at 712-13.

¹⁷ Id. (quoting RCW 29.79.040).

¹⁸ Id. at 713 (emphasis added).

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exclusively a judicial function, not a role for other governmental actors.¹⁹ In so holding, the court rejected the attorney general’s argument that “if an initiative exceeds the scope of initiative power, it is not an initiative at all,” and the attorney general may consequently refuse to prepare the ballot title and summary.²⁰ “It is true that a court may review the substance of a proposed initiative to determine whether it exceeds the scope of initiative power described in Article II, Section 1 of the Washington State Constitution.”²¹ But, the court continued, “[W]e hold that courts, not the Attorney General, should determine whether a proposed initiative exceeds the power reserved to the people in article II, section 1 of the state constitution.”²² As the court noted:

This does not leave the Attorney General without recourse to prevent an initiative from reaching the ballot. If the Attorney General believes an initiative exceeds the scope of the initiative power, she should prepare the ballot title and summary in accordance with her statutory duty and then seek an injunction to prevent the measure from being placed on the ballot.[²³]

As in Philadelphia II, RCW 35A.01.040 and RCW 35A.29.170 both

require the Redmond city clerk to take specific actions when an initiative is submitted. RCW 35A.29.170 states that “[t]he clerk shall transmit the petition to the county auditor who shall determine the sufficiency of the petition under the

19 Id. at 714-15.

20 Id. at 714.

21 Id.

22 Id. at 714-15.

23 Id. at 715-16 (emphasis added).

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rules set forth in RCW 35A.01.040.²⁴ RCW 35A.01.040 mandates that “[w]ithin three working days after the filing of a petition, the officer with whom the petition is filed shall transmit the petition to the county auditor for petitions signed by registered voters, or to the county assessor for petitions signed by property owners for determination of sufficiency.”²⁴ Thus, both statutes in question, like that in Philadelphia II, mandate that the city clerk transmit the petition to the county auditor. There is nothing ambiguous about the use of the words “shall transmit the petition” in the statutes.²⁵

Here, Redmond’s initiative process, like all cities that have adopted the optional municipal code, follows RCW 35A.29.170 and 35A.01.040. By failing to transmit the petition, McGehee failed to comply with her mandatory legal duty.

McGehee argues that because the statutory scheme here is different from that in Philadelphia II, the supreme court’s holding there is inapplicable. This argument has no merit.

All statutes in question here contain the same word: “shall.”²⁶ Thus, they create a clear and non-discretionary duty for the clerk to transmit the initiative once received.

McGehee also argues that because the proposed initiative was clearly beyond the initiative powers stated in Title 35A RCW after this court’s holding in

24 RCW 35.21.005(4) (emphasis added).

25 RCW 35A.29.170; RCW 35A.01 (emphasis added).

26 RCW 35A.29.170; 35A.01.040.

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American Traffic Solutions, it was not "authorized to be filed."²⁷ This, too, is an argument without merit. Philadelphia II makes clear that the determination of the validity of an initiative is "exclusively a judicial function."²⁸ There, the supreme court noted that the requirement that the attorney general prepare a ballot title and summary did "not leave [her] without recourse to prevent an initiative from reaching the ballot."²⁹ She could comply with her statutorily mandated duties and "then seek an injunction to prevent the measure from being placed on the ballot."

Similarly, here, McGehee was statutorily required to transmit the petition to the county auditor.³⁰ Nothing prevented her from bringing a court challenge, an action which would have permitted a court to exercise its exclusive judicial function of determining the validity of the initiative.

Indeed, the trial court correctly acknowledged that McGehee lacked the authority to refuse to transmit the petition. In its oral decision, the court stated:

There is no authority for the city's position that the clerk had the right [not] to transmit the petition to the county auditor. As pointed out in [Philadelphia], even the Attorney General, the highest lawyer in the state, is not allowed to make a legal determination when addressing a statewide initiative.[31]

²⁷ Brief of Respondent-Cross Appellant Michelle McGehee at 32-33 (quoting RCW 35A.29.170).

²⁸ Philadelphia II, 128 Wn.2d at 714.

²⁹ Id. at 715.

³⁰ See RCW 35A.01.040.

³¹ Report of Proceedings (Oct. 11, 2011) at 33 (emphasis added).

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If the attorney general had no authority to usurp the exclusive judicial function of determining the validity of the initiative, it follows that the City Clerk of Redmond lacked such authority. As the trial court stated, the clerk's decision was necessarily an assumption of a judicial function. "To make the decision she did, the clerk had to apply case law and interpret legislation as it relates to the facts at hand. This is a judicial function and is not a city clerk function."³²

In arguing that she did not have a duty to transmit the petition in question, McGehee focuses on a particular portion of RCW 35A.29.170: "Initiative and

referendum petitions authorized to be filed under provisions of this title, or authorized by charter, or authorized for code cities having the commission form of government³³ McGehee argues that the initiative here was not authorized to be filed.³⁴ Thus, she contends, she was not mandated to transmit it to the county auditor. But neither RCW 35A.29.170 nor 35A.01.040 provides that it is within the clerk's function to interpret whether a proposed initiative is authorized or not. As we have discussed earlier in this opinion, the supreme court has explicitly stated that interpretation of an initiative's validity is exclusively a judicial function.³⁴ The only duty required of the clerk by RCW 35A.29.170 is that the clerk shall transmit the petition to the county auditor who shall determine the sufficiency of the petition under the rules set forth in RCW

32 Id.

33 (Emphasis added.)

34 See Philadelphia II, 128 Wn.2d at 714.

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35A.01.040.³⁵

Division Two's opinion in *Save Our State Park v. Hordyk* supports this conclusion.³⁶ There, the county code required the auditor to "determine whether an initiative petition submitted to him or her [was] in proper form."³⁷ The court concluded that this language did not allow "the auditor to determine the legality of an initiative petition."³⁸ The court explained:

The term "proper form" cannot be construed to mean "proper substance." Black's Law Dictionary provides the following definition of "form":

"In contradistinction to 'substance,' 'form' means the legal or technical manner or order to be observed in legal instruments or judicial proceedings, or in the construction of legal documents or processes. Antithesis of 'substance.'"³⁹

McGehee argues that Hordyk is distinguishable from this case. There, she contends, the county employee in question decided to stop the initiative process after engaging in legal interpretation. In contrast, McGehee claims, she merely engaged in "subject review." But, applying the holding of *American Traffic Solutions* to a proposed initiative is not mere "subject review." Nor is it authorized by statute. After verifying that there were sufficient signatures and

35 (Emphasis added.)

36 71 Wn. App. 84, 856 P.2d 734 (1993) (quoting Black's Law Dictionary (5th ed. 1979)).

37 Id. at 91.

38 Id. at 91-92.

39 Id. at 92.

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that the form of the proposed initiative was proper, McGehee's statutory duty was to forward the petition to the county auditor.

MANDAMUS

The separate question is whether the trial court properly denied the requested writ, ruling it was a vain and useless act. The proponent of the initiative argues that this was error. We disagree.

A writ of mandamus is an extraordinary remedy.⁴⁰ It is appropriate to compel the performance of an act which the law especially enjoins as a duty resulting from an office⁴¹ But, even when appropriate, "Mandamus does not lie to compel the doing of a vain and useless thing."⁴² Whether there is a clear duty owed under a particular statute that would require the issuance of a writ is a question of law that an appellate court reviews de novo.⁴³

When examining an initiative whose subject is clearly outside that allowed by the initiative power, Washington courts have declined to issue a writ.⁴⁴ This is despite the fact that the courts have also recognized that the state actor owed

⁴⁰ Walker v. Munro, 124 Wn.2d 402, 407, 879 P.2d 920 (1994).

⁴¹ RCW 7.16.160.

⁴² State ex rel. Close v. Meehan, 49 Wn.2d 426, 432, 302 P.2d 194 (1956); Vashon Island Comm. For Self-Gov't v. Wash. State Boundary Review Board of King County, 127 Wn.2d 759, 765, 903 P.2d 953 (1995) ("Courts should . . . refrain from requiring the performance of useless or vain acts.?).

⁴³ River Park Square, LLC v. Miggins, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

⁴⁴ See Philadelphia II, 128 Wn.2d at 720; see also Vashon Island Comm. for Self-Gov't, 127 Wn.2d at 772-73.

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a clear duty to process the proposed initiative.⁴⁵

In Philadelphia II, though the supreme court held that the attorney general did not have discretion to refuse to prepare a ballot title and summary for a

proposed initiative, it also held that mandamus was improper as the proposal was beyond the scope of the initiative power.⁴⁶ The court stated:

In conclusion, the Attorney General should have prepared the ballot title and summary and then sought to enjoin its placement on the ballot. Nevertheless, because we determine that the initiative is beyond the scope of Washington's initiative power, we decline to direct the Attorney General to do so in this case.^[47]

Here, as in Philadelphia II, McGehee had a duty to transmit Proposition 1 to the county auditor. But this court's decision in American Traffic Solutions Inc. and the supreme court's decision in Mukilteo Citizens for Simple Government v. City of Mukilteo⁴⁸ stood as authority for the conclusion that Proposition 1 was improper and beyond the scope of the initiative power. Thus, as the superior court correctly decided in this case, a writ would not lie because the transmission of the initiative would have been a useless act under both of these cases.

In American Traffic Solutions, this court held that the proposed initiative in

⁴⁵ See Philadelphia II, 128 Wn.2d at 714-15.

⁴⁶ Id. at 712-13, 720.

⁴⁷ Id. at 720 (emphasis added).

⁴⁸ 174 Wn.2d 41, 272 P.3d 227 (2012).

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that case was beyond the scope of the initiative power.⁴⁹ It noted that the legislature had previously passed RCW 46.63.170, which authorizes the use of automated traffic safety cameras, so long as the appropriate local legislative authority first enacts an ordinance allowing for their use.⁵⁰ "An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself."⁵¹ Thus, this court held: "Initiative No. 2011-01 expressly restricts [the legislature's] authority by [expressly] conditioning its use on a concurrence by the majority of the voters. The subject matter of the initiative is therefore clearly beyond the scope of the local initiative power . . . [and] is invalid."⁵²

More recently, in Mukilteo Citizens, the supreme court confirmed the analysis of this court in American Traffic Solutions.⁵³ It held that the proposed initiative

attempted to expressly restrict the authority of Mukilteo's legislative

body to enact red light cameras by requiring a two-thirds vote of the electorate for approval and by limiting the amount of traffic fines. Because automated traffic safety cameras are not a proper subject for local initiative power, Proposition 1 is invalid because it is beyond the initiative power.[54]

49 Am. Traffic Solutions, 163 Wn. App. at 433-34.
50 Former RCW 46.63.170 (2009).

51 Am. Traffic Solutions, 163 Wn. App. at 433 (quoting City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006)).

52 Id. at 434.

53 Mukilteo, 174 Wn.2d at 52-53.

54 Id. at 52.

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Like the proposed initiatives in American Traffic Solutions and Mukilteo Citizens, the initiative here would have required that the use of automated ticketing cameras be approved by both the Redmond City Council and the public. It also would have limited the fines that could have been imposed. Proposed Redmond Proposition 1 read as follows:

BE IT ENACTED BY THE PEOPLE OF THE CITY OF
REDMOND:

Section 1. A new section is hereby added to the Redmond Municipal Code to read as follows:

10.25.100 Automatic Ticketing Cameras: The City of Redmond and for-profit companies contracted by the City of Redmond may not install or use automatic ticketing cameras to impose fines from camera surveillance unless such a system is approved by a majority vote of the City Council and a majority vote of the people at an election.

. . . .

10.25.110 Fines: if a majority of the City Council and a majority of Redmond voters at an election approve a system of automatic ticketing cameras to impose fines from camera surveillance, the fine for infractions committed shall be a monetary penalty of no more than the least expensive parking ticket imposed by law enforcement in the city limits of Redmond.

Section 2. Sections 10.25.010-10.25.090 of the Redmond Municipal Code and Ordinance #2542AM and #2576 are hereby repealed.

Section 3. Removal: all automatic ticketing cameras, as defined by Section 1 of this measure, installed or in use in the city limits of Redmond as of the date of passage of this measure must be removed no later than the effective date of this measure unless such cameras are approved by voters at an election.

Section 4. Severability: If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or application of the provision to other persons

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or circumstances is not affected.[55]

As McGehee notes, the wording of Redmond Proposition 1 is very similar to the Bellingham initiative at issue in *American Traffic Solutions*. The only difference is that there, the Bellingham initiative provided that the automatic ticketing cameras were to be removed no later than 30 days following the effective date of the passage of the proposition.⁵⁶ Further, Proposition 1 is also similar to the initiative the supreme court struck down in *Mukilteo Citizens*.⁵⁷

Thus, like the initiatives in those cases, Redmond Proposition 1 is beyond the scope of the initiative power. Accordingly, the issuance of a writ would have been improper as a vain and useless act.

The initiative proponent makes a number of arguments that he raises for the first time on appeal. Because he fails to demonstrate how these arguments are "manifest" or of a truly constitutional dimension as required by RAP 2.5(a)(3), we decline to consider them.

"The general rule is that appellate courts will not consider issues raised for the first time on appeal."⁵⁸ An appellant seeking review under RAP 2.5(a)(3)

must demonstrate that the error is "manifest" and truly of constitutional dimension.⁵⁹ Stated another way, the appellant must "identify a constitutional

⁵⁵ Clerk's Papers at 31.

⁵⁶ *Id.* at 61.

⁵⁷ *Mukilteo Citizens*, 174 Wn.2d at 47.

⁵⁸ *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)).

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error and show how the alleged error actually affected the [appellant]'s rights at trial.⁶⁰ As the supreme court has noted, however,

RAP 2.5(a)(3) was not designed to allow parties "a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted.[61]

First, the initiative proponent argues that mandamus would not be a vain and useless act because allowing the initiative to be transmitted to the county auditor would have extensive political effects and would allow an advisory vote. Though he conceded at oral argument that he did not make this contention at the trial court level, his appellate briefing fails to address why this is an error that is manifest and involving a constitutional right as required by RAP 2.5(a)(3). Consequently, we do not consider it.

The initiative proponent also argues that Proposition 1 is a valid expression of political speech. Again, he fails to explain why we should address this argument for the first time on appeal. Thus, we need not address this contention, either.

Finally, the initiative proponent argues that allowing the City to stop

59 Kirkman, 159 Wn.2d at 926; State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

60 O'Hara, 167 Wn.2d at 98 (quoting Kirkman, 159 Wn.2d at 926-27).

61 State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting State v. Valladares, 31 Wn. App. 63, 76, 639 P.2d 813 (1982))).

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Redmond [Proposition] 1 before the signature-counting phase will cause irreparable harm to this initiative and to the . . . initiative process as a whole.⁶²

But, he cites no authority to support this argument. Consequently, we can assume that he has found none.⁶³ Generally, we will not review an issue absent reasoned argument and citation to legal authority.⁶⁴ Thus, we need not address this argument.

We affirm the order denying the motion for order to show cause.

WE CONCUR:

62 Appellant's Opening Brief at 15-17.

63 King County Dep't of Adult and Juvenile Det. v. Parmelee, 162 Wn. App. 337, 354, 254 P.3d 927 (2011), review denied, 175 Wn.2d 1006 (2012).

64 State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

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