72302-2

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Court of Appeals No. **72302-2**

San Juan County Superior Court Cause Nos. **13-1-05039-8**

San Juan County District Court Cause No. **12-71**

COURT OF APPEALS

DIVISION I.

OF THE STATE OF WASHINGTON

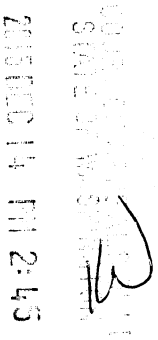
ERROL CHARLES SPEED Appellant

v.

STATE OF WASHINGTON Respondent

STATEMENT OF

ADDITIONAL GROUNDS FOR REVIEW



STATEMENT RE: ADDITIONAL GROUNDS

In this statement, I, Appellant Errol Speed ("Speed") pursuant to RAP 10.10(a) respectfully file additional grounds for review. The issues that were raised in the State's Brief of Respondent but were not addressed in the Reply Brief submitted by my counsel, and other additional grounds that I believe were not included in my counsel's brief are included here.

STATEMENT OF THE CASE

The Appellant's Brief filed by my counsel on May 22, 2015, contained 11 numbered arguments. The State filed a motion to strike some of those arguments as being outside the scope of the issues for which discretionary review was granted.

A letter from this court dated September 10, 2015, informed the parties that respondent's motion was granted in part, and that arguments, numbered 7, 8, and 9 were struck:

> 7. Did the Superior Court err when it ruled that the State may justify its use of the four images by performing fly-overs of the Speed property by ruling that the fly-overs were conducted at or above Minimum Safe Altitude?
>
> 8. Did the Superior Court err by ruling that the state may find Speed's property to not be in a congested area, thereby finding 500 feet AGL to be a lawful altitude for surveillance purposes?
>
> 9. Did the Superior Court err when it ruled that the State may justify its use of the four images by performing fly-overs of the Speed property even when observations of the property were then made using telephoto lenses?

The State's Brief then addressed at pp.7, 14 and 15 the issue of Minimum Safe Altitude ("MSA"), which is the heart of arguments numbered 7 and 8 that were struck by the court at the request of the State. Specifically, the State claimed at p.14, "Based on evidence provided by the State and largely unrefuted by Speed, the District Court found, 'The Defendant does not live in a congested area.' The minimum safe altitude is 500 feet above ground level."

By reason of the State's allegations regarding MSA, which my counsel was not permitted to address in my Reply Brief, I therefore am filing this Statement of Additional Grounds for Review.

At pp.6, 7, 15 and 28, the State made the repeated claim that the officers viewed the property with a naked eye during the fly-overs. Those arguments were at the heart of argument numbered 9 that was struck by the court at the request of the State.

The State's claim is incorrect as the officers viewed the property using telephoto lenses and the photographs they took during the flyovers clearly established the use of such lenses, which facts are also of record (See, Appx.H, p. 6, ¶36 in the appendices to Appellant's Brief). However, as Speed's counsel was not permitted to address these facts in Speed's Reply Brief, I therefore file these issues as Additional Grounds for review.

ADDITIONAL GROUNDS

The page and paragraph references are to the State's Brief of Respondent. The references to appendices are to those appendices that were supplied to the court with my counsels Reply Brief.

Additional Ground 1 - Veracity of Informant

It is important for the court to consider the impetus for San Juan County to pursue this enforcement action so aggressively for possible violations that effect nobody but the actual landowner, myself.

The County Planning Department staff that began this enforcement action against me, along with Mr. Pearson, owner of the Craftsman Corner Development, that I made a formal complaint against in 2010 (CP 206 & 207), all had been involved in the improper permitting of that development. I had pointed out the facts related to the improper permitting of that development and when the final decision in Superior Court upheld the denial of Mr. Pearson's Conditional Use Permit (CUP), things began to happen to me. (See CP 191-192)

Three months after the Superior Court denial was upheld, an activity report created by the Community Development and Planning (CDP) of San Juan County, initiated an

investigation into my residential property. Here, I want it to be absolutely clear that the CDP protocol for a complaint or request for code enforcement is an individual to file that complaint on a department document (see CP 206 & 207). In this case apparently CDP policy was ignored and Deputy Building Official (DBO) John Geniuch created an "Activity Report" that was vague and contradictory concerning what Mr. Pearson informed the department of (see CP 211-212). The DBO first states he observed the following activity at my property, a few lines down he states, direct observation was unavailable from a public way. Well, in my world either one or the other is true, they both can't be true. Again the truthfulness of this report and the veracity of the people involved was never addressed. In fact this report was not even supplied to the magistrate when the County applied for a search warrant. I don't blame them, this report would have given the magistrate pause, a reasonable person would have questioned the content and why it appeared so vague and contradictory. Just so happens this Deputy Building Official also improperly approved plans for Mr. Pearson's Craftsman Corner Development. Mr. Laws the Code Enforcement Officer (CEO) for the CDP, also involved in the improper permitting of Mr. Pearson's development as a storm water technician at the time, was given the CDP created Activity Report and the

enforcement action began. Mr. Laws (CEO) wrote me a letter Dec 21, 2011, four days before Christmas, (I was away at the time) 2 weeks later I returned to find a Notice of Violation posted on gate. Again, CDP protocol and policy was ignored. 18.100.040 C (See CP 158) of San Juan County Code states clearly "If after the investigation, the administrator determines that any provision of this code has been violated, a notice of correction letter shall be the first attempt at obtaining compliance." It appeared CEO Laws was not interested in working towards a civil resolution. Then my attorney asked for any documents related to the notice of violation and he received a copy of the "Activity Report", with the informants name redacted. (See CP 212). If Mr. Pearson had submitted a request for code enforcement CDP document then he would have had the option of requesting non- disclosure, but since this was an activity report written by a CDP Deputy Building Official, no such option was available for non-disclosure of the informant, yet CEO Laws redacted Mr. Pearson's name without legal authority. What Mr. Laws was aware of, was the contentious and retaliatory feelings Mr. Pearson had towards myself that originated from my complaint about his commercial development, Craftsman Corner. Mr. Law's reason for making that initial redaction of Mr. Pearson's name has never been revealed. I can only

assume he did not want me to know that the informant was Mr. Pearson and that the enforcement action would appear as a blatantly retaliatory action.

The actions of the CDP and the County Prosecutor continued to follow a hyper aggressive pattern that communicated to me that I was being punished, in public, for expressing my first amendment right of free speech in regards to Mr. Pearson's commercial development and how the County CDP had improperly permitted it. It must be stated here that the Director of CD&P, Rene Beliveau was instrumental in the improper permitting of Craftsman Corner, Mr. Pearson's commercial development, and he was the direct superior to CEO Laws and DBO Genuich. He also disclosed my identity against state statue regarding "non-disclosure" which is also in CP 206-207.

I trust this helps set the stage for the litigation that has continued since early 2012 until the present before this court.

Additional Ground 2 - Use of Telephoto Lenses

- At p.6, ¶2 (and at p.7), the State refers to conducting a search of my property to determine what could be seen with the naked eye; however, that search was in fact conducted using a telephoto lens, which does not comply

with State v. Myrick, 102 Wash. 2d 506, 512, 688 P.2d 151, 154 (1984).

- At the top of p. 7 (and at pp.15, 28), the State inaccurately claims that the CEO's aerial search used the unaided eye, that what he saw was "undisputed," etc. It was disputed: the CEO used a telephoto lens. I raised the CEO's use of a telephoto lens in this appeal but by reason of the State's motion to strike, I was not permitted to argue it in my Appellant's and Reply briefs.

- During the two fly-overs the officers from the County viewed the structure on my property using telephoto lenses of 190mm and 155mm focal lengths. Appx.Z. The use of those lenses exceeded the focal length of 43mm, which is approximately what the naked eye sees. Appx.H, p. 6, ¶36. This constituted the use of an aided eye.

Additional Grounds 3 -MSA /Lawful altitude

- At p.7 the State claims the lawful altitude over my property is 500 feet above ground level ("AGL") and discusses at pp.14 and 15 why that was. I raised the issue of lawful altitude in my Motion For Discretionary Review at pp.9-11 of that pleading, but was not

permitted to address it upon the objection of the State, which was granted per the Court's letter of September 10, 2015.

- In brief, the FAA'S CFR §91.119 describes MSA as 1,000 ft. AGL over a congested area and 500 ft. AGL otherwise. I argued at both lower courts that The FAA has exclusive authority to regulate aviation, including determining what MSA is, as federal law has preempted the field. See, Inlandboatmen's Union of the Pac. v. Department of Transp., 119 Wash.2d 697, 701, 836 P.2d 823 (1992); See *generally*, 14 CFR Ch. I (1978).

- FAA §91.119 states in part:

  - (b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

  - (c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500

feet to any person, vessel, vehicle, or structure….

- My property is in the settlement of Westsound, on Orcas Island and there are eight neighboring residences within 2,000 feet from the property, and in the neighborhood of about a one half mile square there are over 50 residences, and many more structures. There is also a 347-foot hill 1,320 feet from the property and there are 100-foot trees on the property and on top of the hill (Appx.H, ¶¶ 2-5; Appx.Q, ¶ 2).

- My property is situated 260 feet above Mean Sea Level; therefore, assuming the property is in a congested area under FAA rules, MSA over the property would be 1,447 feet (1,000' + 347' hill, plus 100' for the trees). Deducting the 260-foot elevation from the 1,447-foot calculates MSA above the property to be 1,187 feet, well above the altitudes used during the June 1 fly-over (Appx.H, ¶¶ 4-6).

- The Port of Orcas/Orcas Island Airport recommends a minimum cruise altitude of 1,500 ft. AGL over the San Juan Islands. It is also suggested that pilots avoid flying over homes (Appx.H, ¶ 7 and Ex.A).

- The Traffic Pattern Altitude at Orcas Island Airport is 1,100 ft. This, in conjunction with the 1,500 ft. AGL recommended cruise altitude, directs pilots flying over Orcas Island to descend, in the event of an emergency landing, to 400 ft., which would leave the aircraft at 1,100 ft. MSA and still be able to land safely at Orcas Island Airport (Appx.H, ¶ 8).

- These rules also accomplish noise reduction/ abatement related to aircraft traffic, as maintaining a quiet and peaceful environment is a high priority to Orcas Island residents and visitors (Appx.H, ¶ 9).

- MSA takes into account that at all times an aircraft must be flown at an altitude from which it can land safely in the event of loss of power: If an aircraft loses power at 500 AGL, using the FAA suggested 3 degrees glide/path or glide/ slope, the aircraft will impact the ground within 1.5 miles of the spot where loss of power occurred (Appx.H, ¶ 10).

- Orcas Island Airport is 4.25 miles from my property. If an aircraft were to fly at 1,500 ft. above the property, a 3 degree glide/path slope would *just* allow an aircraft to glide to an emergency landing at the Orcas airport, assuming favorable wind speed and direction; any flight under 1,500 ft. in elevation over my property would risk

the aircraft landing on people, homes, and roads (Appx.H, ¶ 11).

- At p.14, ¶2, the State misleads the Court by saying that I did not refute its evidence on MSA. The State has not looked at the record. See, Appx.X, Y.

- While the State relies on State v. Wilson, 97 Wash. App. 578, 581-82, 988 P.2d 463, 465 (1999) for permitting aerial surveillance at 500 ft. AGL, it did not discuss why it so ruled; thus Wilson is of limited utility in determining MSA.

Additional Grounds 4 - Taint

- The Department's Code Enforcement Officer Laws ("CEO")[1] testified he observed the property from an aircraft at 500 ft. AGL, and then later at 1,000 ft. AGL. Note at p.14 the State presents the CEO's observation in a *reverse order*, first at 1,000 ft. then at 500 ft.; in fact, the CEO had a closer view of my property from the air first before going to a higher view, which adds to my taint argument.

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[1] Any reference in this brief to a CEO is always a reference to Chris Laws.

- In the middle of p.15 the State claims it was "undisputed" what the CEO saw. It was disputed - through the use of illegal images, the illegal search on the ground, the MSA, use of telephoto lens on the fly-overs, the tainted search, etc.

- At p.15 last paragraph, the State claims I did not challenge what the CEO testified to seeing. I did - at the July 23 hearing, by the CEO's use of telephoto lens, by having first searched on the ground, etc.

- The CEO also testified at p.7, l.16 to p.8, l.18 of that transcript that he saw a water heater on the property, visible as a grayish object in a photograph he presented to the court, and that by looking at the photograph alone he himself could *not* tell that it was a water heater <u>but for</u> having seen it on the ground.

- The CEO's testimony undermined his claim, for what he saw from the air could be recognized only because he had earlier searched on the ground. Thus, his observations during the flyovers were tainted by the earlier views when he executed the illegal warrant. Further, all of the CEO's photographs were taken using telephoto lenses,

further undermining his claims of what he could see with the unaided eye. Appx.H, p. 6, ¶36.

Additional Ground 5- Statement of Exemption

- Nowhere in 570 does the term, "valid Statement of Exemption" appear.

- A statement of exemption is to be reviewed for compliance. Nowhere in the record is evidence presented by the state that Speed's statement of exemption was reviewed and found non-compliant with state and county laws. The County demanded I fill out an application and sign an Affidavit that the code does not require for an accessory structure exemption.

Additional Ground 6- Woodstove

- The Assessors report was done in 2008

- There was a woodstove in the structure in 2008, not installed.

- In January 2012, four years later, my attorney told CEO Laws, there was no wood stove.

- The wood stove had been removed sometime before.

- There is no cause or evidence to support that any of these statements I made were false.

- Mr. Laws had no factual knowledge concerning the presence or lack thereof a woodstove in the structure, yet he continued to accuse me of making false statements, based on no facts or evidence.

Additional Grounds 6- Trailer

- Even when Laws and Geniuch executed the search warrant, they did not enter my trailer to see if it was being inhabited.

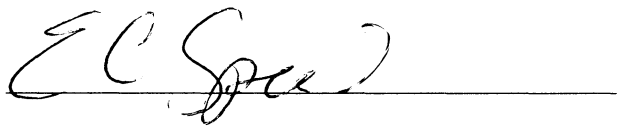
- Apparently it did not matter to them whether or not I was using the trailer as my residence. They had a theory and they and they were going to somehow prove it.

- Laws never provided the court or my counsel with legal citations that showed my trailer required a permit.

CONCLUSION

There is good cause to permit me to respond to issues the State objected to at the outset but yet chose to bring up and argue in its respondent's brief.

Dated this 10 day of December, 2015.



ERROL SPEED, Appellant

Court of Appeals No. 72302-2San Juan County Superior Court
Cause No. 13-1-05039-8
San Juan County District Court Cause No. 12-71

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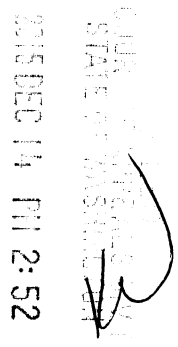

AUTHORITIES RELIED UPON IN
APPELLANT'S RAP 10.10(a) MOTION

Filed by
Appellant Errol Charles Speed

CASES

CODE OF FEDERAL REGULATIONS

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

The following documents are arranged alphabetically, according to the indicated letter listed by each document (documents A through T have been provided previously, in Appendices to Appellant's Brief and Appendices to Appellant's Reply Brief):

E. DECLARATION OF ERROL C. SPEED, dated March 12, 2013

F. DECLARATION OF GREG SUTHERLAND, dated FEBRUARY 2, 2013

G. RESPONSE TO MOTION TO DISMISS OR SUPPRESS dated February 11, 2013

H. DECLARATION OF ERROL C. SPEED, dated May 20, 2013

I. LETTER OF WARD CARSON dated July 5, 2013

J. DECLARATION OF WARD W. CARSON, dated July 19, 2013

K. DECLARATION OF CHERYL JACKSON, dated FEBRUARY 24, 2014

L. SEARCH WARRANT, dated October 16, 2012

M. DECLARATION OF CHRISTOPHER LAWS dated November 14, 2012

N. BRIEF OF APPELLANT FILED IN SAN JUAN COUNTY SUPERIOR COURT dated January 14, 2014

O. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE dated October 23, 2013

P. DECLARATION OF ERROL C. SPEED dated June 20, 2013

Q. LETTER DECISION OF THE SUPERIOR COURT dated July 9, 2014

R. Administrator v. Harkom, 35 C.A.B. 934 (1962)

S. Richards v. Pick, NTSB Order No. EA 3646, August 24, 1992; March 3, 2010, letter to Ms. Simmons from Rebecca B. McPherson; FAA Memorandum dated August 28, 2012

T. ORDER ON MOTION RE: TRANSCRIPT AND OVER-LENGTH BRIEF dated December 20, 2013

U. DEFENDANT'S MEMORANDUM RE: THE STATE'S CLAIMS RE: STATEMENT OF EXEMPTION dated June 3, 2013

V. Omitted.

W. VERBATIM REPORT OF PROCEEDINGS; TUESDAY, JULY 23, 2013; THE HONORABLE STEWART R. ANDREW, JUDGE filed April 10, 2015

X. DEFENDANT'S SUPPLEMENTAL MEMORANDUM RE: MINIMUM SAFE ALTITUDE dated August 16, 2013

Y. DECLARATION OF ERROL C. SPEED, dated July 8, 2013

Z. DECLARATION OF ERROL C. SPEED, filed June 20, 2013

AA. DECLARATION OF ERROL C. SPEED, dated September 3, 2013

Dated this 10 day of Dec, 2015.

E.C. Speed

ERROL SPEED, Appellant