NO. 95890-4

SUPREME COURT OF THE STATE OF WASHINGTON

THEODORE BERNSTEIN,

Appellant,

v.

JOHN URQUHART, KING COUNTY SHERIFF,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Washington State:

I. INTRODUCTION

The Court of Appeals affirmed the King County Sheriff's Office's ("KCSO") authority to assign sex offender risk level classifications and the decision of the superior court dismissing Theodore Bernstein's ("Bernstein") writ as time barred. None of the four issues in Bernstein's petition for review justifies further consideration under RAP 13.4. Bernstein's allegations of significant constitutional interest or case law conflict are neither borne out by the record nor reflective of the decision made by the Court of Appeals in its unpublished opinion.

II. STATEMENT OF THE CASE

Bernstein was convicted of two counts of possession of depictions of a minor engaged in sexually explicit conduct, a Class C Felony. CABR 1-7.[1] Bernstein was sentenced to fourteen (14) months of confinement and released from the King County Correctional Facility on May 12, 2013. CP 230; CABR 67-73. Prior to his release, the End of Sentencing Review Committee (ERSC)

[1] King County Superior Court Clerk sent a letter the Court of Appeals indicating that the Certified Appeal Board Record (CABR Sub No. 24) was available as an exhibit. The 310 pages of documents in the Certified Appeal Board Record are referenced in this brief as "CABR" with the associated bates number ending. For example, Certified Appeal Board Record page KC000067 is identified as "CABR 67."

recommended that Bernstein be classified as a level I sex offender. CP 231.

On May 1, 2013, KSCO Detective Jessica Santos was assigned to supervise Bernstein and assign him a risk level as a registered sex offender. CP 230-233. After reviewing Bernstein's risk assessment, the ESRC recommendation, progress reports from his sex offender treatment, and communicating with people familiar with Bernstein's risk to the community, Detective Santos recommended Bernstein be classified as a level II Registered Sex Offender at moderate risk of re-offense. CP 230-231; Supp. CP 236-239; CABR 182, 308-310. KCSO finalized its decision to classify Bernstein as a level II sex offender on January 17, 2014. CP 231; CABR 310. Bernstein learned that he was classified as a level II sex offender on March 24, 2014. CP 231.

Over two years later, on July 8, 2016, Bernstein filed a petition of writ of review in King County Superior Court challenging his sex offender classification. CP 231. Bernstein served the KCSO another month later, on August 15, 2016. Id.

On August 18, 2016, the Superior Court issued a writ of review directing KCSO to certify the record, and assigned the matter to the Honorable Judge Monica Benton for consideration of

the merits. CP 50-51. The writ of review left issues of timeliness and service of process to the assigned judge. CP 50.

On August 22, 2016, before KCSO had filed the certified records, Bernstein filed a motion "to disclose to Plaintiff all information and records with agencies possession regarding Plaintiff." CP 57-59; 63-65. KCSO objected and argued Bernstein's motion was wholly unnecessary because KCSO staff were already in process of gathering the entire record for certification and judicial review, as mandated by RCW 7.16.070. CP 66-75. The Superior Court denied Bernstein's motion on September 2, 2016. CP 86-87.

KCSO filed a certified copy of the record on October 28, 2016, and supplemented it on November 16, 2016. CP 137; Supp. CP 235-239 (Sub. 22); CABR 1-310. The Superior Court allowed Bernstein to further supplement the record with any evidence he believed to be pertinent. CP 86-87.

King County also moved to dismiss Bernstein's writ due to untimeliness. CP 190-205.

The Superior Court conducted its hearing on January 13, 2017. CP 223; RP 4-5. After considering briefing and hearing argument, the Superior Court granted KCSO's motion and dismissed Bernstein's writ as untimely CP 223; RP 44-45. The

court issued written findings of fact and conclusions of law on the timeliness issue on February 3, 2017. CP 230-233.

Bernstein filed a notice of appeal on March 3, 2017. CP 229-234. On April 23, 2018, the Court of Appeals, Division One filed an unpublished opinion affirming the Superior Court's decision. The Court of Appeals ruled that statutory writs must be filed within "a reasonable time," and found that the analogous statutory rule creates a time limit of 30 days. *See* Court of Appeals Unpublished Opinion Attached as Appendix A.

III. ARGUMENT

KCSO opposes Bernstein's petition as further review in this case is not warranted under RAP 13.4. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interests that should be determined by the Supreme Court. RAP 13.4(b).

Bernstein's petition fails to satisfy any of these criteria for acceptance of review.

A. The Decision of the Court of Appeals is not in Conflict with a Decision of the Supreme Court.

Bernstein does not argue that the Court of Appeals decision is in conflict with a Supreme Court decision. He cannot do so as Supreme Court precedent supports the Court of Appeals' decision. The Washington Supreme Court has held that a petition for a writ of certiorari must be filed within a "reasonable time." *Clark County Public Utility Dist. No. 1 v. Wilkinson*,139 Wn.2d at 847; *Akada v. Park 12-01 Corp.*,103 Wn.2d 717, 718-19, 695 P.2d 994 (1985) ("we have long held that a writ of certiorari should be applied for within a reasonable time after the act complained of has been done"). "A reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period." *Clark County*, 139 Wn.2d at 847.

Therefore, review should not be granted on this basis.

B. The Decision of the Court of Appeals is not in Conflict with another decision of the Court of Appeals.

Likewise, Bernstein does not argue that the Court of Appeals decision is in conflict with another decision of the Court of Appeals.

He cannot do so because the opinion is consistent with other Court of Appeals decisions. *See New Cingular Wireless PCS, LLC v. City of Clyde Hill,* 187 Wn. App. 210, 349 P.3d 53 (2015), *aff'd,*185 Wn.2d 594, 604-05, 374 P.3d 151 (2016); *Schreiner Farms, Inc. v. Am. Tower, Inc.,* 173 Wn.App. 154, 163, 293 P.3d 407 (2013).

Therefore, review should not be granted on this basis.

C. The Decision of the Court of Appeals does not Involve a Significant Question of Constitutional Law.

The bulk of Bernstein's petition focuses on the dismissal of his writ due to timeliness. He argues that dismissal was improper and that: (1) he has the right to file a writ of review at *any* time; (2) notification to the Department of Corrections restarts the clock for filing a writ; (3) the Superior Court erred when dismissing his motion to compel discovery; and (4) the Superior Court exceeded its authority in issuing findings of fact and conclusions of law.

None of Bernstein's arguments amount to a constitutional issue.

1. Review of Right to File Writ at Any Time is not Warranted

State law vests the KCSO with significant discretion in making classification decisions. *In re Det. of Enright,* 131 Wn.App. 706, 715, 128 P.3d 1266, 1270 (2006) citing RCW 72.09.345(5); *Meyer,* 142 Wn.2d at 618, 16 P.3d 563. Law enforcement agencies

are to assign a risk level classification to all offenders after consideration of:

> (i) any available risk level classifications provided by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (ii) the agency's own application of a sex offender risk assessment tool; and (iii) other information and aggravating or mitigating factors known to the agency and deemed rationally related to the risk posed by the offender to the community at large.

RCW 4.24.550(6)(a).

This Court has held that a petition of writ of certiorari must be filed within a "reasonable time." *Clark County*, 139 Wn.2d at 847. The determination of what constitutes a reasonable time is determined by analogy to the time allowed for a similar action as prescribed by statute, rule of court, or other provision. *Akada v. Park 12-01 Corp.* 103 Wn.2d 717, 719, 695 P.2d 994 (1985). The most analogous statutory rule is the Rules of Appellate Procedure. Under the appellate rules, the party seeking review must file a notice of appeal within 30 days from the entry of the order. RAP 5.1, 5.2. An extension of time may be granted, but only in extraordinary circumstances. RAP 18.8. Bernstein filed his writ well after any of the analogous appeal periods.

Bernstein attempts to justify his delay by asserting that the KCSO is constantly evaluating and reviewing the level of an offender. Petition at p. *8*. The record does not support this assertion. KCSO finalized Bernstein's classification on January 17, 2014 and memorialized its reasoning in a memorandum. CP 231; Supp. CP 237-239. Bernstein learned of his classification on March 24, 2014. CP 231. KCSO did not engage in a continuous review and evaluation of Bernstein's classification.

More than two years passed between Bernstein learning of his classification and his challenge to that decision. CP 231. Bernstein failed to provide any evidence that justified his delay and the Superior Court properly dismissed his late writ. CP 231-232.

2. Review of the KCSO's Classification Process is not Warranted

This Court has held that no due process rights attach to the classification of the risks that sex offenders present to the public.

> The sex offender registration and disclosure statutes are essentially procedural statutes; no liberty interests arise from them.
>
> ***
>
> In the absence of such a liberty interest, no due process rights attach to the classification of risk such individuals present on their release from confinement.

In re Pers. Restraint of Meyer, 142 Wn.2d 608, 619 and 623, 16P.3d 563 (2001).

As a matter of law, KCSO's classification decision is supported by competent proof and substantial evidence. RCW 7.16.120(4) and RCW 7.16.120(5). KCSO also met its statutory obligation by explaining, in a memorandum, its reasoning for deciding to classify Bernstein differently than the ESCR had. *See* RCW 4.24.550(10); CP 231; Supp. CP 237-239. KCSO's risk level classification was not arbitrary and capricious or unsupported by substantial evidence.

3. Review of Bernstein's Discovery Motion is not Warranted

The abuse of discretion standard governs appellate review of discovery decisions. See *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191, 197 (2009). "A court abuses it discretion when it bases its decision on unreasonable or untenable grounds." *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999). It is within the Superior Court's discretion to deny a motion to compel discovery. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 183, 313, P.3d 408 (2013).

The Superior Court's justification for rejecting Bernstein's motion was that it was duplicative. Bernstein moved for disclosure of the official records that KCSO used in his classification process. CP 63-65. However, the Superior Court had already entered a case scheduling order specific to a writ of review (as mandated by King County Local Civil Rule 4(d)) that set forth a defined timeline for KCSO to prepare, submit, and provide Bernstein with the entire classification record. CP 51-56, 86-87. KCSO gave Bernstein a copy of the entire certified classification record in advance of filing them in the Superior Court. CP 137. Bernstein was also allowed to supplement the record at his leisure. CP 86-87; Supp. CP 235. KCSO did not object to any additional record materials that Bernstein filed. RP 26.

Denial of Bernstein's discovery request in this writ context was well-within the Superior Court's discretion.

4. Review of Trial Court's Issued Finding of Facts is not Warranted

There is no legal merit to Bernstein's contention that the trial court exceeded its authority by issuing findings of fact and conclusions of law. While no findings are required where the trial court reviews only an administrative record and does not itself take

evidence, their entry is not prohibited. *See King Cty. Water Dist. No. 54 v. King Cty. Boundary Review Bd.*, 87 Wn.2d 536, 543-44, 554 P.2d 1060, 1065 (1976).

In this case, the trial court issued findings and conclusions solely in support of its decision to deny the writ as untimely. The Superior Court did not weigh the evidence and substitute its own judgment or discretion for that of KCSO. *See City of Seattle, Seattle Police Dept. v. Werner,* 163 Wn.App. 899, 907, 261 P.3d 218 (2001). Review of the trial court's findings is not warranted.

D. The Decision of the Court of Appeals does not Involve an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

Bernstein does not argue how his petition involves an issue of substantial public interest that should be determined by the Supreme Court. Therefore, review should not be granted on this basis.

IV. CONCLUSION

KCSO respectfully requests that Bernstein's request for further review be denied.

DATED this 25TH day of June, 2018.

RESPECTFULLY submitted,

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Certificate of Service

I certify that on June 25th, 2018, I caused true and correct copies of the foregoing via email to:

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THEODORE BERNSTEIN, Appellant, v. JOHN URQUHART, KING COUNTY SHERIFF, Respondent.	No. 76544-2-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2018

MANN, A.C.J. — Over two years after the King County Sheriff's Office (KCSO) classified Theodore Bernstein a level II sex offender, he filed a petition for writ of review before the King County Superior Court. Bernstein appeals the superior court's decision dismissing his petition as untimely. Because statutory writs must be filed within "a reasonable time," and the analogous statutory rule creates a time limit of 30 days, we affirm.

FACTS

Bernstein was convicted of two counts of possession of depictions of a minor engaged in sexually explicit conduct, a class C felony. Bernstein was sentenced to 14 months of confinement and released from the King County Correctional Facility on May 12, 2013.

Just prior to his release, the End of Sentencing Review Committee (ESRC), recommended that Bernstein be classified as a level I sex offender. On May 1, 2013, KCSO Detective Jessica Santos was assigned to supervise Bernstein and assign him a risk level as a registered sex offender. After reviewing Bernstein's risk assessment, the ESRC recommendation, progress reports from his sex offender treatment, and communicating with people familiar with Bernstein's risk to the community, Detective Santos recommended Bernstein be classified as a level II Registered Sex Offender at moderate risk of sexual reoffense. The decision to classify Bernstein as a level II sex offender was finalized by KCSO on January 17, 2014. KCSO executed a community notification process shortly thereafter. Bernstein learned that he was classified as a level II sex offender on March 24, 2014.

On July 8, 2016, Bernstein filed a petition for writ of review in King County Superior Court seeking to challenge his sex offender classification. Bernstein served the KCSO on August 15, 2016. On August 17, 2016, the superior court issued a writ of review directing KCSO to certify the record and assigned Bernstein's case for consideration on the merits. The writ of review left issues of timeliness and service of process to the assigned judge.

On August 22, 2016, before the certified record was filed, Bernstein filed motions "to disclose to Plaintiff all information and records within agencies possession regarding Plaintiff." KCSO objected to the motion. KCSO argued the motion was unnecessary because they were already in the process of gathering the record for purposes of review, and argued further discovery was improper because review under RCW

7.16.070 is based on the record the agency used to reach its decision. The superior court denied Bernstein's motion on September 2, 2016.

KCSO filed a certified copy of the record on October 28, 2016, and supplemented the record on November 16, 2016. Bernstein was also permitted to supplement the record with any evidence he believed to be pertinent.

The hearing on the writ occurred on January 13, 2017. KCSO argued that Bernstein's challenge should be denied due to its untimeliness. After considering briefing and hearing argument, the superior court dismissed Bernstein's petition on the grounds that it was untimely. The court issued written findings of fact and conclusions of law dismissing the writ action on February 3, 2017. Bernstein appeals.

ANALYSIS

Timeliness of Petition for Writ of Review

The primary issue in this case is whether the superior court erred in denying Bernstein's writ of review as untimely. When review of a quasi-judicial administrative action is invoked by statutory writ of certiorari, the appellate court looks to the standards of review implicit in the certiorari statute, RCW 7.16.120. Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 29, 891 P.2d 29 (1995). We review questions of law de novo and we review questions of fact based on "[w]hether the factual determinations were supported by substantial evidence." RCW 7.16.120(3), (5); Hilltop, 126 Wn.2d at 29. We review a superior court's order granting or denying a statutory writ of review de novo. Dep't of Labor & Indus. of State v. Bd. of Indus. Ins. Appeals of State, 186 Wn. App. 240, 244, 347 P.3d 63 (2015).

Under RCW 9A.44.130(1)(a), any person who has been convicted of a sex offense must "register with the county sheriff for the county of the person's residence." Under RCW 4.24.550(6)(a), the sheriff's office "shall assign a risk level classification to all offenders." In assigning this classification, the sheriff's office is to consider

> (i) Any available risk level classifications provided by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (ii) the agency's own application of a sex offender risk assessment tool; and (iii) other information and aggravating or mitigating factors known to the agency and deemed rationally related to the risk posed by the offender to the community at large.

RCW 4.24.550(6)(a). An offender is to be classified at risk level I if "he or she is at a low risk to sexually reoffend;" risk level II if "he or she is at a moderate risk to sexually reoffend;" or risk level III if "he or she is at a high risk to sexually reoffend." RCW 4.24.550(6)(b).

The statute further states, "[a]gencies may develop a process to allow an offender to petition for review of the offender's assigned risk level classification. The timing, frequency, and process for review are at the sole discretion of the agency." RCW 4.24.550(6)(d). At the time Bernstein's risk assessment was determined, no such review process had been developed. Therefore, Bernstein pursued review under the writ statute, chapter 7.16 RCW.

On review of agency actions, superior courts have the power to issue constitutional or statutory writs of certiorari. CONST. art. IV, § 6; chapter 7.16 RCW. Bernstein does not clearly determine which writ he sought at trial or on appeal.

A statutory writ of certiorari is mandated where a petitioner shows that: "(1) an inferior tribunal or officer (2) exercising judicial functions (3) exceeded its jurisdiction or

acted illegally, and (4) there is no other avenue of review or adequate remedy at law." Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 533, 79 P.3d 1154 (2003), as corrected on denial of reconsideration (Mar. 11, 2004); Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000).

By contrast, the constitutional writ of certiorari embodied in article IV, section 6 of the Washington Constitution is available in somewhat narrower circumstances. Clark County, 139 Wn.2d at 845. "The fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." Saldin Sec., Inc. v. Snohomish County, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). This form of review lies entirely within the trial court's discretion, and "will not issue if another avenue of review, such as a statutory writ or direct appeal, is available." Malted Mousse, 150 Wn.2d at 533 (citing Saldin, 134 Wn.2d at 293).

In this case, we hold a statutory writ was available. Bernstein is challenging an inferior tribunal or officer, the sheriff's office, the sheriff's officer was exercising a quasi-judicial function, see In re Det. of Enright, 131 Wn. App. 706, 716, 128 P.3d 1266 (2006),[1] and RCW 4.24.550 does not provide any mechanism for review of the sheriff's office assigned risk level classification.[2]

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[1] In determining whether the agency was exercising a judicial function, the court looks to four elements:

> (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Because we determine a statutory writ was available in this case, we move on to whether Bernstein's writ was untimely. As both parties acknowledge, chapter 7.16 RCW does not indicate a specific time limitation under which writs must be filed. However, the Washington Supreme Court has held that a petition for a writ of certiorari must be filed within a "reasonable time." Clark County, 139 Wn.2d at 847; Akada v. Park 12-01 Corp., 103 Wn.2d 717, 718-19, 695 P.2d 994 (1985) ("we have long held that a writ of certiorari should be applied for within a reasonable time after the act complained of has been done"). "A reasonable time within which to apply for a statutory writ is the analogous statutory or rule time period." Clark County, 139 Wn.2d at 847. The most analogous statutory rule is the Rules of Appellate Procedure.

"The sex offender registration and disclosure statutes are essentially procedural statutes; no liberty interest arises from them." In re Pers. Restraint of Meyer, 142 Wn.2d 608, 619, 16 P.3d 563 (2001). "In the absence of such a liberty interest, no due process rights attach to the classification of the risk such individuals present on their release from confinement." Meyer, 142 Wn.2d at 623. In State v. Hand, 173 Wn. App. 903, 907-08, 295 P.3d 828 (2013), aff'd, 177 Wn.2d 1015, 308 P.3d 588 (2013), this court held an appeal of the revocation of a suspended sentence is governed by the

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Raynes v. City of Leavenworth, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992) (quoting Standow v. Spokane, 88 Wn.2d 624, 630, 564 P.2d 1145). In Enright, Division Three of this court held that the act of classifying a sex offender is a quasi-judicial function because "[t]he determination of a sex offender's risk to reoffend is historically assigned to the sentencing court, and involved here the application of statutory guidelines to the past and present facts. See, e.g., RCW 71.09.060(1)." Enright, 131 Wn. App. at 716. We agree. See also RCW 9.94A.670.

[2] Our Supreme Court acknowledged this lack of review, in In re Pers. Restraint of Meyer, 142 Wn.2d 608, 624, 16 P.3d 563 (2001), in which the court "express[ed] a certain discomfort with the seeming unfairness of a process of classification in which the offenders have little involvement." The court explained, however, "such offenders are not without avenues of relief . . . These individuals may secure judicial review by writ of certiorari for arbitrary or capricious classification. RCW 7.16.040; CONST. art. IV, § 4, § 6." Meyer, 142 Wn.2d at 624.

Rules of Appellate Procedure, "which provide a right of appeal of all final orders in adjudicative proceedings." Hand, 173 Wn. App. at 908; RAP 2.2. This is because "an offender facing revocation of a suspended sentence has only minimal due process rights, the same as those afforded during revocation of probation or parole." An appeal of an offender's final classification is directly analogous to a court's decision on probation or parole, and is likewise governed by the Rules of Appellate Procedure.

Under the appellate rules, the party seeking review must file a notice of appeal within 30 days from the entry of the order. RAP 5.1, 5.2. An extension of time may be granted, but only in extraordinary circumstances. RAP 18.8. In this case, the trial court considered the length of time between the agency action, over 2 years, and the excuses provided by Bernstein to explain his delay in seeking the writ. The trial court considered Bernstein's excuse that he did not pursue an appeal because he was afraid of retaliation, then held it was not credible and was unsupported by any evidence on the record.

Bernstein argues essentially that because statutory writs do not have a set time limit, the trial court erred in ruling his writ was untimely. Bernstein relies on New Cingular Wireless PCS, LLC v. City of Clyde Hill, 185 Wn.2d 594, 604-05, 374 P.3d 151 (2016). Bernstein's reliance on New Cingular is misplaced. In New Cingular, New Cingular Wireless challenged the legality of a municipal fine in King County Superior Court by filing an action for declaratory judgment, and asked the court to invalidate the notice of violation. New Cingular, 185 Wn.2d at 597-98. The court held an action for declaratory judgment was proper because the "writ of review statute does not limit itself to being the exclusive remedy for contesting a city fine. In fact, it does the opposite by

holding itself out as the remedy of last resort. RCW 7.16.040." New Cingular, 185 Wn.2d at 604-05. Although the court acknowledges that the writ statute "fails to specify a time limit for appeal," the court did not overrule past precedent that assumes an implied time limit on appeal of agency decisions. Until our precedents are specifically overruled, they remain good law. Saleemi v. Doctor's Associates, Inc., 176 Wn.2d 368, 379, 292 P.3d 108 (2013).

Because Bernstein failed to demonstrate extraordinary and compelling circumstances justifying his two-year delay in filing this motion, we affirm the superior court's dismissal of his writ.

Denial of Discovery Motion

Bernstein next argues that the superior court erred in denying his motion to compel discovery. It is within the superior court's discretion to deny a motion to compel discovery and we will not disrupt the ruling absent an abuse of discretion. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 183, 313 P.3d 408 (2013). A court abuses its discretion when it bases its decision on unreasonable or untenable grounds. Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 665, 989 P.2d 1111 (1999). "Under a writ of review, a municipality or agency must return a complete record concerning the challenged action. When the petition involves allegations of procedural irregularities or appearance of fairness, or raises constitutional questions, the court may consider evidence outside the record." Responsible Urban Growth Grp. v. City of Kent, 123 Wn.2d 376, 384, 868 P.2d 861 (1994).

In this case, Bernstein moved to compel disclosure of evidence before KCSO filed the certified record. Because the evidence Bernstein sought was likely to have

been included in the certified record, we hold the superior court did not abuse its discretion when denying Bernstein's discovery motion.

Written Findings and Conclusions

Finally, relying on Andrew v. King County, 21 Wn. App. 566, 586 P.2d 509 (1978), Bernstein argues the superior court exceeded its authority in issuing findings of fact and conclusions of law. In Andrew, this court held the superior court exceeded its proper scope of review when it substituted its own judgment for that of the fact finder. Andrew is inapplicable here.

In this case, the superior court did not weigh the evidence then substitute its judgment for KCSO. The court did not even consider the issues contained within the writ on the merits. The findings and conclusions in this case were in support of the trial court's legal conclusion denying the writ as untimely. This is not a finding that must be reserved for the lower authority. Moreover, even if this were a decision on the merits, while "the trial court need not enter findings of fact or conclusions of law. . . . If the trial court nonetheless enters findings and conclusions, they are treated as mere surplusage by the appellate court." Concerned Land Owners of Union Hill v. King County, 64 Wn. App. 768, 772-73, 827 P.2d 1017 (1992).

We affirm.[3]

Mann, A.C.J.

WE CONCUR:

Trickey, J

Schindler, J

[3] Bernstein also argues that the trial court erred by not considering all of the briefing before rendering its decision. Bernstein points to one occurrence at trial when the court was unable to follow Bernstein's line of argument. However, this is not evidence that the trial court failed to consider Bernstein's pleadings. The evidence on the record is that the trial court considered all of the pleadings and evidence.

KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

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