

No: 74454-2-I

DIVISION 1 COURT OF APPEALS
OF THE STATE OF WASHINGTON

SCOTT SANDBERRY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF FINANCIAL
INSTITUTIONS,

Respondent.

ON REVIEW FROM KING COUNTY SUPERIOR COURT
(Hon. Timothy Bradshaw)

REPLY BRIEF OF APPELLANT

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I. Introduction

This matter involves a dispute over whether or not a brief was mailed without postage, a mistake the Department of Financial Institutions (“Department”) wrongly concluded would deny the Superior Court jurisdiction. Scott Sandsberry (“Sandsberry”) contends, and the Department admits this fact, that the brief was placed in the U.S. Mail on the date of mailing certified by affidavit. The Department’s employees stamped the brief received eight business days later, discarded the envelope in which it was mailed, and the Department’s attorney filed a timely response. Any error would therefore be harmless. More important, the Superior Court’s jurisdiction does not require strict compliance with procedural requirements for appeals of the Department. RCW 2.08.010 and RCW 34.05.542

This Court has argued in dicta that subject matter jurisdiction for administrative appeals should not rely on service procedural requirements because such reliance is “outdated,” see Concurrence, *Sprint Spectrum, LP v. State, Dep't of Revenue*, 156 Wash. App. 949, 967, 235 P.3d 849, 857 (2010). The Washington Administrative Procedures Act allows an appeal

of most state agencies to be filed with minor procedural errors. But the Administrative Procedures Act does not apply to all agencies in Washington. A party filing with an agency that does not fall under the Administrative Procedures Act may still rely on the Administrative Procedures Act, however, if the party maintains strict compliance with all procedural requirements. A line of case law outlines the strict procedural requirements that, if followed, allow appeals of these agencies to be heard under the Administrative Procedures Act. These cases do not apply to this matter, or to any appeal from an agency that holds hearings under the Administrative Procedures Act. This split in case law apparently confused the Superior Court and caused Sandsberry's appeal to be wrongly dismissed.

Sandsberry's appeal falls under Administrative Procedures Act. Sandsberry did not need to "invoke" the Administrative Procedures Act by strict compliance with all procedural requirements, as he would if he were appealing a decision of the Growth Management Hearings Board, the Shoreline Hearings Board, the Board of Industrial Insurance Appeals, a city or county entity, or any other agency that does not hold hearings under the Administrative Procedures Act. The Superior Court had jurisdiction to hear Sandsberry's appeal under RCW 2.08.010. and RCW 34.05.510-514.

IV. Argument

The Department of Financial Institutions (“Department”) confused the issue of jurisdiction by arguing from a line of cases that does not apply to this matter. This case offers this Court the opportunity to support the dicta in *Sprint* “It appears likely that the Supreme Court will in due course recognize that a failure to comply with the service requirements of the Administrative Procedures Act is a defect that goes to something other than subject matter jurisdiction.” *Sprint Spectrum, LP v. State, Dep’t of Revenue*, 156 Wash. App. 949, 967, 235 P.3d 849, 857 (2010).

A. All Relevant Documents Are Part of the Record; The Department’s Arguments About Postage Are Not Central Issues And The Department Has Been Contradicted By This Court.

Sandsberry designated the Order dismissing Appellant’s Petition for Review as part of the record on review. This Order, on its face, proves that Sandsberry’s Petition for Review was filed with the Superior Court before the Petition was dismissed for lack of jurisdiction. Sandsberry also designated all motions filed and the proceeding transcript, which incorporate the Department’s motion, declarations, and supporting documents cited by the Department. The Department then supplemented the record by including the Department’s motions and supporting

documents as well. Cites and descriptions of all documents incorporated through the report of proceedings are included in Sandsberry's Statement of Facts. The record therefore contains all relevant documents, either through incorporation, reference, or designation by one or both parties.

The Department incorrectly relies on *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 335, 760 P. 2d 368 (1988) to argue that the Appellant may not prevail because the Appellant did not provide a complete record. This is wrong. *Story v. Shelter* concerns an appellant who sued for libel but failed to provide a transcript to the Court of Appeals pursuant to R.A.P. 9.2 and R.A.P. 9.6. The appellant in *Story v. Shelter* also supported the claim of libel with reference to documents and statements that were never entered in any court or referenced on the record. This matter is different.

Sandsberry complied with R.A.P. 9.2 and R.A.P. 9.6, entering a verbatim transcript incorporating all relevant documents.

Sandsberry therefore provided a record of "sufficient completeness for appellate review of potential errors." *State v. Classen*, 143 Wash. App. 45, 48, 176 P.3d 582, 584 (2008). Relevant case law requires a party to have a "record of sufficient completeness" for appellate review of potential errors. *State v. Larson*, 62 Wash.2d 64, 66, 381 P.2d 120 (1963) (citing *Draper v. Washington*, 372 U.S. 487, 495–96, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963)). But a "complete verbatim transcript" is not required. *State v.*

Tilton, 149 Wash.2d 775, 781, 72 P.3d 735 (2003). The appellant should only seek to “place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise.” *State v. Jackson*, 87 Wash.2d 562, 565, 554 P.2d 1347 (1976) (quoting *Draper*, 372 U.S. at 495, 83 S.Ct. 774). Sandsberry did this.

The Department’s arguments about whether or not the Department found a postage stamp on the briefs it received through U.S. Mail eight business days after the date of mailing, allowing the Department to file a timely response, are not a central issue to this Court’s determination.

This matter turns on the question of jurisdiction. Sandsberry argues that the Superior Court has jurisdiction to hear appeals of most state agencies under RCW 2.08.010 and RCW 34.05.514. The Department argues that any party appealing a state agency must invoke the court’s appellate jurisdiction because the court has no jurisdiction without strict compliance with all procedural requirements. The Superior Court dismissed Sandsberry’s Petition for lack of jurisdiction. Sandsberry appeals this dismissal.

Sandsberry argues that the Washington Administrative Procedures Act confers jurisdiction on Superior Court by statute. This simpler interpretation has been upheld by this Court in dicta in *Sprint*, where this Court stated that jurisdiction is conferred by statute and arguments

surrounding strict procedural compliance are “outdated.” The Superior Court broke with this Court and relied for its dismissal of Sandsberry’s petition on cases that only apply to state agencies falling outside the Administrative Procedures Act. The question of jurisdiction is therefore central to this matter.

Finally, the Department added its motion for summary judgment to the record before this court, making the point of what is or is not on the record now moot.

***B. The Department Incorrectly Cites Cases Involving Agencies
Where Parties Must Invoke The Court’s Appellate Jurisdiction
And Case Holdings Overturned By The Legislature.***

The Department’s Response appears to miss Sandsberry’s central argument: There are two types of state agencies in Washington.

Most state agencies hold hearings under the Administrative Procedures Act. Agencies that hold hearings under the Administrative Procedures Act are governed by RCW 34.05.514, which requires appeals from a state agency to be filed in Superior Court. Superior Court therefore has jurisdiction under RCW 2.08.010, which grants “original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” These agencies are a “state agency” defined by RCW 34.05.010 as, “(A)ny state board, commission,

department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law.”

a. Jurisdiction Requirements Differ For Entities That Do Not Hold Hearings Under the Administrative Procedures Act.

A minority of state agencies, including city and county governments, do not hold hearings under the Administrative Procedures Act. These agencies are exceptions to the Administrative Procedures Act. Agencies that are exceptions to the Administrative Procedures Act have vested the right to hear their appeals exclusively, thereby removing appeals of these decisions from the court’s original jurisdiction. RCW 2.08.010. Appeals of these agencies may still be heard under the Administrative Procedures Act, however, under a line of cases that applied to all state agencies before the Administrative Procedures Act was adopted in 1988. Before the Administrative Procedures Act clarified the rules for most state agencies, an agency could only be appealed by invoking the court’s limited appellate jurisdiction. See *City of Seattle v. Pub. Employment Relations Comm’n*, 116 Wash. 2d 923, 926, 809 P.2d 1377, 1379 (1991). It is notable that these cases developed from earlier rules only after 1988, when the Administrative Procedures Act took effect.

In support of its claim that any appeal must have “strict compliance” with the Administrative Procedures Act, the Department cites cases involving the Employment Security Department, the Public Employees Relations Commission, The City of Spokane, the Growth Management Hearings Board, Spokane County, a Public Utilities District, and so on. All of these entities do not hold hearings under the Administrative Procedures Act. These cases do not apply.

b. The Department Centers Its Main Argument On Authority That Has Been Reversed By The Legislature.

In particular, the Department relies in error on *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cy.* 135 Wn. 542, 555, 958 P. 2d 962 (1998) and *Union Bay Preserv. Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wash.2d 614, 620, 902 P.2d 1247 (1995). The Department uses these cases together to wrongly argue that 1) Service on an agency’s attorney is not service on an agency and 2) Failure to serve a party requires dismissal. There are several problems with this argument.

First, both of these cases involve exceptions to the Administrative Procedures Act. *Friends of Skagit County* is not a state agency under RCW 34.05.010. Neither is *Union Bay Preservation Coalition*. These cases involved entities that are not state agencies acting on the state’s

behalf. Appeals of these entities therefore must invoke the court's appellate jurisdiction. The Administrative Procedures Act does not apply.

More important, the Department's argument that the Department's attorney was not a "party of record" has been preempted by the Legislature. In 1995, the court ruled in *Union Bay Preserv. Coalition v. Cosmos Dev. & Admin. Corp.* that "(A)ttorneys of record were not "parties of record" on whom Administrative Procedure Act (APA) required service of petition for judicial review." In 1998, the Legislature added the following provision to RCW 34.05.542, "For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record." The Department's reliance on these two cases must therefore fail.

Service on the Department's attorney constitutes service on the agency or party of record. The Department's attorney admits he was served with a petition. Sandsberry therefore served all parties.

C. The Department Admits Delivery Of Sandsberry's Brief To The Agency Representative Under RCW 34.05.542(6).

The Department admits two copies of Sandsberry's brief were received by the Department and the attorney who represented the Department in Sandsberry's hearing. The Department argues the brief was stamped "received" by a Department employee eight business days after

the date of mailing on Sandsberry's Affidavit of Mailing. The Department was able to file a timely response, and does not allege harm resulted from the alleged delay.

The Department argues incorrectly that *Sprint Spectrum, LP v. Dept. of Revenue*, 156 Wn. App. 949, 954, 253 P.3d 849 (2010) *review denied*, 170 Wn.2d 1023, 245 P.3d 774 (2011) provides controlling authority. This is not true. *Sprint Spectrum* involves a matter where a party appealed a Board of Tax Appeals decision, but did not serve the Board of Tax Appeals. Instead, the appellant in *Sprint* served its appeal of the Board of Tax Appeals decision on the Department of Revenue, a separate agency and one that did not hold the hearing that was being appealed. This service on a separate agency provided insufficient notice under the plain meaning of the Administrative Procedures Act. RCW 34.05.542.

Sandsberry did not serve the wrong party. Sandsberry served both the Department and the Attorney General who represented the Department in Sandsberry's hearing. Under RCW 34.05.542(6) the office of the Attorney General who represented the agency in the hearing constitutes an agency representative, "For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record." Sandsberry also served a copy on the Department of Financial Institutions headquarters.

This Court decided the issue in *Sprint* on different grounds. There was no question of jurisdiction. Sandsberry correctly served the Department's representative as well as the Department via U.S. Mail. As a result, the Department was able to enter this matter and respond in a timely fashion. *Sprint* has no relevance.

a. Division One Has Already Dismissed The Department's Jurisdictional Argument In Dicta.

A concurrence to *Sprint* outlines an argument that is very similar to Sandsberry's argument in this matter. In *Sprint's* Concurrence, this court wrote, "What are the consequences for a petitioner who fails to comply with the service procedures dictated by the Administrative Procedures Act? According to the Department of Revenue, the petition must be dismissed for lack of subject matter jurisdiction. In my view, the authorities supporting that position are outdated and harmful." *Sprint Spectrum, LP v. State, Dep't of Revenue*, 156 Wash. App. 949, 964, 235 P.3d 849, 856 (2010).

In more supportive dicta, this Court wrote, "If *Sprint* could not confer jurisdiction on the superior court by properly serving the correct entities, then Sprint could not deprive the superior court of jurisdiction by failing to serve the correct entities. *Treating subject matter jurisdiction as though it were a fleeting and fragile attribute of a court diminishes the authority of*

the court, creates a trap for the unwary, and prevents worthy cases from being heard on the merits even when the procedural violation has not prejudiced the opposing party.” (Emphasis added). This Court further relied on *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash.2d 769, 791, 947 P.2d 732 (1997), “Elevating procedural requirements to the level of jurisdictional imperative has little practical value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice.” *Id.*

Sandsberry similarly asks this Court to find the shortest, simplest answer to the question of jurisdiction. This Court has jurisdiction under RCW 2.08.010 and RCW 34.05.514. As this Court said in *Sprint's* Concurrence, ‘To think of subject matter jurisdiction as something that depends on what the parties to an action do or fail to do is to undermine the fixed nature of a tribunal's power. “Jurisdiction exists because of a constitutional or statutory provision. A party cannot confer jurisdiction; all that a party does is invoke it.” Quoting *Dougherty v. Dep't of Labor & Indus. for State of Washington*, 150 Wash. 2d 310, 76 P.3d 1183 (2003). It defeats the purpose of the Administrative Procedures Act jurisdiction to rely for the statute’s interpretation on a line of cases that would require the parties to parse the question of hypothetical causes for an alleged eight-day delay in mailing. Under the Administrative Procedures Act, the

Legislature intended to, “(C)larify the existing law of administrative procedure, to achieve greater consistency with other states and the federal government in administrative procedure, and to provide greater public and legislative access to administrative decision making.” RCW 34.05.010.

The Superior Court’s dismissal of Sandsberry’s petition harms all of these Legislative goals.

V. Conclusion

Sandsberry had no need for good cause or substantial compliance because his brief was served in the 30-day window required by RCW 34.05.542. The Department never alleged a delay in placing the brief in the U.S. Mail, and admitted Sandsberry mailed his brief on the correct day. The Department further admits the brief reached two offices, giving actual notice to all parties, as required by RCW 34.05.542.

Finally, the Department’s authorities are incorrect. The Department relies in error on case law that has been reversed by the Legislature for the proposition that service on an agency’s attorney does not constitute service on the agency. This is contradicted by RCW 34.05.542(6), which requires that service on the agency’s attorney constitutes service on the agency. The Department repeatedly cites case law applying only to entities that do not fall under the Administrative Procedures Act. These cases do not apply to this matter because the Department holds its hearings under the

Administrative Procedures Act. Most important, the Department asks this Court to contradict its dicta in *Skagit*, where this Court noted, “It appears likely that the Supreme Court will in due course recognize that a failure to comply with the service requirements of the Administrative Procedures Act is a defect that goes to something other than subject matter jurisdiction.” *Sprint Spectrum, LP v. State, Dep't of Revenue*, 156 Wash. App. 949, 967, 235 P.3d 849, 857 (2010).

The Superior Court erred in relying on the Department’s arguments concerning subject matter jurisdiction. The Superior Court had jurisdiction over Sandsberry’s appeal under RCW 2.08.010 and RCW 34.05.514. Sandsberry had no need to “invoke” the appellate jurisdiction of the court. Sandsberry’s appeal was therefore wrongly dismissed.

RESPECTFULLY SUBMITTED this 12th day of October, 2016.



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Certificate of Service

Pursuant to RAP 10.4, I hereby certify under penalty of perjury under the laws of the state of Washington that I caused to be served a copy of the foregoing Appellant's Reply Brief on the following person in the manner indicated at the following address.

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