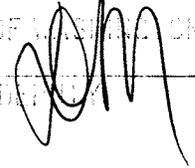


COURT OF APPEALS  
DIVISION II

NO. 36969-9-II

03 DEC 15 AM 9:22

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY 

STATE OF WASHINGTON

Respondent,

v.

MICHAEL JAMES HIBBERD,

Appellant.

ON APPEAL FROM THE  
SUPERIOR COURT OF COWLITZ COUNTY

Before The Honorable James J. Stonier, Judge

REPLY BRIEF OF APPELLANT

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Of Attorneys for Appellant

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P.M. 12-12-2008

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**A. STATEMENT OF THE CASE**

The statement of this case is set forth in the Appellant's Brief.

**B. STATEMENT OF THE FACTS**

Appellant will rely upon the Statement of the Facts as presented in his Opening Brief, but makes this additional statement of facts pertaining to the motion:

Michael Hibberd filed a CrR 7.8 Motion to Modify Judgment and Sentence. Clerk's Papers at 15-39. The motion was noted to be heard by Judge Stonier on October 18, 2007. Second Supp. CP at 119. The Clerk's Minutes of the hearing states: "Court already denied motion[.]" Second Supp. CP. at 119. Judge Stonier wrote a letter to Hibbard dated October 11, 2007 providing in part that "[p]ursuant to CrR 7.8(c)(2) the motion is denied without a hearing. The affidavit/motion does not establish grounds for relief." The letter was filed in the Superior Court on October 11, 2007. CP at 41.

**C. ARGUMENT**

**I. THE JUDGE'S LETTER OF OCTOBER 11, 2007 DENYING THE MOTION IS AN APPEALABLE DECISION UNDER RAP 2.2**

The State alleges that Michael Hibberd's appeal is improperly before

the Court because the superior court did not enter an ordering denying the motion. Brief of Respondent at 2. RAP 2.2(a) provides:

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

...

(9) Order on Motion for New Trial or Amendment of Judgment. An order granting or denying a motion for new trial or amendment of judgment.

The question here is whether Judge Stonier's letter contains the elements essential to constitute a decision or an appealable order. The judge wrote a letter that clearly stated that the motion was denied and gave the court's reason for the ruling. The letter was entered into the court record the same day. CP at 41.

In the context of civil proceedings, in *In State ex rel. Lynch v. Pettijohn*, 34 Wn.2d 437, 209 P.2d 320 (1949), the Court found that there is a "distinct difference" between the terms "opinion" and "decision", and noted that the terms are often used interchangeably to denote a form of judicial utterance. The Court found that "[a]n "opinion" of the court is a statement by the court of its reasons for its findings, conclusions, or judgment, whereas a judicial "decision" is the judgment or conclusion itself rendered by the court and constitutes the instrument through which the court acts." *Pettijohn*, 34

Wn.2d at 442. The general rule is that a mere opinion, or memorandum decision of a court does not constitute the court's judgment and will not furnish a basis for an appeal until a formal order or judgment is entered. *Pettijohn* creates a limited exception to the rule that a memorandum decision is not a final, appealable judgment. The Court found the "[t]he decision of a court is its judgment; the opinion only the reasons given for that judgment." *Pettijohn*, 34 Wn.2d at 442 (quoting *In re Guardianship of Brown*, 6 Wn.2d 215, 235, 107 P.2d 1104 (1940)). See also, *In the Matter of the Recall of West*, 156 Wn.2d 244, 251, 126 P.3d 798 (2006).

*Pettijohn* involved a proceeding under a statute providing for a taxpayer's appeal to the superior court from an order of the board of county commissioners authorizing an emergency expenditure. The appeal took the form of a trial de novo and the statute provided that the procedure was to be "summary and informal" and that the court's determination was to be final. The trial court in *Pettijohn* prepared a written document entitled "Opinion of the Court", read it into the record, and gave a copy to each counsel. The entry of the order was noted in the clerk's minutes and immediately after the reading of the opinion, petitioner's counsel gave oral notice of appeal. Petitioner's attorney thereafter sought to have the judge enter a formal order.

The judge refused, stating that the written opinion "was intended to be and was considered by all parties at the time as a final order". 34 Wn.2d at 441. The Court concluded that the written opinion was in fact a final order and therefore appealable. 34 Wn.2d at 447. In its analysis, the *Pettijohn* court noted particular facts of the case, including that the court's "Opinion of the Court" was read into the record and the document was recorded by the clerk; and that the document the instrument concluded with the statement that "The order of the Board of County Commissioners in making the emergency appropriation is in all things affirmed." 34 Wn.2d at 445.

The Court declined to follow *Pettijohn* in *Department of Labor & Indus. v. City of Kennewick*, 99 Wn.2d 225, 661 P.2d 133 (1983). In that case, the Court distinguished *Pettijohn* on the basis that CR 54(a)(1), defining judgments, contemplates a formal procedure, requiring entry of a formal order preparing by the prevailing party and signed by the judge, and held that a memorandum decision entered in that case did not comply with those requirements. *Kennewick*, 99 Wn.2d at 228. The *Kennewick* Court also distinguished *Pettijohn* on the ground that a statutory declaration that the superior court proceedings be summary and informal, and that the *Pettijohn* Court interpreted this to mean that the proceedings "be conducted as

expeditiously and with as little technical formality as possible.” *Kennewick*, 99 Wn.2d at 230-31 (quoting *Pettijohn*, 34 Wn.2d at 447).

The case at bar is criminal rather than civil, of course, and therefore does not hinge upon CR 54. The appellant submits that the reasoning in *Pettijohn* is compelling and urges this Court to follow the *Pettijohn* Court’s reasoning in the absence of authority in criminal cases.

In the case at bar, the superior court judge’s October 11, 2007 letter of denial contains the reason for the decision to deny the motion, and clearly orders that the motion is denied. The letter, or more specifically the portion of the letter stating that the “motion is denied without a hearing”, is the decision on review.

In *Recall of West*, the Court noted that the *Pettijohn* court placed great weight on what the issuing court *intended*. Here, there is no evidence that the judge intended anything other than his letter to be the final judgment in the case; he ruled prior to the scheduled hearing, and when the hearing did come on the calendar on October 18, the clerk’s minutes state that the court had “already denied [the] motion[.]”

It is clear from the record that the judge intended that the document, although in the form of a letter, should operate as a final order or decision in

the case. Therefore, the letter in this case constitutes a final ruling and consequently, satisfies the definition of the term "decision" as that word is used in RAP 2.2(a).

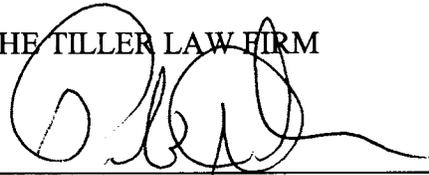
**D. CONCLUSION**

For the above-stated reasons, and those set forth in Hibberd's Opening Brief, this Court should grant the relief requested in the opening brief.

DATED: December 12, 2008.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over the printed name 'PETER B. TILLER-WSBA 20835'. The signature is fluid and cursive.

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Of Attorneys for Appellant

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BY \_\_\_\_\_  
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MICHAEL JAMES HIBBERD,

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COURT OF APPEALS NO.  
36969-9-II

COWLITZ COUNTY NO.  
04-1-01380-9

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Reply Brief was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Michael James Hibberd, Appellant, and Amie L. Hunt, deputy prosecuting attorney, by first class mail, postage pre-paid on December 12, 2008, at the Centralia, Washington post office addressed as follows:

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Cowlitz County Prosecutor's Office  
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Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
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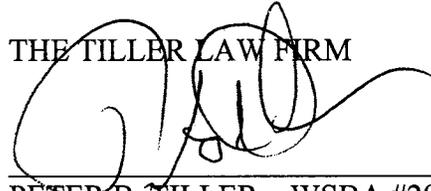
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Dated: December 12, 2008.

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A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over the text 'THE TILLER LAW FIRM'.

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