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NO. 90068-0

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON

Petitioner

v.

RYAN JAMES PEELER,

Respondent.

**PETITIONER'S (STATE'S) ANSWER TO MOTION TO STRIKE
NEW ARGUMENTS RAISED IN AMICUS BRIEF FILED BY WAPA
OR TO PERMIT SUPPLEMENTATION OF THE RECORD**

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
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ORIGINAL

I. IDENTITY OF ANSWERING PARTY

COMES NOW the Petitioner, State of Washington, by and through Erik Pedersen, Deputy Prosecuting Attorney for Skagit County and provides an answer to the Court for the relief sought by the Respondent.

II. STATEMENT OF ANSWER PROVIDED

Pursuant to RAP 9.6(a), 9.11, 10.3(f), and 17.4(e), the Petitioner respectfully answers the Motion to Strike New Arguments raised in the Amicus Brief Filed by WAPA or Permit Supplementation of the Record (Respondent's Motion).

III. GROUNDS FOR DENIAL OF MOTION

As grounds for and in opposition of the Respondent's Motion, the Petitioner shows unto the Court as follows:

1. Cases discussing tolling were presented to the Court of Appeals and dismissed by their opinion.

Peeler seeks to strike the Brief of Amicus Washington Association of Prosecuting Attorneys (WAPA Amicus) contending the brief contains novel factual and legal arguments that have not been raised before in this case.

The State contends that the facts pertaining to the timing of Peeler's demand, his transport to King County and his disposition of the charges there were all part of the record considered by the trial court as described below in section 3.

The statement of respondent's Supplemental Statement of Authorities filed in the Court of Appeals, referenced the case of *State v. Peterson*, 137 Idaho 255, 47 P.3d 378 (Idaho Ct. App. 2002). The reference to the case stated "transport from Washington State to Idaho under uniform interstate detainer act to deal with trials multiple counties made defendant unable to stand trial in the second county while pending trial in the first county." *Peterson* specifically discusses the provisions of the Idaho interstate detainer act which apply the tolling when a person is unable to stand trial. *State v. Peterson*, 137 Idaho at 257, 47 P.3d 378 (Idaho Ct. App. 2002). The Court of Appeals noted the citation to supplemental authority "did not control." *State v. Peeler*, COA no. 68368-9-I filed February 24, 2014, (Slip op. at page 8, note 4).

Tolling is a way of analyzing the State's contention that Peeler was not serving a term of confinement under the language of RCW 9.98.010, since Peeler was unavailable due trial in another county. The trial court found Peeler was not available to transport under RCW 9.98.010. CP 86 (Findings 1, 2).

This Court would benefit from evaluation of the manner in which other state and federal jurisdictions deal with analyzing the transfer of

prisoners between multiple jurisdictions. The WAPA Amicus provides helpful citations to authority addressing those issues.

In addition, the WAPA Amicus did not merely discuss tolling but also provided case law pertaining to the requirement that a prisoner make a new demand from the new facility. WAPA Amicus at pages 5-7 citing, *State v. Roulette*, 162 Ohio App. 3d 775 840 N.E.2d 645 (2005).

2. The supplemental documentation from King County cases are not certified, were not part of the trial court record and should not be accepted under judicial notice.

From the copy of the documents the State received, they are not certified. This Court has condemned the "loose practice" of submitting uncertified or unauthenticated photocopies of apparent or purported court records. See *In re Personal Restraint of Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001), *overruled on other grounds by In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). Counsel have been on notice since 2001, that "all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents." *Connick*, 144 Wn.2d at 458.

The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior

Court Clerk, and any exhibits admitted in the trial court proceedings. *State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986).

The documents from the three King County Superior Court case were not part of the trial court record and therefore should not be made part of the case. *See generally Spokane Research v. City of Spokane*, 155 Wn.2d 89, 97-99, 117 P.3d 1117 (2005) (refusing to consider documents from a related proceeding where the party that asked the appellate court to consider the documents did not address RAP 9.11); *In re the Adoption of B.T.*, 150 Wn.2d 409, 414-16, 78 P.3d 634 (2003) (an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding; rule applies even when the separate proceedings involve the same parties); *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 762 P.2d 1141 (1988) (RAP 9.11 motion to admit insurance policy endorsement into appellate record denied because it was inequitable to excuse the insurance company's failure to offer the evidence earlier).

The State contends the records from the King County Superior Court are not appropriate for judicial notice.

Judicial notice is allowed at any stage of the proceeding. ER 201(f). Judicial notice may be taken on appeal if the following standard is met:

We may take judicial notice of the record in the case presently before us or "in proceedings engrafted, ancillary, or supplementary to it."

However, we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.

In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (citations omitted). Further, RAP 9.11 applies in addition to the normal judicial notice standard. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000) ("Even though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review.").

Spokane Research v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005). The provisions of RAP 9.11 list six requirements before the additional evidence may be accepted. Among those that it is needed to fairly resolve the case, would change the decision and would be inequitable to decide the case solely on the evidence taken in the trial court. As described below in argument sections 3 and 4, the State contends that an adequate factual record of transport of Peeler to and from King County and for the disposition of those cases before the trial court such that RAP 9.11 does not permit acceptance of the additional records by judicial notice.

3. The supplemental documentation from King County adds nothing of significance to the record since the Skagit County trial court pleadings reference relevant facts of King County proceedings.

Peeler seeks to supplement the fact based upon pleadings from the King County Superior Court in cases in which Peeler was transported from

prison and held pending resolution of the cases. However, the trial court was aware of the facts pertaining to Peeler's transport to and from King County. Those specific facts include documents and findings pertaining to: Peeler's transport order in King County being entered on September 28, 2011, CP 39-42, 84 (Finding 2); Peeler being transported from prison to King County on October 18, 2011, CP 36, 44, 82 (Finding 4); Peeler's resolution of the King County cases by sentencing of three of the cases and dismissal of the fourth on December 23, 2011, CP 48-51, 85 (Finding 9).

Thus, the record as it exists before the trial court adequately shows Peeler's unavailability due to the King County cases to be able to evaluate tolling without supplementation of the record.

4. Even if this Court were to consider the answer to tolling based upon the facts contained therein, the calculations by Respondent are incorrect.

If tolling is applied, it would apply to whole period of time of Peeler's unavailability due to his pretrial and presentencing status in the King County Jail. *See State v. Pair*, 416, Md. 157, 176, 5 A.3d 1090, 1098 (Md. 2010) (defendant unable to stand trial when sending jurisdiction actively prosecuting inmate on current and pending charges).

Peeler contends the tolling would not apply during the period of time from the State's notice on October 26, 2011, until the hearing on November

17, 2011. Respondent's Answer to Amicus Brief filed by Washington Association of Prosecuting Attorneys (Respondent's Answer) at page 10.

However, the records in the trial court showed that Peeler was transported to King County on October 18, 2011. CP 36. That is an unchallenged finding of the trial court. CP 84.

Tolling would cease on King County cases on the date that Peeler would cease to be held there. Peeler contends that date was the date of the plea on December 9, 2011. Respondent's Answer at pages 11-12. The State contends the date of sentencing on December 23, 2011, would be the date from which tolling should apply. Additionally, the records already before the trial court showed Peeler did not plead guilty in King County case 11-1-00217-5 on December 9, 2011. CP 51. That case had been issued with a warrant and was resolved by dismissal on December 23, 2011. CP 51.

Based upon the date of December 23, 2011, and assuming application of tolling, the 120 day period under RCW 9.98.010 would have run on April 22, 2012. At Peeler's appearance on February 16, 2012, Peeler's trial date was set for April 9, 2012, and his time for trial calculated as April 16, 2012. CP 55.

Subsequently, on March 15, 2011, Peeler agreed to continue his case for trial. CP 57. Despite Peeler's suggestions that Peeler did not agree to

continue the case, the trial court specifically found “[a]ll continuances in this case were either done by the agreement or at the request of defense.” CP 86 (finding 16). That continuance operated to waive application of RCW 9.98.010 since it was made before the lapse of that time period. RCW 9.98.010(1) (“court may grant any necessary or reasonable continuance”).

IV. CONCLUSION

The Petitioner respectfully requests this court deny the Respondent’s Motion to Strike the Arguments of WAPA or Permit Supplementation of the Record.

DATED this 14th day of January, 2015.

Respectfully submitted,

By: Erik Pedersen
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney

DECLARATION OF DELIVERY

I, Karen Wallace, declare as follows:

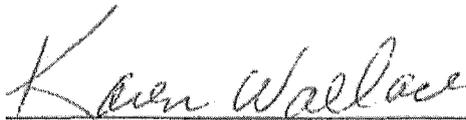
I sent for delivery by; United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to

Nancy Collins, Washington Appellate Project, 1511 3rd Ave STE 701, Seattle, WA 98101-3635.

Suzanne Lee Elliott, Co-Chair Amicus Committee, Washington Association of Criminal Defense Lawyers, 705 Second Avenue, Suite 1300, Seattle, WA 98104

Pamela Beth Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys, 206 10th Ave SE, Olympia, WA 98501

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 14th day of January, 2015.



Karen Wallace, Declarant

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To: KarenWallace
Cc: Bausch, Lisa; 'nancy@washapp.org'; 'suzanne@suzanneelliottlaw.com';
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Importance: High

I'm so sorry, I didn't attach the document. Here it is.

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pamloginsky@waprosecutors.org; ErikPedersen
Subject: State v. R Peeler 90068-0 Pet. Answer to Mot to Strike
Importance: High

Good afternoon. Attached is the Petitioner's (State's) Answer to Motion to Strike New Arguments Raised in Amicus Brief Filed By WAPA or to Permit Supplementation of the Record for filing with your court.