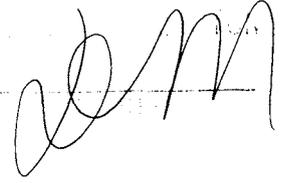


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COURT OF APPEALS

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34422-0-II
NO. 34422-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Appellant,

vs.

JUSTIN LEE JOHNSTON,

Respondent.

BRIEF OF RESPONDENT JOHNSTON

**LISA E. TABBUT/WSBA #21344
Attorney for Respondent Johnston**

**1402 Broadway
Longview, WA 98632
(360) 425-8155**

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I. ANSWER TO STATE'S ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The state is incorrect in its assertion that the trial court failed to recognize its inherent contempt power. The court does recognize its authority to impose its inherent contempt. However, pursuant to the authority of this Court's opinion in State v. A.L.H., 116 Wn. App. 158, 64 P.3d 1262 (2003), the court preliminarily limited the length of any such contempt sanction to seven days incarceration.

II. STATEMENT OF THE CASE

On December 8, 2005, the Cowlitz County prosecuting attorney filed an information charging respondent Justin Johnson, DOB: 11/14/90, with a single count of criminal truancy.

The defendant in the County of Cowlitz, State of Washington, on or about the 28th, 29th, and 30th of November and/or December 1st and 2nd, 2005 did intentionally disobey a lawful order of this court, to wit: the Order to Attend School issued in Cowlitz County Juvenile Court, Cause number 04-7-00735-5, on November 22, 2004, by not attending school as required by the aforementioned order; contrary to RCW 7.21.010(1)(b), RCW 7.21.040 and against the peace and dignity of the State of Washington. The State requests a punitive sanction of up to one year in detention and/or a fine of up to \$5,000.

CP 1. The prosecutor filed a similar information against Ernesto Hernandez-Picardo. Both Johnson and Hernandez-Picardo were

represented by the same defense counsel and were consequently heard at the same time.¹ 1RP² 3-21 & 2RP 3-8.

Prior to the first hearing, the state filed a motion and memorandum asking the trial court to invoke its inherent contempt power against both boys and to allow the state to proceed with the “criminal informations filed in these cases.” CP 2-8. The state’s memorandum gave an account of both boys’ failure to abide the trial court’s November 22, 2004, Order to Attend School. CP 3-8. The court and the parties discussed the state’s memorandum and scope of the trial court’s authority on truancy filings at a December 13 hearing. 1RP 11-14. The discussion began with the defense objecting to the criminal informations. 1RP 12. The state and defense counsel agreed that the allowable penalties for violations of truancy contempt orders were unclear. 1RP 11-14. Both agreed that the maximum penalty for a civil violation was seven days; the disagreement was over the allowable penalty for a criminal violation in light of the state’s criminal information. 1RP 12-14. The court called for defense briefing and set the matter over. 1RP 14-15.

¹ This Court also consolidated the cases for appellate purposes.

² “1RP” refers to the verbatim report of the December 13, 2005, hearing. “2RP” refers to the December 20, 2005, report of proceedings.

Defense counsel's reply brief focused on the rehabilitative goal of the Juvenile Justice Act of 1977 and reminded the court of the statutory authority allowing up to a seven-day penalty for truancy civil contempt.³ CP 9-13. The brief also attached the Governor's Juvenile Justice Advisory Committee Request for Proposals. The proposals sought were those that would aid Washington State in complying with federal standards which prohibit juvenile status offenders – such as truant children – from being confined in secure detention facilities. CP 14.

The court took the issue up again on December 20. 2RP. In denying the state's request to file the criminal truancy information, the court ruled that it was bound by this court's precedence in State v. A.L.H., 116 Wn. App. 158, 64 P.3d 1262 (2003). 2RP 4-5. In A.L.H., this court very specifically held that, "But when a juvenile subject to an ARY order violates a condition of **that** order, the State is expressly limited by statute to seek remedial sanctions under RCW 7.21.030(2)." A.L.H. at 164. RCW 7.21.030(2) applies to violations of truancy orders under RCW 28A.225.090.⁴ Following the precedence of A.L.H., the court dismissed the state's efforts to file a criminal contempt charge. 2RP 4. The trial court also noted

³ See RCW 7.21.030

⁴ See Appendix for text of statutes

however, that Johnson's non-compliance with the truancy order made seven days an inadequate penalty and that it would exercise greater authority if it thought it could. 2RP 8.

The state filed a motion for reconsideration in light of Division Three's subsequently issued opinion In re the Dependency of A.K., 130 Wn. App. 862, 125 P.3d 220 (2005). CP 15-18. In A.K., Division Three held trial courts have inherent contempt power to exceed the seven-day detention statutorily allowed for status offenses. A.K. at 866. In a February 1 written denial of the state's reconsideration motion, the court noted it still found A.L.H., 116 Wn. App. 158, binding precedence for Division Two trial courts. CP 19. The court merely advised the parties that should the state re-file its criminal informations, and should the court hypothetically find Johnson and/or Hernandez-Picardo in contempt, then it would only consider a remedial remedy and not a punitive remedy: "My previous oral ruling is modified to allow the state to file a criminal contempt, but the remedy, sanction, is limited to seven days in detention." CP 19.

Rather than filing a criminal truancy information the state filed a notice of appeal on February 16.⁵ The state did not designate the notice of appeal as a clerk's paper. The state did not attach an appealable order to its notice of appeal. Rather, the notice of appeal references a February 14, 2006, decision. A review of the court file reveals nothing filed on February 14.

III. ARGUMENT

THE STATE'S APPEAL SHOULD BE DENIED BECAUSE (1) THE STATE HAS NOT APPEALED FROM A COURT ORDER, (2) THE APPEAL IS NOT RIPE BECAUSE THE TRIAL COURT GRANTED THE STATE'S REQUESTED RELIEF, TO FILE A CRIMINAL TRUANCY CONTEMPT INFORMATION, BUT THE STATE FAILED TO DO SO, AND (3) THE TRIAL COURT CORRECTLY FOLLOWED THIS COURT'S PRECEDENT IN HOLDING THAT SEVEN DAYS IS THE MAXIMUM PENALTY ALLOWED FOR VIOLATION OF A REMEDIAL OR PUNITIVE TRUANCY ORDER.

(1) The lack of an Order from which the state is appealing warrants dismissal of the appeal.

Preliminarily, it should be noted that pursuant to RAP 5.3, Content of Notice – Filing, the appellant must designate the decision which the party wants reviewed. Moreover, the appellant should attach to the notice of appeal a signed order from which the appeal is taken. RAP 5.3(a). In this appeal, there is no order attached to the notice of appeal and the state refers to a seemingly

⁵ The state did not make its notice of appeal part of its designated court papers.

nonexistent trial court decision filed on February 14, 2006. Without the required specificity as to what is being appealed, an answer is difficult. The absence of the February 14, 2006, order warrants dismissal of this appeal.

(2) This case is not appealable because the trial court granted the state's requested relief.

This case is not appealable because it is not ripe. Assuming this Court decides that the notice of appeal is proper under RAP 5.3(a), the only order it appears the state could possibly be appealing is the court's denial of the State's Motion for Reconsideration filed on February 1, 2006. CP 19. This order is not appealable under RAP 2.2; it did not terminate the state's case. It was not a final judgment or disposition. It was, viewed in the light most favorable to the state, a revision of the trial court's earlier decision and an invitation to proceed. The court explicitly invited the state to immediately re-file its information charging criminal contempt. It merely stated the court's future intention, assuming the contempt was proven beyond a reasonable doubt (as it must be in criminal proceedings), to impose only a remedial, as opposed to a punitive, sanction. To make this an appealable issue, the state would have had to file its criminal information, as the trial court

encouraged it to do in its February 1 order and then, assuming contempt was found, to ask for the punitive remedy it wanted and subsequently appeal the trial court's refusal to even consider it.

(3) The trial court's reliance on this Court's precedence in State v. A.L.H. was appropriate.

In A.L.H., this Court, while acknowledging the inherent contempt power of the trial courts, held that the sanctions for violations of an ARY order was limited to seven days incarceration pursuant to a civil contempt. A.L.H. at 160, nt.3 and 163-64. The Court also acknowledged broader contempt authority if the contemptuous behavior was based on some other basis than the status offense order. A.L.H. at 163-64. The trial court interpreted this holding to limit the allowable contempt sanction on truancy cases (pursuant to RCW 13.32A.250(2)) to seven days incarceration.

While Divisions Three's opinion in State v. A.K., 130 Wn. App. 862, 125 P.3d 220 (2005), suggests that the trial courts have greater inherent authority to impose longer sanctions in rare instances on status offenses, Division Two has not issued an opinion specifically endorsing this approach. In fact, the State

Supreme Court has accepted review of A.K. listing the issue on its website as,

“Whether a juvenile court has inherent power to incarcerate a juvenile for contempt without an opportunity to purge the contempt and without affording the juvenile the safeguards associated with criminal trials.”

See www.courts.wa.gov/appellate_trial_courts_/supreme/issues/
(Cases Not Yet Set).

With A.K.’s holding in question, it was appropriate for the trial court in this case to limit contempt sanctions – remedial or punitive - to seven days.

IV. CONCLUSION

The appeal should be dismissed for lack of an appealable order and because it is not ripe. Alternatively, the court should stay an opinion in the case pending the State Supreme court’s decision in State v. A.K.

Respectfully submitted this 27th day of November, 2006



LISA E. TABBUT/WSBA #21344
Attorney for Respondent Johnston

APPENDIX OF STATUTES AND COURT RULES

RCW 7.21.010

Definitions.

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

RCW 7.21.030

Remedial sanctions — Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice

and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the

person to juvenile detention for a period of time not to exceed seven days.

RCW 7.21.040
Punitive sanctions — Fines.

(1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.

(2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(d) If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(3) The court may hold a hearing on a motion for a remedial sanction jointly with a trial on an information or complaint seeking a punitive sanction.

(4) A punitive sanction may be imposed for past conduct that

was a contempt of court even though similar present conduct is a continuing contempt of court.

(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars or imprisonment in the county jail for not more than one year, or both.

RCW 13.32A.250

Failure to comply with order as civil contempt — Motion — Penalties.

(1) In all child in need of services proceedings and at-risk youth proceedings, the court shall verbally notify the parents and the child of the possibility of a finding of contempt for failure to comply with the terms of a court order entered pursuant to this chapter. Except as otherwise provided in this section, the court shall treat the parents and the child equally for the purposes of applying contempt of court processes and penalties under this section.

(2) Failure by a party to comply with an order entered under this chapter is a civil contempt of court as provided in RCW 7.21.030(2)(e), subject to the limitations of subsection (3) of this section.

(3) The court may impose remedial sanctions including a fine of up to one hundred dollars and confinement for up to seven days, or both for contempt of court under this section.

(4) A child placed in confinement for contempt under this section shall be placed in confinement only in a secure juvenile detention facility operated by or pursuant to a contract with a county.

(5) A motion for contempt may be made by a parent, a child, juvenile court personnel, or by any public agency, organization, or person having custody of the child under a court order adopted pursuant to this chapter.

(6) Whenever the court finds probable cause to believe, based upon consideration of a motion for contempt and the information set forth in a supporting declaration, that a child has violated a

placement order entered under this chapter, the court may issue an order directing law enforcement to pick up and take the child to detention. The order may be entered ex parte without prior notice to the child or other parties. Following the child's admission to detention, a detention review hearing must be held in accordance with RCW 13.32A.065.

RCW 28A.225.090

Court orders — Penalties — Parents' defense.

(1) A court may order a child subject to a petition under RCW 28A.225.035 to do one or more of the following:

(a) Attend the child's current school, and set forth minimum attendance requirements, including suspensions;

(b) If there is space available and the program can provide educational services appropriate for the child, order the child to attend another public school, an alternative education program, center, a skill center, dropout prevention program, or another public educational program;

(c) Attend a private nonsectarian school or program including an education center. Before ordering a child to attend an approved or certified private nonsectarian school or program, the court shall: (i) Consider the public and private programs available; (ii) find that placement is in the best interest of the child; and (iii) find that the private school or program is willing to accept the child and will not charge any fees in addition to those established by contract with the student's school district. If the court orders the child to enroll in a private school or program, the child's school district shall contract with the school or program to provide educational services for the child. The school district shall not be required to contract for a weekly rate that exceeds the state general apportionment dollars calculated on a weekly basis generated by the child and received by the district. A school district shall not be required to enter into a contract that is longer than the remainder of the school year. A school district shall not be required to enter into or continue a contract if the child is no longer enrolled in the district;

(d) Be referred to a community truancy board, if available; or

(e) Submit to testing for the use of controlled substances or alcohol based on a determination that such testing is appropriate to the circumstances and behavior of the child and will facilitate the child's compliance with the mandatory attendance law and, if any test ordered under this subsection indicates the use of controlled substances or alcohol, order the minor to abstain from the unlawful consumption of controlled substances or alcohol and adhere to the recommendations of the drug assessment at no expense to the school.

(2) If the child fails to comply with the court order, the court may order the child to be subject to detention, as provided in RCW 7.21.030(2)(e), or may impose alternatives to detention such as community restitution. Failure by a child to comply with an order issued under this subsection shall not be subject to detention for a period greater than that permitted pursuant to a civil contempt proceeding against a child under chapter 13.32A RCW.

(3) Any parent violating any of the provisions of either RCW 28A.225.010, 28A.225.015, or 28A.225.080 shall be fined not more than twenty-five dollars for each day of unexcused absence from school. It shall be a defense for a parent charged with violating RCW 28A.225.010 to show that he or she exercised reasonable diligence in attempting to cause a child in his or her custody to attend school or that the child's school did not perform its duties as required in RCW 28A.225.020. The court may order the parent to provide community restitution instead of imposing a fine. Any fine imposed pursuant to this section may be suspended upon the condition that a parent charged with violating RCW 28A.225.010 shall participate with the school and the child in a supervised plan for the child's attendance at school or upon condition that the parent attend a conference or conferences scheduled by a school for the purpose of analyzing the causes of a child's absence.

(4) If a child continues to be truant after entering into a court-approved order with the truancy board under RCW 28A.225.035, the juvenile court shall find the child in contempt, and the court may order the child to be subject to detention, as provided in RCW

7.21.030(2)(e), or may impose alternatives to detention such as meaningful community restitution. Failure by a child to comply with an order issued under this subsection may not subject a child to detention for a period greater than that permitted under a civil contempt proceeding against a child under chapter 13.32A RCW.

(5) Subsections (1), (2), and (4) of this section shall not apply to a six or seven year-old child required to attend public school under RCW 28A.225.015.

RAP 5.3 CONTENT OF NOTICE--FILING

(a) Content of Notice of Appeal. A notice of appeal must (1) be titled a notice of appeal, (2) specify the party or parties seeking the review, (3) designate the decision or part of decision which the party wants reviewed, and (4) name the appellate court to which the review is taken.

The party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made, and, in a criminal case in which two or more defendants were joined for trial by order of the trial court, provide the names and superior court cause numbers of all codefendants.

(b) Content of Notice for Discretionary Review. A notice for discretionary review must comply in content and form with the requirements for a notice of appeal, except that it should be titled a notice for discretionary review.

A party seeking discretionary review of a decision of a court of limited jurisdiction should include the name of the district or municipal court and the cause number for which review is sought.

(c) Identification of Parties, Counsel, and Address of Defendant in Criminal Case. The party seeking review should include on the notice of appeal the name and address of the attorney for each of the parties. In a criminal case the attorney for the defendant should also notify the appellate court clerk of the defendant's address, by placing this information on the notice. The attorney for a defendant in a criminal case must also keep the appellate court clerk advised of any changes in defendant's address during review.

(d) Multiple Parties Filing Notice. More than one party may join in filing a single notice of appeal or notice for discretionary review.

(e) Notices Directed to More Than One Case. If cases have been consolidated for trial, or have been tried together even though not consolidated for trial, separate notices for each case or a single notice for more than one case may be filed. A single notice for more than one case will be given the same effect as if a separate notice had been filed for each case. If cases have not been consolidated for trial or have not been tried together, separate notices must be filed.

(f) Defects in Form of Notice. The appellate court will disregard defects in the form of a notice of appeal or a notice for discretionary review if the notice clearly reflects an intent by a party to seek review.

(g) Notices Directed to More Than One Court. If a notice of appeal or a notice for discretionary review is filed which is directed to the Court of Appeals and a notice is filed in the same case which is directed to the Supreme Court, the case will be treated as if all notices were directed to the Supreme Court.

(h) Amendment of Notice Directed to Portion of Decision. The appellate court may, on its own initiative or on the motion of a party, permit an amendment of a notice to include additional parts of a decision in order to do justice. On discretionary review, the appellate court may, on its own initiative or on the motion of a party, permit an amendment of a notice to include acts of the trial court that are subsequent to the act for which discretionary review was first sought if the subsequent acts relate to the subject of the first review. If the amendment is permitted, the record should be supplemented as provided in rule 9.10. The appellate court may condition the amendment on appropriate terms, including payment of a compensatory award under rule 18.9.

(i) Notice by Fewer Than All Parties on a Side--Joinder. If there are multiple parties on a side of a case and fewer than all of the parties on that side of the case timely file a notice of appeal or notice for discretionary review, the appellate court will grant relief

only (1) to a party who has timely filed a notice, (2) to a party who has been joined as provided in this section or (3) to a party if demanded by the necessities of the case. The appellate court will permit the joinder on review of a party who did not give notice only if the party's rights or duties are derived through the rights or duties of a party who timely filed a notice or if the party's rights or duties are dependent upon the appellate court determination of the rights or duties of a party who timely filed a notice.

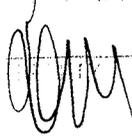
(j) Assistance to Defendant in Criminal Case. The trial court clerk shall, if requested by a defendant in a criminal case in open court or in writing, supply a notice of appeal form, a notice for discretionary review form, or a form for a motion for order of indigency, and file the forms upon completion by the defendant.

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COURT OF APPEALS

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STATE OF WASHINGTON

BY _____



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

STATE OF WASHINGTON,

Appellant,

vs.

JUSTIN LEE JOHNSTON,

Respondent.

) Court of Appeals No. 34422-0-II
) Cowlitz County No. 05-8-00436-6
)

) AFFIDAVIT OF MAILING
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LISA E. TABBUT, being sworn on oath, states that on the 27th day of November 2006, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. First Avenue
Kelso, WA 98611

And

Justin L. Johnston
2769 Maryland
Longview, WA 98632

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT

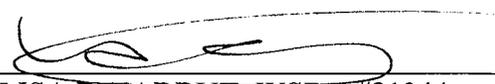
ATTORNEY AT LAW

1402 Broadway • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 423-7499

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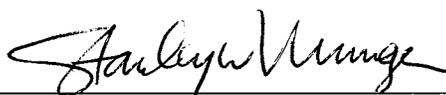
- 5 (1) RESPONDENT'S BRIEF
6 (2) AFFIDAVIT OF MAILING
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8 Dated this 27th day of November 2006.

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11 LISA E. TABBUT, WSBA #21344
12 Attorney for Appellant

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14 SUBSCRIBED AND SWORN to before me this 5th day of August 2005.



26 
27 Stanley W. Munger
28 Notary Public in and for the
29 State of Washington
30 Residing at: Longview, WA 98632
31 My commission expires:

32 *May 24, 2008*

33 AFFIDAVIT OF MAILING - 2 -

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LISA E. TABBUT
ATTORNEY AT LAW

1402 Broadway • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 423-7499