

Original

No. 36048-9-II

07 JUL 98 AM 9:18

STATE OF WASHINGTON  
BY Om

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON

V.

ERIK PETTERSON

---

REPLY BRIEF OF APPELLANT

---

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton, WA 98337  
(360) 792-9345

**ORIGINAL**

**TABLE OF CONTENTS**

A. Argument in Reply.....1

    1. The October 4, 2005 order was not the result of a clerical error.....1

    2. The trial court erroneously concluded that the Order was void..6

B. Conclusion.....6

**TABLE OF AUTHORITIES**

**Cases**

Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 917 P.2d 100 (1996) .....3  
State v. Alvarez, 128 Wn.2d 1, 24, 904 P.2d 754 (1995) .....2  
State v. Hescok, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999) .....1  
State v. Priest, 100 Wn.App. 451, 997 P.2d 452 (2000).....2

A. Argument in Reply

**1. The October 4, 2005 order was not the result of a clerical error.**

The State argues for the first time on appeal that the October 4, 2005 Order (hereinafter "Order") was a clerical error within the meaning of CrR 7.8(a). The State correctly points out that clerical mistakes may be corrected at any time. But the language of the Order does not qualify as a clerical mistake. It was a mistake pursuant to CrR 7.8(b)(1) and the motion to correct the mistake was not timely.

Generally, oral pronouncements are not findings of fact. State v. Hescoek, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, the court's oral opinion is "no more than a verbal expression of [its] informal opinion at that time necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. Hescoek at 606. The Court of Appeals quoted approvingly from Justice (now Chief Justice) Alexander's dissent in State v. Alvarez for this proposition:

But how is the appellate court to know when a failure to find is an oversight, and when it accurately represents the judge's view of the evidence at the time of decision? The entry of findings and conclusions is a considered and formal judicial act vastly different from the informal oral opinion judges give at the end of a case. The prosecutor, who normally prepares the findings, has time to do a thoughtful job, and the court has time to consider whether these are the findings it indeed wishes to make. Under such circumstances, it is inappropriate for the

appellate court to assume that some mere "trial error" has occurred.

Hescock, footnote 4, quoting State v. Alvarez, 128 Wn.2d 1, 24, 904 P.2d 754 (1995) (Justice Alexander, dissenting).

The State relies on State v. Priest, 100 Wn.App. 451, 997 P.2d 452 (2000) to support its argument that the Order is a clerical mistake. Priest is easily distinguishable. In Priest, the trial court signed a preprinted Judgment and Sentence (J&S) for Taking a Motor Vehicle Without the Owner's Permission. As is common, the J&S contains many paragraphs that apply in some situations, but not others. In Mr. Priest's case, the paragraph regarding sex offender registration was not crossed out due to an oversight. The Court of Appeals reprimanded the parties for wasting precious appellate resources arguing over an issue that was uncontested and could be easily corrected by bringing the issue to the attention of the trial court.

Mr. Petterson's situation is different from Mr. Priest's situation. In Mr. Petterson's case, the pre-printed language of the order said that "community custody is imposed for the remainder of the defendant's life in accordance with RCW 9.94A.712." Someone crossed out that language and made a point of replacing the preprinted language with the word "terminated." There is a significant difference between inadvertently

forgetting to cross out an inapplicable paragraph and intentionally crossing out preprinted language in order to replace it with different language.

The State also argues that the Order is a clerical mistake because the Order does not embody the trial court's intention, as expressed in the record. The State points to Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 917 P.2d 100 (1996), a civil case that was analyzed under CR 60(a). CR 60(a) is nearly identical language to CrR 7.8(a) and is analyzed the same way. In Presidential Estates the Court distinguished between clerical errors and judicial errors. An error is clerical when it merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment. Otherwise the error is judicial and not governed by CrR 7.8(a). Presidential Estates at 326. The court's intent must be clearly "expressed in the record at trial." Presidential Estates at 326.

The problem with the State's theory is that the transcript from October 4, 2005 does not express the intent of the Court. It expresses the intent of the Department of Corrections (DOC). Debra Walsh, the Community Corrections Officer, made the request "to terminate – he has completed successfully the SSOSA, and that he continues on with the supervision with the Department of Personnel [sic] – Corrections." CP 53.

The transcript also reflects Mr. Petterson's understanding of what was happening. He said, "It terminates the SSOSA, but does impose community custody." CP 54.

Noticeably absent from the record, however, is the *Court's* intention. When the Court asked what orders needed to be entered, CCO Walsh answered, "The completion of the SSOSA." CP 53. Later, the Court congratulated Mr. Petterson, saying, "You've completed the program and [I] hope you continue on." CP 54. While it is possible the Court intended to grant the DOC request and impose a lifetime of community custody, it is equally possible that the Court found that he had "completed the program," that he had reached the "completion of the SSOSA," and that he should be terminated from all future obligations, including community custody. As was the case in Presidential Estates, the intent of the court is not clearly "expressed in the record at trial." Presidential Estates at 326. As the Presidential Estates case illustrates, neither trial courts nor appellate courts are permitted later to divine the unexpressed intent of the trial court from the time of the original hearing. The error is judicial, not clerical, and cannot be corrected pursuant to CrR 7.8(a).

It is worth noting that the trial court in Mr. Petterson's case, when correcting the Order over one year later, did not treat the mistake as a

clerical error. CrR 7.8(b) contains a sentence that does not exist in CrR 7.8(a): “A motion under section (b) does not affect the finality of the judgment or suspend its operation.” On December 21, 2006, when the validity of the Order was being addressed, Mr. Petterson’s counsel argued based upon this sentence that “an erroneous judgment remains in full force and effect until it is corrected.” RP 5 (December 21, 2006). The trial court agreed and concluded, “Nonetheless, it appears to me that [defense counsel] Mr. Weaver is correct, and under these circumstances that we’re faced with CrR 7.8 controls Judge Olsen’s order is presumed facially valid until shown otherwise.” RP 11 (December 21, 2006).

The issue of whether Mr. Petterson was on community custody during the period from October 4, 2005 to March 9, 2007 came up again on March 9, 2007. Defense counsel again pointed to CrR 7.8(b) and argued that the Order was in effect until modified. The Court responded, “And that is the Court’s understanding as well, so community custody resumes effective today.” RP 10 (March 9, 2007).

The State did not argue in the trial court that the Order was a clerical mistake. Had they done so, it would have permitted them to argue that the erroneous language of the Order should be ignored and Mr. Petterson should be sanctioned for not complying with his community custody. Instead, the State argued that the Order was void pursuant to CrR

7.8(b)(4). The State should be precluded from making an argument for the first time on appeal that is not supported by the record and that was implicitly rejected by the trial court.

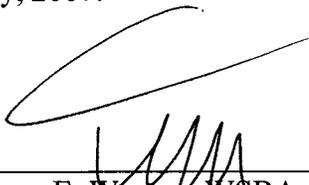
**2. The trial court erroneously concluded that the Order was void.**

The State argues that the trial court was without authority to terminate Mr. Petterson from community custody prior to its expiration. This issue was adequately briefed in Mr. Petterson's Brief of Appellant and it is unnecessary to repeat those arguments here. It is worth noting, however, that the State concedes that, if the Order is a mistake pursuant to CrR 7.8(b)(1), then the motion was not timely and the March 9, 2007 order must be vacated. See Brief of Respondent, 10.

**B. Conclusion**

The Order of March 9, 2007 should be vacated and the Order of October 4, 2005 reinstated.

DATED this 27<sup>th</sup> day of July, 2007.

  
\_\_\_\_\_  
Thomas E. Weaver, WSBA #22488  
Attorney for Defendant

COURT OF APPEALS  
DIVISION II  
07 JUL 2007 11:09:18  
STATE OF WASHINGTON  
BY Chum  
DEPUTY

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

STATE OF WASHINGTON, ) Case No.: 01-1-01509-3  
Respondent, ) Court of Appeals No.: 36048-9-II  
vs. ) AFFIDAVIT OF SERVICE  
ERIK PETTERSON, )  
Defendant. )

STATE OF WASHINGTON )  
COUNTY OF KITSAP )

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,  
and competent to be a witness.

On July 27, 2007, I sent an original and a copy, postage prepaid, of the REPLY BRIEF  
OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway,  
Suite 300, Tacoma, WA 98402.

*[Handwritten signature]*

1 On July 27, 2007, I sent a copy, postage prepaid, of the REPLY BRIEF OF  
2 APPELLANT, to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port  
3 Orchard, WA 98366-4683.

4 On July 27, 2007, I sent a copy, postage prepaid, of the REPLY BRIEF OF  
5 APPELLANT to Mr. Erik Petterson, 27470 Anchor Place N.W., Poulsbo, WA 98370.

6 Dated this 27<sup>th</sup> day of July, 2007.



7  
8 Thomas E. Weaver  
9 WSBA #22488  
10 Attorney for Defendant

11 SUBSCRIBED AND SWORN to before me this 27<sup>th</sup> day of July, 2007.



12  
13 Christy A. McAdoo  
14 NOTARY PUBLIC in and for  
15 the State of Washington.  
16 My commission expires: 07/31/2010