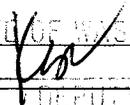


FILED
COURT OF APPEALS
DIVISION II

NO. 364409

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STATE OF WASHINGTON

BY  DEPUTY

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

MARK VANNAUSDLE, Appellant,

v.

PIERCE COUNTY, Respondent.

RESPONDENT'S OPENING BRIEF

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ORIGINAL

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does this Court lack appellate jurisdiction because plaintiff has appealed a memorandum opinion that was never entered as an order of dismissal and has not appealed the order denying his motion for reconsideration? (Assignments 1-4)

2. Is in personam jurisdiction absent where plaintiff never attempts to personally serve defendant except by mail? (Assignments 1-4)

3. Did plaintiff make a Public Records Act (hereinafter "PRA") request when he wrote his appointed Department of Assigned Counsel (hereinafter "DAC") attorney demanding criminal defense records be provided to him at no expense? (Assignment 1)

4. Does the prosecuting attorney violate the PRA when it does not produce its work product? (Assignment 2)

5. Was it error in the instant case for the Superior Court not to perform an in camera review of the requested documents? (Assignment 3)

6. Where a complaint asserts a claim against an individual who is not named as a defendant therein, never personally served, and the claim does not state a cause of action, is dismissal proper? (Assignment 4)

II. STATEMENT OF THE CASE

After plaintiff Mark Vannausdle shot a taxi driver who tried to escape his attempt to steal the taxi and place its driver in its trunk, plaintiff

was arrested by the Washington State Patrol and charged by the State with first degree assault, first degree robbery, and attempted first degree kidnapping. CP 430-31. Plaintiff thereafter pleaded guilty to the first two counts and was sentenced to 240 months in prison. CP 431-33. As part of his pro se appeal of those criminal convictions, plaintiff sought to compel production under the Public Records Act (hereinafter "PRA") of documents from various Pierce County agencies -- including the Department of Assigned Counsel (hereinafter "DAC"). CP 425. However, that motion was dismissed because such relief required plaintiff first to "file a separate complaint or petition against the agencies before he can obtain judicial review of the agencies' actions." CP 427.

On February 2, 2007, plaintiff filed but did not serve a "Verified Complaint for Public Disclosure Act Violations" against Pierce County's DAC, Prosecuting Attorney's Office, and another County agency. CP 263. Instead, plaintiff thereafter apparently mailed these agencies -- among other things -- a copy of a different and shorter "Verified Complaint" dated "March 4, 2007." CP 346. That new complaint, in pertinent part, claimed that in 2004 and 2005 plaintiff sent three PRA requests to the DAC but supposedly had received no response, CP 347-349, as well as three similar requests to the Prosecutor's Office but supposedly received inadequate responses. CP 348-49. Though the new complaint included a

"cause of action" against his DAC attorney Richard Whitehead asking the "court to rule" so as to "aid Mr. Vannausdle in his disbarment action pending against Whitehad [sic]," CP 350, 353, it also stated it was brought expressly pursuant to the "Public Disclosure Act" and Whitehead was nowhere named as a defendant therein nor either served or mailed a copy. CP 346. See also RCW 42.56.550 (formerly RCW 42.17.340) (authorizing suits only "against an agency"); RCW 42.56.520 (imposing duty of a response to public record request only upon "agencies" and not individuals); Yakima Newspapers v. Yakima, 77 Wn.App. 319, 329, 890 P.2d 544 (1995) (refusing any penalty when "an individual and not the City opposed" disclosure). Hence, the County's April 6, 2007, answer asserted "SERVICE OF PROCESS" as its first affirmative defense. CP 396.

On April 27, 2007, a hearing was held on plaintiff's motion to show cause that had been filed back in September 8, 2006, but never noted for hearing. CP 1, 414; 4/27/07 RP. After oral argument, the Superior Court on May 10, 2007, issued a memorandum opinion "dismissing [Vannausdle's] action" and stated therein "I will enter an Order of Dismissal within a week or so to allow either side to comment on my decision." CP 755 - 757. However, before the Court did so Vannausdle on May 21, 2007, filed a motion for reconsideration, see CP 601, and before the Court had ruled on reconsideration, plaintiff, on June 11, 2007, filed a notice of

appeal of the memorandum decision without attaching it or any other order. CP 642. On June 15, 2007, the Court entered an order denying reconsideration, CP 758, which plaintiff has not appealed.

III. ARGUMENT

Attempting to impose order on the chaos of Vannausdle's appellate brief, it appears plaintiff contests only the denial of PRA claims over the responses of Pierce County's DAC and Prosecuting Attorney's Office to certain requests to those agencies, Pet. Br. 1, 3-4, 9-15, 21-29, the alleged failure of the Superior Court to conduct an in camera review, id. at 1-4, 15-21, and failure to find his DAC attorney improperly refused requests he admits were not controlled by the PRA. Id. at 3, 5, 42-48.

Plaintiff however also makes sweeping assignments of error over the lower court proceedings but includes no supporting citation to the record. Under RAP 10.3(a)(5), "the brief of the appellant should contain a fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." Mr. Vannausdle's brief makes sweeping generalizations about the documents he received in response to his various PRA requests, claiming improper redactions, but does not refer to the record in order to identify any factual statements nor specify what errors occurred. Pet. Br. 21.

Though plaintiff also lumps together other alleged errors or claims of misconduct such as a supposed conspiracy to interfere with his mail, id. at 2, 5, 31-42, such not only also have no cited factual or legal basis as required by RAP 10.3(a)(5), but do not appear to have been the subject of any order nor to have effected the final disposition of the case. Because a party need not answer such sweeping generalizations where plaintiff does not identify the errors nor brief them, these other unappealed issues will not be addressed below. See e.g. In re F.D. Processing, Inc., 119 Wn.2d 452, 456, 832 P.2d 1303 (1992) (This court generally does not engage in conjectural resolution of issues present, but not briefed.); US West Communications, Inc. v. Utils. & Transp. Comm'n, 134 Wn.2d 74, 112, 949 P.2d 1337 (1997) (Court will "not allow" an appellant "to incorporate by reference parts of its trial brief" but will "hold that [appellant] has abandoned this issue on appeal."); McNeil v. Powers, 123 Wn.App. 577, 591, 97 P.3d 760 (2004) ("The issues relying on incorporated briefing are considered abandoned."); Holland v. City of Tacoma, 90 Wn.App. 533, 538, 954 P.2d 290 (1998) ("Instead of making a reasoned argument, Holland simply incorporates his trial briefs by reference" but "trial court briefs cannot be incorporated into appellate briefs by reference" and therefore the Court "holds that Holland has abandoned the issues for which he at-

tempted to incorporate arguments by reference to trial briefs or otherwise.")

A. NO JURISDICTION EXISTS OVER APPEAL OR DEFENDANT

1. PLAINTIFF'S APPEAL IS UNTIMELY AND APPELLATE JURISDICTION IS ABSENT

The Rules of Appellate Procedure provide in pertinent part that "a party may appeal from only" a "final judgment" RAP 2.2. As a matter of law a "memorandum is not a final disposition of its subject matter by the trial court" nor "an order in the cause" and therefore the "time within which an appeal must be perfected is computed from the date of the final order or judgment of the court, and not from the date of its memorandum decision." Dep't of Labor & Indus. v. Kennewick, 99 Wn.2d 225, 229, 661 P.2d 133 (1983) (quoting Chandler v. Doran Co., 44 Wn.2d 396, 400, 267 P.2d 907 (1954)). Here, the "final disposition of its subject matter by the trial court" was not the Superior Court's May 10, 2007, memorandum opinion but its June 15, 2007, denial of plaintiff's motion for reconsideration. CP 758. See also Schoening v. Grays Harbor Community Hospital, 40 Wn.App. 331, 333 n. 1, 698 P.2d 593 (1985) (because the "memorandum decision of the trial court was not a final judgment," the time to file a notice of appeal ran from the entry of the order on reconsideration).

Here, the actual notice of appeal filed does not concern a final order,¹ while the actual final order in the case has not been appealed. Rather, under RAP 5.2, any notice of appeal had to be filed within "30 days after entry" of the final order of June 15, 2007, denying reconsideration. Accordingly, plaintiff's appeal is untimely, this Court lacks appellate jurisdiction, and this appeal should be dismissed on that ground alone.

**2. PROPER SERVICE WAS NEVER ATTEMPTED
AND PERSONAL JURISDICTION NEVER OBTAINED**

Plaintiff asserts he obtained personal jurisdiction over Pierce County simply by mailing his complaint. See CP 29-41. However, though plaintiff asked for and received permission to serve the DAC, Prosecutor's Office, and LESA by mail, see CP 695, such are merely departments of Pierce County that have no capacity to be sued individually. See Foothills Dev. Co. v. Clark County Bd. of County Commissioners, 46 Wn.App. 369, 377 (1986) (Board of County Commissioners properly dismissed because it "is not a separate entity that has the capacity to be sued"); Wright v. City of Las Vegas, 395 F.Supp.2d 789, 794 (D. Iowa 2005) ("political subdivisions may be sued; departments of political sub-

¹ Indeed, even as to his attempt to "appeal" the memorandum opinion, plaintiff failed to attach a copy to his notice of appeal as required by RAP 5.3(a). CP 642.

divisions may not"). Hence, plaintiff has never served the only actual defendant -- i.e., Pierce County -- which requires service on the Auditor. See RCW 4.28.080(1). Accordingly, the action was never properly initiated, and the complaint was properly dismissed for lack of service. See Davidheiser v. Pierce County, 92 Wn.App. 146, 154, 960 P.2d 998 (1998) (service on agency other than the County's Auditor requires dismissal).

As to Vannausdle's DAC attorney Richard Whitehead, plaintiff not only did not even seek to obtain an order allowing service by mail but never actually mailed the complaint to him. CP 695. Appellant's supposed claims of attorney misconduct require personal service of process on the defendant. Under RCW 4.28.080(15) personal service means service made to a "defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein. If unable to do so, the plaintiff must leave a copy at the defendant's usual mailing address with a person of suitable age and discretion" However, the statute notes that, "usual mailing address" shall not include a "the person's place of employment." RCW 4.28.080(16).

Simply including Richard Whitehead's name in the complaint was not "service," and the court's order of service by publication under CR 4 did not include DAC attorney Whitehead in any case. CP 695. Accord-

ingly, none of the defendants received service of process, and the Court lacks jurisdiction over them.

B. PLAINTIFF HAD NO CLAIM UNDER THE PRA

1. PRA CLAIM FOR DAC RECORDS WAS PROPERLY DISMISSED

Plaintiff alleges in his brief that he was never given criminal defense records that were in the control of his DAC attorney Whitehead as he requested in October of 2005. Pet. Br. 10, 26. However, plaintiff's "PRA Request" to the DAC neither sought "public records" nor was a valid request.

a. DAC "PRA Request" Did Not Seek Public Records

Appellant's "PRA Request" does not fall under the Public Records Act because the request did not seek "Public Records." Our Courts have made clear that the PRA "only applies when public records have been requested," and RCW 42.17.020(41) expressly defines a "public record" as a writing "containing information relating to the conduct of government or the performance of any governmental or proprietary function" Bonamy v. City of Seattle, 92 Wn.App. 403, 408-09, 960 P. 2d 447 (1998). Though DAC is a "public agency," any request for records concerning its criminal defense against the state does not involve "public records" as required by the PRA because its documents do not relate "to the conduct of

government or the performance of any governmental or proprietary function" but as a matter of law relate to conduct adverse to the government.

As a matter of law Courts recognize that "a defense lawyer's actions [are] deemed private. Even though they are employed by the county and act within the scope of their duty as a public defender," when "doing a defense lawyer's primary job; then, the public defender does 'not act on behalf of the State; he is the State's adversary.'" Brentwood Academy v. Tennessee Secondary School, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (citing Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)). In Polk County v. Dodson, 454 U.S. at 318-319, the court explained that our "system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. The defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" Hence, criminal defense records of the DAC are not "public records" and not subject to the PRA.

b. Request to the DAC Was Invalid

Even if the law was to change and the PRA was to apply to the DAC's criminal defense records, appellant's two October 6, 2005, requests to the DAC would have been invalid and therefore not enforceable. Plaintiff's requests expressly demanded that the records be produced "at your

expense" even though appellant by that time knew the County required costs of reproduction and of mailing. CP 39, 721. RCW 42.56.120 expressly authorizes a "reasonable charge . . . for providing copies of public records," and the Pierce County Code expressly provides that its departments "shall . . . charge a fee" for copying. PCC 2.04.070(A). A request for records which makes clear the citizen will not pay for copies is an invalid request, and as a matter of law the Supreme Court made clear in Hangartner v. City of Seattle, 151 Wn.2d 439, 449, 890 P.3d 26 (2004) that "[w]hen a request is invalid, the agency is excused from complying with it." See Id (PRA claim dismissed because city was not required to respond to request that failed to describe "identifiable records"). See also Bonamy v. City of Seattle, 92 Wn.App. 403, 412, 960 P. 2d 447 (1998) (summary judgment granted because "city was not required to comply" with or even respond to an improper PRA request).

2. PRA CLAIM FOR PROSECUTOR'S RECORD WAS PROPERLY DISMISSED

The only specific documents that plaintiff's brief claims he was improperly denied were 911 dispatch tapes/transcripts that were in the control of the Pierce County Prosecuting Attorney's Office. Pet. Brief 26. However, these documents were properly withheld by the Prosecutor be-

cause the items requested were exempt under RCW 42.17.310(d), (e), and the work product doctrine, CR 26.

The record is undisputed that the requested records were gathered by the Prosecutor's Office for the purposes of litigation. CP at 67. Pursuant to RCW 42.56.290 (previously RCW 42.17.310(1)(j)), the PRA exempts from disclosure those records that are not "available to another party under the rules of pretrial discovery for causes pending in the superior courts." Hence, our Supreme Court holds: "Any materials that would not be discoverable in the context of a controversy under the civil rules of pretrial discovery are also exempt from public disclosure under RCW 42.56.290." Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 731, 174 P.3d 60 (2007) (citing Guillen v. Pierce County, 144 Wn.2d 696, 713, 31 P.3d 628 (2001), rev'd on other grounds, Pierce County v. Guillen, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003)); Limstrom v. Ladenburg, 136 Wn.2d 595, 605, 963 P.2d 869 (1998). Under the rules of pretrial discovery it is well established that documents "prepared in anticipation of litigation . . . by or for another party or by or for that other party's representative (including his attorney . . .)" are not discoverable. CR 26(b)(4); Dever v. Fowler, 63 Wn.App. 35, 47, 816 P.2d 1237 (1991) (prosecutor's files protected from civil discovery). Our Courts therefore hold the exemption of RCW 42.56.290 "incorporates the work product doctrine" and "is trig-

gered prior to the official initiation of litigation" where litigation is "reasonably anticipated." Dawson v. Daly, 120 Wn.2d 782, 791, 845 P.2d 995 (1993). Soter v. Cowles Publ'g Co. further explains that "because records prepared by attorney's investigators "are protected under CR 26's work product protection or its incorporation of attorney-client privilege, then the documents are not subject to public disclosure" and this "protection is triggered 'prior to the official initiation of litigation and extends beyond the official termination of litigation.'" 162 Wn.2d at 734.

Because the transcript requested from the Prosecutor's Office by appellant is privileged from disclosure by having been either generated or gathered by or for the Prosecutor for purposes of determining whether the State of Washington should file criminal charges, CP at 67, it was exempt from disclosure from that office as a matter of law.

3. **NO CLAIM FOR ALLEGED FAILURE TO CONDUCT AN IN CAMERA REVIEW**

Appellant's brief alleges that the reason the trial court denied his request for an in camera review of the exempt documents was because the court was biased against him. Pet. Br. 17. He also alleges that the evidence was insufficient for the trial court to make such a conclusion. However, such allegations not only lack any supporting evidence, but as a matter of law any such ruling would have been proper. Further, nowhere in

the record does it state that the trial judge did not perform an in camera review of the documents.

First, appellant presents no evidence the Superior Court failed to conduct an in camera review and simply assumes such a review did not occur. More importantly, the court had no duty to conduct such a review. In Yakima Newspapers, Inc. v. City of Yakima, 77 Wn.App. 319, 890 P.2d 544 (1995), the court held no error occurred when a trial court denied plaintiff's request to conduct an in camera review. The court held that a decision determining whether an in camera review of documents is necessary is reviewed only for abuse of discretion. Overlake Fund v. City of Bellevue, 60 Wn.App. 787, 796-97, 810 P.2d 507 (1991). In Harris v. Pierce County, 84 Wn.App. 222, 235-36, 928 P.2d 1111 (1996), the court expressly held that no in camera review is required where it can "ascertain that the attorney-client privilege and the work product rule applied by viewing the parties' memoranda regarding the motion to compel and their supporting affidavits."

Here, Mr. Vannausdle fails to offer any specific reason why an in camera review of the documents was necessary. The decision to conduct such a review was at the trial court's discretion. The court could properly rely on the supporting affidavits provided by Pierce County. This documentation would have allowed the trial court to ascertain that the attorney-

client privilege and the work product rule applied to the documents. Pierce County provided lists that clearly detailed the content of the withheld documents and their reasons for exemption. CP at 422. This provided sufficient evidence for the trial judge to make his conclusion.

4. **PRISONER VANNAUSDLE HAS NO PRA CLAIM**

Plaintiff is a convicted felon, In re Pers. Restraint of Matthews, 128 Wn.App. 267, 270, 115 P.3d 1043 (2005), and -- as shown by the appellate record in this case -- his PRA suit has placed great burdens on the judicial system. The PRA does not and should not apply to benefit convicted felons.

The PRA was enacted because "full access to information concerning the conduct of government" is "a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). However, incarcerated felons as a matter of state law are barred from participating in the "governance of a free society" -- they cannot serve as voters, candidates, or jurors. RCW 2.36.070(5); RCW 9.92.120; RCW 42.04.020. Hence, there is a "salient difference between persons who are members of the public community and prison inmates in that the latter, by law, are prohibited from exercising the rights and privileges they enjoyed as free members of society." Mithrandir v. Dept. of Corr., 164 Mich.App. 143, 416 N.W.2d 352, 354 (1987). Indeed, other statutes such as the Ad-

ministrative Procedure Act have been held not to apply to incarcerated felons because of the limited rights of such parties. See Dawson v. Hearing Comm., 92 Wn.2d 391, 396 (1979). The same is true for the PRA.

C. NO DECLARATORY ACTION AGAINST DAC ATTORNEY

Finally, plaintiff's complaint makes allegations of attorney misconduct against his DAC attorney Richard Whitehead, CP 350, and seeks a declaratory ruling to "aid Mr. Vannausdle in his disbarment action pending against Whitehad [sic]" CP 353. However, even aside from the absence of jurisdiction over this DAC attorney, a declaratory judgment is an inappropriate procedure in this case.

The Uniform Declaratory Judgments Act, codified at RCW 7.24, can apply only in two instances. First, a court of record may declare a person's rights and status under a written instrument, a statute, a municipal ordinance, or a contract either before or after it has been breached. RCW 7.24.030; City of Sequim v. Malkasian, 119 Wn.App. 654, 79 P.3d 24 (2003). Second, a court has the power to grant declaratory relief under RCW 7.24.050, which may be given in any proceeding "in which a judgment or decree will terminate the controversy or remove an uncertainty." RCW 7.24.050. See also RCW 7.24.060. A declaratory judgment has the same force and effect as a final judgment. RCW 7.24.010. Hence, a court may refuse to render or enter a declaratory judgment or decree where such

judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. RCW 7.24.060.

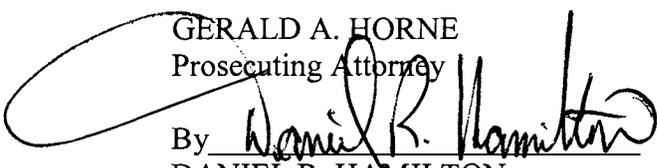
The present case does not involve either of the situations envisioned or encompassed by the Uniform Declaratory Judgments Act. The separate issue of "disbarment" does not involve the interpretation of an instrument, statute, municipal ordinance, or contract. Further, a declaratory judgment on Mr. Whitehead's alleged misconduct would not terminate this PRA controversy or eliminate any uncertainty giving rise to this proceeding. Indeed, plaintiff's allegations of attorney misconduct are totally unrelated to the present controversy of whether the Pierce County Prosecutors Office and DAC somehow violated the PRA. Thus, plaintiff has no jurisdiction under the Uniform Declaratory Judgments Act and a declaratory judgment on Mr. Whitehead would be improper.

IV. CONCLUSION

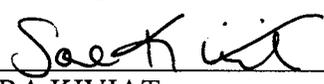
For the above stated reasons, Pierce County respectfully requests the Court affirm the decision below.

DATED: 9/8/08

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing RESPONDENT'S OPENING BRIEF was delivered this 8th day of September, 2008, to the United States Postal Service, Certified Mail, Return Receipt Requested, postage prepaid, with appropriate instruction to forward the same to the following:

Mark Vannausdle / 845800
Clallam Bay Correction Center
1830 Eagle Crest Way, CH04
Clallam Bay, WA 98326-9724

Christina M. Smith
CHRISTINA M. SMITH

FILED
COURT OF APPEALS
DIVISION II
03 SEP -9 AM 2:01
STATE OF WASHINGTON
BY [Signature]
DEPUTY