



Washington State Court of Appeals
Division Two

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October 16, 2008

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CASE #: 37548-6-II

State of Washington, Respondent v. Thomas Ludvigsen, Appellant

Counsel:

The action indicated below was taken in the above-entitled case.

A RULING SIGNED BY COMMISSIONER SCHMIDT:

Appellant's motion to take judicial notice is deemed a motion to file a supplemental brief. That motion is granted. The motion will also be considered as the supplemental brief. The State's brief is due 60 days from the date of this ruling.

Very truly yours,

David C. Ponzoha
Court Clerk

10/9/08
Motion to
take judicial
notice granted.
EJB/SLK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,)

Respondent,)

v.)

THOMAS E. LUDVIGSEN,)

Appellant.)

NO. 37548-6-II

MOTION TO TAKE
JUDICIAL NOTICE
OF COURT OF APPEALS
DECISION

03 OCT -7 AM 11:59
STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS
DIVISION II

A. IDENTITY OF MOVING PARTY

The appellant, Thomas Ludvigsen, through his attorney, Elaine L. Winters, requests the relief designated in Part B below.

B. STATEMENT OF RELIEF SOUGHT

Mr. Ludvigsen requests that this Court take judicial notice of the Court of Appeals decision in State v. Thomas E. Ludvigsen, No. 28087-6-II, November 22, 2002.

C. FACTS RELEVANT TO MOTION

Elaine Winters, attorney for the appellant, states:

1. Thomas Ludvigsen is appealing his Grays Harbor County Superior Court conviction for possession of stolen property in the first degree. Mr. Ludvigsen's sentence is not stayed pending appeal.

2. The Washington Appellate Project was appointed to represent Mr. Ludvigsen, and I am the attorney assigned to his case. I have prepared the brief of appellant and raised two issues – the sufficiency of the evidence to convict Mr. Ludvigsen and the inclusion of a washed-out conviction in computing his offender score. The conviction at issue is a 1982 conviction for Violation of the Uniform Controlled Substances Act (VUCSA).

3. In 2002, Mr. Ludvigsen appealed from a conviction for vehicular assault, and this Court ruled the 1982 VUCSA conviction washed out and should not have been included in computing his offender score for that offense. State v. Thomas E. Ludvigsen, No. 28087-6-II, November 22, 2002. This Court reviewed the facts and determined his last day of confinement for that offense was more than five years before his next felony conviction. Id.

4. I am requesting this Court take judicial notice of its prior opinion in determining if the same conviction “washed out” for purposes of determining his offender score for the current appeal. As explained in the Brief of Appellant, the relevant portions of the SRA have not changed since this Court’s 2002 opinion.

D. ARGUMENT

THIS COURT SHOULD TAKE JUDICIAL NOTICE OF ITS
UNPUBLISHED DECISION ADDRESSING THE SAME PRIOR
CONVICTION

ER 201 requires a court to take judicial note of adjudicative facts when requested by a party and supplied with the necessary information. ER 201(d). Judicial notice may be taken on appellate review. ER 201(f).

Adjudicative facts are defined as those not subject to reasonable dispute because they are either “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b). Here, the Court of Appeals opinion contains facts that were fully litigated by the parties in the superior court, and are thus reliable.

Courts may take judicial notice of court records in the same case or in ancillary or supplemental proceedings. State v. Myers, 47 Wn.2d 842, 843-44, 209 P.2d 253 (1955) (proper for court to take judicial notice of file of insanity proceedings before the same court based upon same conduct); Swak v. Department of Labor & Industries, 47 Wn.2d 51, 53, 240 P.2d 560 (1952). In recent cases addressing judicial notice by an appellate court, the Washington Supreme Court explained an appellate

court cannot take judicial notice of “independent and separate judicial proceedings even though they are between the same parties.” Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (quoting In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003)). Thus, the Court did not take judicial notice of prior litigation where issues before the court in the present case were not litigated. Spokane Research, 155 Wn.2d at 98-99 (court would not take judicial notice of proceeding where intervener had dropped two issues and prosecuted them in current case);

An appellate court must also look to RAP 9.11 in determining if it should take judicial notice of another court action. Spokane Research, 150 Wn.2d at 98; B.T., 150 Wn.2d at 414. RAP 9.11 addresses the taking of additional evidence on appeal and grants this Court the discretion to direct additional evidence be taken if certain criteria are met.

The rule provides:

The appellate court may direct that additional evidence on the merits of the case be taken before the decision on a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party’s failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate

or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a). Ordinarily the appellate court orders the additional evidence be taken in the trial court. ER 9.11(b).

The RAP 9.11(a) criteria are met in this case. The additional facts and ruling found in this Court's prior opinion are needed to determine if the prior conviction should be included in computing Mr. Ludvigsen's offender score; this Court cannot adequately resolve the issues without those facts and they will thus probably change the outcome on appeal.

It is also equitable to excuse Mr. Ludvigsen's trial attorney from litigating this issue. The prosecutor's office prepared a Statement for the sentencing court which does not include the 1982 VUCSA in the list of Mr. Ludvigsen's prior convictions. CP 16-17. Thus, Mr. Ludvigsen's attorney had no notice the State intended to include a 1982 VUCSA in determining Mr. Ludvigsen's offender score. In face of the prosecutor's presentence statement and this Court's prior opinion, it is possible that the inclusion of the 1982 conviction was simply an oversight by the prosecutor's office that can be easily corrected at this level.

Mr. Ludvigsen is not entitled to court-appointed counsel for purposes of filing a post-judgment motion to correct his offender score, and his court-appointed attorney has already withdrawn from his case. State v. Robinson, 153 Wn.2d 689, 696, 107 P.3d 90 (2005). It would be more expensive for this Court to remand his case for a new sentencing hearing and appoint new counsel than simply decide the issue. As explained in the Brief of Appellant, the relevant portions of the law remain the same. The equities and judicial economy thus favor considering this Court's prior decision on the issue and deciding the issue in this Court.

The issue of whether Mr. Ludvigsen's 1982 VUCSA conviction "washed out" because he was crime-free in the community for five years before committing another felony was already decided by this Court. This Court should take judicial notice of its prior opinion.

E. CONCLUSION

For the reasons stated above, Thomas Ludvigsen requests this Court take judicial notice of its unpublished opinion State v. Thomas Ludvigsen, Court of Appeals No. 28087-6-II (November 22, 2002).

DATED this 6th day of October 2008.

Respectfully submitted,



Elaine L. Winters - WSBA #7780
Washington Appellate Project
Attorneys for Appellant

FILED
COURT OF APPEALS
DIVISION II

08 OCT -7 AM 11:59

STATE OF WASHINGTON

BY _____
DEPUTY

DECLARATION OF DOCUMENT FILING AND MAILING/DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed by US Mail in the **Court of Appeals – Division Two** under **Case No. 37548-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for respondent **Megan Valentine - Grays Harbor County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 6, 2008