

COURT OF APPEALS
DIVISION TWO

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NO. 38269-5-II

STATE OF WASH.

BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE DETENTION OF SHELDON MARTIN

STATE OF WASHINGTON,

Respondent,

v.

SHELDON MARTIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

THE TRIAL COURT'S REFUSAL TO COMPLY WITH
THE SUPREME COURT'S DIRECTIVE TO GRANT MR.
MARTIN'S MOTION TO DISMISS MUST BE
REVERSED.

Sheldon Martin won his case in the supreme court, and that Court directed the Thurston County Superior Court to "grant Sheldon Martin's motion to dismiss the State's petition." In re Detention of Martin, 163 Wn.2d 501, 516, 182 P.3d 951 (2008). But instead of granting Mr. Martin's motion to dismiss the case with prejudice, the trial court granted the State's motion to dismiss without prejudice.

In his opening brief, Mr. Martin argued that the trial court's refusal to dismiss with prejudice violated the law of the case doctrine. He also noted that Mr. Martin's motion to dismiss was essentially a CR 12(b)(6) motion, under which dismissal is always with prejudice. For instance, in Foss v. Department of Corrections, this Court reversed and dismissed with prejudice under CR 12(b)(6) because it concluded that "the teachers were without statutory authority to petition the superior court for review of the DOC's decision." 82 Wn. App. 355, 362, 367, 918 P.2d 521 (1996). Here, the supreme court held that the Thurston County prosecutor was

without statutory authority to petition for Mr. Martin's commitment. Martin, 163 Wn.2d at 516. As in Foss, then, this case should be dismissed with prejudice.

The cases the State cites in response are inapposite. In Lawrence v. Department of Health, the petitioning party voluntarily dismissed the case. 133 Wn. App. 665, 671, 679, 138 P.3d 124 (2006). It is well-settled that a voluntary dismissal is by default without prejudice. CR 41(a)(4). In State v. Vangerpen, the State moved to amend an information to add a missing element after resting its case, another circumstance warranting dismissal without prejudice.¹ 125 Wn.2d 782, 793, 888 P.2d 1177 (1995). And a pretrial dismissal for insufficient evidence in a criminal case is also without prejudice. State v. Knapstad, 107 Wn.2d 346, 357, 729 P.2d 48 (1986). This case does not involve any of these scenarios. Rather, like Foss, it involves an absence of statutory authority by the petitioning party. The case should be dismissed with prejudice.

The State mistakenly claims that the Clark County prosecutor has the authority that the Thurston County prosecutor

¹ In contrast, where the State moves to amend the information after resting its case because it charged the wrong crime to conform to the evidence, or charged the wrong alternative means of committing a crime, dismissal is by default with prejudice. State v. Dallas, 126 Wn.2d 324, 328, 892 P.2d 1082 (1995). This is so even though, contrary to the State's argument, there has not yet been an adjudication on the merits.

lacked. It attaches a recent amendment to RCW 71.09 that grants authority to a prosecuting attorney of a county in which a respondent has committed a recent overt act, as opposed to vesting such authority only in prosecutors of counties in which a sexually violent offense was committed. But Mr. Martin has committed no sexually violent offenses and no recent overt acts in Washington, so no Washington prosecuting attorney has the authority to petition for his commitment as an SVP – even under the new amendment.

The State has already conceded that Mr. Martin has committed no sexually violent offenses in Washington, but claims that Mr. Martin committed a recent overt act in Clark County. This is incorrect as a matter of law. Mr. Martin's Clark County offenses occurred in 1991, which is 18 years ago and 12 years before the SVP petition was filed. The Clark County acts are therefore not "recent." Our supreme court has held "in the SVP context that overt acts occurring up to five years before the petition's filing may be 'recent.'" In re Detention of Anderson, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 1956996 at 3 (No. 79111-2, Filed July 9, 2009) (emphasis added). The State did not petition for Mr. Martin's commitment within five years of the Clark County offenses;

accordingly, those offenses do not constitute "recent overt acts" for purposes of the SVP statute. Anderson at 3.

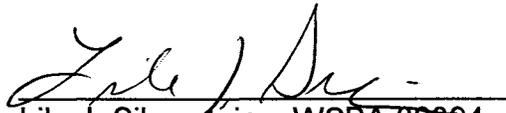
In sum, no prosecuting attorney in Washington has the authority to initiate SVP proceedings against Mr. Martin. For this reason, too, the State's petition must be dismissed with prejudice.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Martin respectfully requests that this Court reverse the trial court and remand for entry of an order dismissing the petition with prejudice.

DATED this 30th day of July, 2009.

Respectfully submitted,


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Attorneys for Appellant

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DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	NO. 38269-5-II
)	
v.)	
)	
SHELDON MARTIN,)	
)	
APPELLANT.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 30TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THIS **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MALCOLM ROSS ATTORNEY GENERAL OF WASHINGTON 800 5 TH AVE, SUITE 2000 SEATTLE, WA 98104-3188	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] SHELDON MARTIN SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388-0647	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JULY, 2009.

x 


STATE OF WASHINGTON
BY _____
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