

NO. 40939-9-II

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

JEFFREY R. MCKEE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellee.

RESPONDENT'S ANSWERING BRIEF

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I. ISSUE PRESENTED

Was Petitioner Jeffrey R. McKee's lawsuit properly dismissed where he failed to comply with the scheduling order of the court and failed to comply with explicit instructions from the superior court judge requiring him to file a motion on the merits by the trial date?

II. COUNTER STATEMENT OF THE CASE

Mr. McKee submitted a request for public records to the Department of Corrections (DOC) under the Public Records Act (PRA), pursuant to RCW 42.56, on December 7, 2006. CP 159. Mr. McKee was not satisfied with the response he received to his request and, thus, filed an action to compel disclosure of records and for award of penalties under RCW 42.56.550. Mr. McKee's lawsuit was filed on February 21, 2008. CP 309.

On August 21, 2009, Mr. McKee filed a motion with the Thurston County Superior Court asking that a scheduling order be set. CP 310. The court entered a case scheduling order setting the case for trial on December 18, 2009. *Id.* On December 22, 2009, the court entered a new scheduling order setting the case for trial on May 14, 2010. *Id.*

On April 30, 2010, the parties participated in a hearing on Plaintiff's motion for an order staying the case, pending the resolution

of issues about the shipping of his property, as Mr. McKee had been transferred to a new prison facility. *Id.* Prior to the hearing, Mr. McKee's motion to ship his property was made moot by the transfer of his property, thus Mr. McKee asked the court to convert his motion to a motion for continuance. CP 321-24.¹ At the hearing, Mr. McKee informed the court he would be filing a discovery motion. CP 310. The court informed Mr. McKee that he needed to file a motion on the merits, as the trial date was two weeks away. *Id.* Mr. McKee specifically stated he would file a motion for summary judgment. *Id.* The court informed Mr. McKee that a motion for summary judgment would not be timely because it "generally take[s] 28 days". *Id.* In order to accommodate moving the trial date, the court inquired of Mr. McKee if he would be willing to agree to waive his right to penalties for the duration of a continuance. *Id.* Mr. McKee refused. *Id.*

On May 12, 2010, Mr. McKee filed and served a motion for summary judgment and two motions to compel with noting dates of May 14, 2010. CP 128. Pursuant to the requirements of Civil Rule (CR) 56, Mr. McKee's motion for summary judgment was properly

¹ In his opening brief, Mr. McKee asserts that he was unable to proceed with his case because he did not have all of the discovery he needed. The record demonstrates that Mr. McKee made no attempts to address his discovery disputes between January 12, 2009 and the April 30, 2010 hearing. *See* Appellant's Supplemental Designation of Clerk's Papers, Defendant's Surreply to Plaintiff's Reply to Defendant's Response to Plaintiff's Motion to Stay Proceedings at Exhibit 2.

noted by the court for June 25, 2010. CP 310. Mr. McKee did not present a motion on the merits to be heard on the trial date of May 14, 2010.

In light of Mr. McKee's failure to comply with the court's verbal instruction during the April 30, 2010 hearing and the scheduling order, DOC filed a motion to strike the motion for summary judgment and moved to dismiss for want of prosecution. CP 309-348. The court granted DOC's motion and struck Mr. McKee's motion for summary judgment and dismissed Mr. McKee's case pursuant to CR 41(b).² Appellant's Brief at 14. Mr. McKee did not appeal the superior court's granting of DOC's motion to strike his untimely motion for summary judgment or his motions to compel. Mr. McKee appeals the dismissal of his action.

III. STANDARD OF REVIEW

Appellate review of a trial court ruling dismissing an action under CR 41(b) is for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002); see also *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995) (a court has the discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order). A court

² Mr. McKee does not appeal the superior court's granting of DOC's motion to strike his motion for summary judgment.

abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

IV. ARGUMENT

A. **Mr. McKee's Lawsuit Was Properly Dismissed Based On His Willful Refusal To Comply With Orders Of The Court**

Civil Rule 41(b) provides, in pertinent part:

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

Mr. McKee's case was properly dismissed, under CR 41(b), for his failure to comply with the court's order. In his briefing, Mr. McKee erroneously asserts that his case was dismissed under CR 41(b)(1). However, even considering the standard for dismissal under CR 41(b)(1), the dismissal was proper.

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1. Dismissal Under CR 41(b) Was Proper

Mr. McKee failed to comply with a court order and his case was properly dismissed under CR 41(b). Dismissal under CR 41(b) is an appropriate remedy where the record establishes that: (1) the party's refusal to obey a court order was willful or deliberate; (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial; and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 129, 89 P.3d 242 (2004). To enable the appellate court to meaningfully review the dismissal, the trial court must explicitly discuss each element on the record. *Will*, 121 Wn. App. at 133.

Where a party fails to comply with a court order and offers no "reasonable excuse or justification," we deem the failure willful. *Will*, 121 Wn. App. at 129, quoting *Rivers*, 145 Wn.2d at 686-87. Under this standard, Mr. McKee's violation of the court's order was willful. Here, the scheduling order entered by the superior court on December 22, 2009, set a trial date of May 14, 2010. Mr. McKee did not comply with this scheduling order.

Mr. McKee's action was filed under the Public Records Act in 2008. The Public Records Act, RCW 42.56, calls for the speedy resolution of actions challenging the non-disclosure of records. *Spokane*

Research & Defense Fund v. City of Spokane, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *rev'd on other grounds*, 155 Wn.2d 89 (2005). In accordance with this, the Public Records Act provides that a requestor can file a motion asking the Court to require the agency to show cause why it has not provided responsive records. RCW 42.56.550(1). A motion to show cause is a non-dispositive motion that can be heard on the court's motion calendar, with five days notice to the opposing party. Thurston County Local Court Rule 5(b)(2). Although other methods may be used, "[S]how cause hearings are the usual method of resolving litigation under [the Public Records Act]." *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

Mr. McKee knew, beginning on December 22, 2009, that his case was set for trial on May 14, 2010. In addition to this written order from the court, Mr. McKee was told, in certain terms at the hearing on April 30, 2010, that he was to file a motion on the merits to be heard on May 14, 2010. Appellant's Opening Brief at 13. Mr. McKee could have either timely filed a motion for summary judgment, with a noting date of May 14, 2010, or could have filed a motion for show cause, as late as May 7, 2010, with a noting date of May 14, 2010. Instead, Mr. McKee chose to file a motion for summary judgment, on May 12, 2010, with a noting date

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of May 14, 2010. CP 128. Mr. McKee's actions were deliberate and willful.

Although the court did not make an explicit finding that Mr. McKee's failure to follow the court's scheduling order substantially prejudiced the DOC's ability to prepare for trial, the records is clear that this is the case. DOC was unable to defend itself in an action for penalties under the Public Records Act as a result of Mr. McKee's actions. The Public Records Act does not have a specific remedy for an agency to demonstrate that it did not violate the Public Records Act, once an action has been filed under RCW 42.56.550, absent a motion by the plaintiff and order form the court. *See* RCW 42.56.550(1). Because Mr. McKee failed to file a timely brief on the merits, DOC was unable to defend itself. Additionally, DOC was placed in the tenuous position of potentially being liable for penalties for every day Mr. McKee let his case languish in the court. *See Sanders v. State*, 169 Wn.2d 827, 863-64, 240 P.3d 120 (2010). The record is clear that DOC was substantially prejudiced.

Finally, although the court did not make an explicit finding in the order granting the motion to dismiss, no lesser sanction was appropriate. At the scheduled trial date, May 14, 2010, Mr. McKee's case had been pending for over two years. Pursuant to the PRA, Mr. McKee could have resolved his case at any time by filing a motion for a show cause order.

RCW 42.56.550(1). Instead, Mr. McKee failed to pursue his action in a timely manner, to the detriment of DOC, who could have been liable for penalties for every day the case was pending in the courts. *See Sanders*, 169 Wn.2d at 863-64.

The court's instruction at the hearing on April 30, 2010, that Mr. McKee was to file a motion on the merits to be heard on May 14, 2010, was clear and unambiguous. Additionally, Mr. McKee was aware of the trial date for five months. Mr. McKee failed to meet his burden at trial to demonstrate a violation of the Public Records Act. He was appropriately denied an unfettered delay, and the additional accrual of penalties, by the dismissal of his case. No lesser sanction would have remedied the situation presented in the superior court and any lesser sanction would have potentially served to punish DOC by increasing the applicable penalty days.

In these circumstances, dismissal under CR 41(b) for failure to obey the superior court's order was appropriate and was not an abuse of discretion. The superior court's order of dismissal should be affirmed.

2. Dismissal Under CR 41(b)(1) Was Appropriate

Although DOC's dismissal motion was made pursuant to CR 41(b), the standards of CR 41(b)(1) were also met. Dismissal for lack of prosecution is mandatory under CR 41(b)(1) unless the case is noted for

trial before the motion to dismiss is heard. *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 167, 750 P.2d 1251 (1988). The converse also is true. That is, if the case is noted for trial before the hearing on a motion to dismiss for want of prosecution, the case may not be dismissed. *Id.* at 168-69.

Here, the trial date came and went without Mr. McKee presenting his trial on the merits.³ The motion for dismissal was filed and served by DOC on May 21, 2011 and was noted for hearing on June 4, 2010. Mr. McKee did not note his case for trial between May 21 and June 4, 2010. As such, dismissal for want of prosecution under CR 41(b)(1) was mandatory. The superior court's order of dismissal should be affirmed.

B. Mr. McKee Is Not Entitled To Attorneys Fees And Costs

Mr. McKee argues that he is entitled to attorney fees and costs pursuant to the Public Records Act and Rules of Appellate Procedure (RAP) 18.1. The attorney fees and costs section of the Public Records Act provides in pertinent part:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

³ Mr. McKee may argue that his filing of a motion for summary judgment, noted for after DOC's motion to dismiss, sufficed for the purposes of noting a trial date. However, Mr. McKee's motion for summary judgment was untimely and was ordered stricken from the record. Mr. McKee does not appeal this order.

RCW 42.56.550(4). However, Mr. McKee has not prevailed against DOC in an action in court seeking to inspect or copy a public record, under RCW 42.56.550. Even if he prevails on appeal, he will not have prevailed in an action in court seeking to inspect or copy a public record. Therefore, he is not entitled to statutory attorney fees and costs under the PRA.

Mr. McKee is similarly not entitled to recovery for attorney fees and costs on appeal under RAP 18.1. Pursuant to RAP 18.1(a) a party may be entitled to attorney fees if the applicable law grants him the right to recover on review. The PRA makes no mention of awarding of attorney fees and costs on review. Rather it refers to the awarding of attorney fees at the trial court level, fees to which Mr. McKee is not entitled. As a result, he is not entitled to attorney fees and costs for this appeal.

V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that Mr. McKee's appeal be denied and that the trial court's order be affirmed.

RESPECTFULLY SUBMITTED this 7th day of December, 2011.

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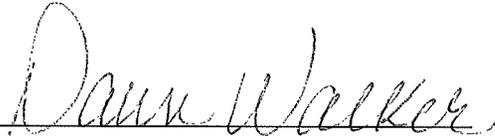
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