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DIVISION II
JUL 17 2006

No. 32972-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

State of Washington, Respondent

vs.

Sheldon Martin, Appellant

PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

Petitioner Sheldon Martin (hereafter Mr. Martin) asks the Supreme Court to accept review of the Court of Appeals decision terminating review, which is designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division II filed a published opinion in this matter on June 14, 2006. This decision affirmed the trial court's denial of Mr. Martin's motion to dismiss. A copy of the decision is in the Appendix at pages A-1 through 5.

C. ISSUES PRESENTED FOR REVIEW

The sole issue presented for appeal is whether the State of Washington may institute a civil commitment proceeding under RCW 71.09 in a county in which the Respondent has never been charged with or convicted of any offense.

D. STATEMENT OF THE CASE

On March 4, 2003, the State of Washington filed a petition in Thurston County Superior Court seeking to commit Mr. Sheldon Martin as a sexually violent predator (SVP) pursuant to Washington's SVP law, chapter 71.09 RCW. CP at 3-5. At the time the petition was filed, Mr.

Martin was finishing his 30-month sentence for a 1992 Clark County, WA conviction for Burglary in the Second Degree with sexual motivation and Indecent Exposure. CP at 4-5, 84. This 30-month sentence was run consecutively to Mr. Martin's 1992 Multnomah County, OR convictions for Kidnapping in the Second Degree and Attempted Sexual Abuse in the First Degree. CP at 4-5, 111-114.

The Clark County crimes were committed first in time in relation to the Oregon offenses; however, while awaiting sentencing on the Clark County crimes, Mr. Martin committed the Oregon offenses. RP at 5, 8 (October 29, 2004.) He was then convicted of and sentenced for the Oregon offenses after which he was extradited back to Clark County where he was sentenced for the Clark County crimes. Id.

On October 6, 2004, Mr. Martin filed a motion to dismiss the petition against him, framing the question presented as follows: "whether the State of Washington may institute a civil commitment proceeding under RCW 71.09 in a county in which the Respondent has never been charged with or convicted of any offense (and whose predicate sexually violent offenses are solely out-of-state offenses.)" CP at 69, 74. Mr. Martin argued that "[t]he petition against him must be dismissed because the State ha[d] not observed the statutory requirements listed in chapter 71.09 RCW[.]" CP at 74. Mr. Martin principally relied on RCW 71.09.030 in

support of his argument that the petition should be dismissed. RP at 5.

The State responded on October 13, 2004 stating, *inter alia*, the following:

The offense, which was the basis for Mr. Martin's incarceration at the time the Petition against him was filed, occurred in Clark County. However, that offense, Burglary in the Second Degree with Sexual Motivation, is not classified as a sexually violent offense under the definition provided in RCW 71.09.020(15). The portion of RCW 71.09.030 as set forth above refers to the sexually violent offense as the offense for which "the person was convicted or charged". It is to the prosecuting attorney of the county where the sexually violent offense occurred, then, that the matter is to be referred for filing.

Where the sexually violent offense is from another state, RCW 71.09.030 provides little guidance as the appropriate venue; the statute does not set forth a procedural remedy for this anomaly. The definition of a sexually violent offense, RCW 71.09.020(15), however, clearly allows the use of out-of-state convictions as predicate sexually violent offenses. Therefore, as Thurston County is the seat of state government and the county wherein the Office of Attorney General has its primary place of business, Thurston County is an appropriate county to hear and decide this Petition, both on the basis of subject matter jurisdiction and venue. The legislature gave the Attorney General the authority in RCW 71.09.030 to file a sexually violent predator petition, done here at the request of the Thurston County Prosecuting Attorney. (CP at 90-91) (emphasis added).

The motion was heard on October 29, 2004. RP at 1 (October 29, 2004.) The Court made an oral ruling on the matter denying Mr. Martin's motion to dismiss. RP at 18-24. Specifically, the Court declared the following:

The issue then becomes whether, by filing here in Thurston County, the Attorney General has made a mistake the magnitude of which deprives this court of jurisdiction. I cannot conclude that

such would be the case. This court does have jurisdiction, if it is appropriate, upon receipt of a request from the Thurston County Prosecutor for the Attorney General to file this petition here in Thurston County because the Respondent was convicted of a sexually violent offense in a jurisdiction outside of the State of Washington.

I am aware that it is the policy of the Attorney General to file all such cases here in Thurston County. I presume there is some mechanism, perhaps not through the Attorney General's Office, but perhaps through some review board that causes the Thurston County Prosecutor to be notified of the potential release of a person potentially subject to this statute and that the prosecutor then makes a request of the Attorney General. That appears to be what happened here, and from my experience, it appears to be the standard practice.

In any event, the statute does not limit the authority of a Prosecutor to make such a request of the Attorney General to only those prosecutions where the sexually violent offense was committed. If the law was such, then in the case of this respondent and in the case of any respondent who is convicted of a sexually violent offense in a jurisdiction other than Washington, there would be no prosecutor who could make such a request of an attorney general. And as a consequence, the provisions for addressing sexually violent offenders who have committed their offenses outside the state of Washington that are included in Chapter 71.09 would have no effect at all. A construction of Section .030 that would result in that result is a construction that results in an absurd result, because it is clearly not the will expressed by the Legislature. Accordingly, I decline to adopt that construction of it and instead conclude that any prosecutor can make such a request for this type of case. The Thurston County Prosecutor has done so in this case, and jurisdiction and venue are proper here, and the motion is denied. (RP at 22-24) (emphasis added).

On February 22, 2005, Mr. Martin's case was called for a bench trial. RP at 4 (February 22, 2005). In lieu of proceeding with the trial,

Mr. Martin stipulated to civil commitment under chapter 71.09 RCW. CP at 100-106. Mr. Martin's stipulation, however, provided the right to appeal the trial court's denial of his motion to dismiss. CP at 101-102; RP at 16-17. Mr. Martin's timely appeal to the Washington Court of Appeals, Division II followed. CP at 155-157.

The parties briefed the case, and the case was argued on February 14, 2006. And as mentioned above, on June 14, 2006, the Court of Appeals, Division II affirmed the trial court's order denying Mr. Martin's motion to dismiss.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept Mr. Martin's petition for review because the decision of the Court of Appeals, Division II is contrary to the rules of statutory construction as enunciated by the Supreme Court

In *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004), the Washington Supreme Court recited a basic rule of statutory construction, e.g., "[w]here a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words." *In re Estate of Jones*, 152 Wn.2d at 11 (concluding that "[t]he appellate court's statutory interpretation [was] contrary to the rules of statutory construction.").

The Court of Appeals, Division II sidestepped this basic rule of statutory construction when it affirmed the trial court's order denying Mr. Martin's motion to dismiss the SVP petition against him.

The statute at issue, RCW 71.09.030, provides as follows:

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to *RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW **10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation. (Emphasis added).

This statute clearly states that an SVP petition must be filed in a county where the Respondent was convicted or charged. The reference to "the attorney general if requested by the prosecuting attorney" clearly indicates that the attorney general may file an SVP petition at the request

of “the prosecuting attorney of the county where the person was convicted or charged” *in* the county where the person convicted or charged.

The Court of Appeals, Division II dealt with this argument as follows:

Although RCW 71.09.030 does not state so directly, the legislature clearly intended the SVP civil commitment statute to provide for the civil commitment of a person who was convicted of a sexually violent crime in another state. *Cf.* RCW 71.09.020(15)(b) with RCW 71.09.030. But Martin is correct that the only venue language in the statute refers to filing in the 'county where the person was convicted or charged.' RCW 71.09.030. Nevertheless, Martin cannot avail himself of the apparent gap in the commitment procedure concerning venue for petitions of SVPs whose only sexually violent offenses are out-of-state.

In re Detention of Martin, ___ Wn. App. ___ (2006) (slip opinion at 4-5).

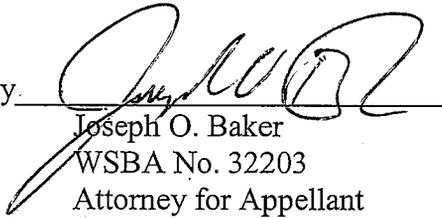
Therefore, because it looked “past the plain meaning of the words” of RCW 71.09.030, the Court of Appeals, Division II decided this case contrary to the rules of statutory construction as announced by the Supreme Court. As such, the Supreme Court should accept Mr. Martin’s petition for review.

F. CONCLUSION

For all the foregoing reasons, Mr. Martin respectfully requests that the Supreme Court (1) accept review and (2) reverse the decision of the trial court denying his motion to dismiss.

RESPECTFULLY SUBMITTED this 12th day of JULY, 2006

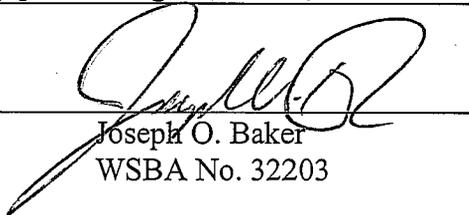
GEHRKE & BAKER

By: 
Joseph O. Baker
WSBA No. 32203
Attorney for Appellant

CERTIFICATE

I certify that I served a copy of the foregoing PETITION FOR REVIEW to the following individuals specified below on July 13, 2006. Service was made by the means specified below.

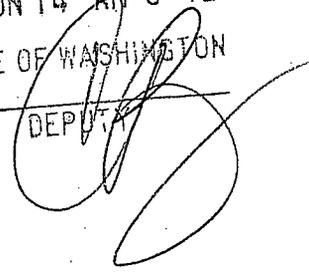
Melanie Tratnik Attorney General's Office 900 4 th Ave Suite 2000 Seattle, WA 98164	<input type="checkbox"/> First class mail, postage prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic means (email) <input checked="" type="checkbox"/> ABC Legal Services, Inc.
Sheldon Martin Special Commitment Center PO Box 88450 Steilacoom, WA 98388	<input checked="" type="checkbox"/> First class mail, postage prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic means (email) <input type="checkbox"/> ABC Legal Services, Inc.


Joseph O. Baker
WSBA No. 32203

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Detention of

Sheldon Martin.

Appellant.

No. 32972-7-II

PUBLISHED OPINION

ARMSTRONG, J. -- Sheldon Martin moved to dismiss Thurston County's petition to civilly commit him as a sexually violent predator under RCW 71.09.020(16). He argued that the Thurston County Superior Court lacked jurisdiction because his sexually violent offense occurred in Oregon and his other criminal activity occurred in Clark County, Washington. The lower court denied his motion, and Martin appeals. Although venue may have been improper,¹ the remedy for improper venue is a change of venue, not dismissal of the action. Martin never moved for a change of venue. And because the Thurston County Superior Court had jurisdiction of the action, we affirm.

FACTS

In 1992, the State charged and convicted Sheldon Martin of second degree burglary with sexual motivation and indecent exposure in Clark County, Washington. Pending sentencing on those convictions, Martin fled to Oregon where he committed and was convicted

¹ Because Martin did not move to change venue, we need not decide where venue lies when the defendant's sexually violent offense occurs in another state.

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of two sexually violent offenses: second degree kidnapping and attempted first degree sexual abuse. After Martin served the Oregon sentences, the authorities returned him to Clark County where he began serving a 30-month sentence for his Clark County crimes.

In March 2003, the attorney general's office petitioned in Thurston County Superior Court to commit Martin as a sexually violent predator (SVP) under RCW 71.09.020(16). Neither of Martin's Washington offenses, second degree burglary with sexual motivation and indecent exposure, is a sexually violent offense as that term is defined in RCW 71.09.020(15) and as used in RCW 71.09.030.

Martin moved to dismiss the State's petition for civil commitment, asserting that the Thurston County Superior Court was not the proper court to hear the State's petition since he had never been convicted of an offense there. The State countered that the definition of "sexually violent offense" under RCW 71.09.020(15) allows the use of out-of-state convictions as predicate sexually violent offenses, and the established practice of the attorney general's office is to file those petitions in Thurston County. Clerk's Papers (CP) at 90.

The trial court denied Martin's motion to dismiss, ruling that both jurisdiction and venue were proper.

In his February 2005 bench trial, Martin stipulated to the facts sufficient to commit him as an SVP, reserving the right to appeal the trial court's denial of his motion to dismiss.

ANALYSIS

I. Civil Commitment for Sexually Violent Predators

In chapter 71.09 RCW, the Washington legislature enacted legislation that allows the State to indefinitely confine offenders "likely to engage in sexually violent behavior." RCW 71.09.010. Under this legislation, if the court or a jury determines that the person is a SVP

beyond a reasonable doubt, the court may civilly commit the person. RCW 71.09.060. Under RCW 71.09.020(16), a “sexually violent predator” is “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(15)(b) clarifies that a “sexually violent offense” includes any out-of-state conviction for a felony offense that under the laws of Washington would be a sexually violent offense.

RCW 71.09.030 describes the commitment procedure:

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement . . . or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a “sexually violent predator” and stating sufficient facts to support such allegation.

II. Subject Matter Jurisdiction and Venue

Martin did not move for a change in venue; he moved to dismiss for lack of jurisdiction. In Washington, superior courts are courts of general jurisdiction and “have the authority to hear and decide cases in equity, and all cases at law for which jurisdiction has not been vested by law exclusively in some other court.” WASH. HANDBOOK ON CIVIL PROC. § 9.3, at 124 (2006) (citing WASH. CONST. art. IV, § 6); *see also Wash. State Coal. for the Homeless v. Dep’t of Soc. and Health Servs.*, 133 Wn.2d 894, 915, 949 P.2d 1291 (1997). In general, subject matter jurisdiction means “the court’s authority to hear and decide a particular kind of case.” WASH. HANDBOOK § 9.1, at 123 (2006); *see Bour v. Johnson*, 80 Wn. App. 643, 910 P.2d 548 (1996). Martin does not dispute that all Washington State superior courts, including Thurston County,

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have subject matter jurisdiction to hear SVP civil commitment cases under RCW 71.09.020(15)(b).

While jurisdiction refers to the power of a particular court to hear and decide cases, venue concerns only the place where the suit may be brought within the state. *Dougherty v. Dep't of Labor and Indus.*, 150 Wn.2d 310, 316, 76 P.3d 1183 (2003); WASH. HANDBOOK § 13.1, at 142 (2006). The remedy for filing in the wrong county under the venue statutes is a change of venue—not dismissal for lack of subject matter jurisdiction. *J.A. v. State*, 120 Wn. App. 654, 659, 86 P.3d 202 (2004) (citing *Sim v. Wash. State Parks & Recreation Comm'n*, 90 Wn.2d 378, 383, 583 P.2d 1193 (1978)); cf. *Shoop v. Kittitas County*, 149 Wn.2d 29, 35, 65 P.3d 1194 (2003).

Martin moved only to dismiss, arguing that chapter 71.09 RCW makes clear that “an SVP petition may only be filed in a county in which the Respondent has some type of criminal activity.” CP at 75. On appeal, Martin argues that because his “sexually violent offense,” first degree attempted sexual abuse, is from Multnomah County, Oregon, “there is absolutely no basis for filing an SVP petition against [him] in Thurston County, WA.” Br. of Appellant at 11. He emphasizes that under RCW 71.09.030, the prosecutor must file a SVP petition in a county where the respondent was convicted or charged and that because the petition against him was not filed in a county where he was convicted or charged, it must be dismissed.

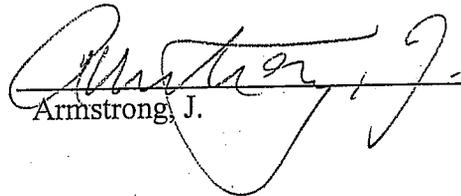
Although RCW 71.09.030 does not state so directly, the legislature clearly intended the SVP civil commitment statute to provide for the civil commitment of a person who was convicted of a sexually violent crime in another state. Cf. RCW 71.09.020(15)(b) with RCW 71.09.030. But Martin is correct that the only venue language in the statute refers to filing in the “county where the person was convicted or charged.” RCW 71.09.030. Nevertheless, Martin

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cannot avail himself of the apparent gap in the commitment procedure concerning venue for petitions of SVPs whose only sexually violent offenses are out-of-state.

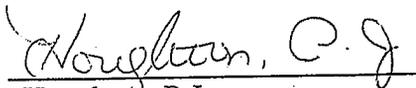
Martin moved for dismissal based on lack of jurisdiction, a motion the court properly denied because it had jurisdiction. *See, e.g., Dougherty*, 150 Wn.2d at 316 (stating that “[s]tatutes which require actions to be brought in certain counties are generally regarded as specifying the proper venue and are ordinarily construed not to limit jurisdiction of the state courts to the courts of the counties thus designated.”); *Shoop*, 149 Wn.2d at 37 (holding that the filing requirements of RCW 36.01.050 relate to venue, not subject matter jurisdiction); *Haywood v. Aranda*, 143 Wn.2d 231, 237, 19 P.3d 406 (2001) (holding that “the failure of a person to strictly observe the filing requirements set forth in the mandatory arbitration rules does not deprive the superior court of jurisdiction”). Martin did not move for change of venue, a motion that would have required the court to decide proper venue in light of Martin’s out-of-state predicate offense.

We affirm.

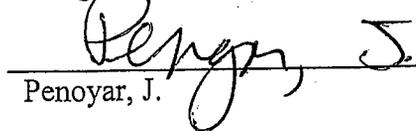


Armstrong, J.

We concur:



Houghton, P.J.



Penoyar, J.