

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint of Kevin L. Hendrickson

STATE OF WASHINGTON,

Respondent,

v.

KEVIN L. HENDRICKSON,

Petitioner.

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

Supplemental Brief of Petitioner

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A. ISSUE ON REVIEW

Whether a *nunc pro tunc* order is the proper mechanism to amend an order dismissing an action without prejudice?

B. STATEMENT OF THE CASE

1. Proceedings in superior court. Mr. Hendrickson was tried on an information charging him with possession of stolen property in the first degree and 16 counts of identity theft in the second degree. At the close of the State's case-in-chief, the prosecutor moved to dismiss five counts of identity theft counts while Mr. Hendrickson argued for a directed verdict in his favor on all counts. After granting the State's motion, the trial court dismissed another eight of the eleven remaining theft counts because the prosecutor failed to present sufficient evidence from which the jury could find Mr. Hendrickson possessed the financial information for an illegal purpose because he obtained the information in conjunction with his employment. State v. Hendrickson, 138 Wn.App. 827, 830, 158 P.3d 1257 (2008).

The jury convicted Mr. Hendrickson on the three remaining counts of identity theft, but was unable to reach a verdict on the charge of possession of stolen property. State v. Hendrickson, 138 Wn.App. at 830.¹

¹ After the jury failed to reach a verdict, and before sentencing, the prosecutor filed a Third Amended Information realleging as Court XIX, the possession of stolen

Mr. Hendrickson was then sentenced within the standard range on the three counts of identity theft.² He then timely appealed his conviction and sentence.

Five weeks after sentencing, on March 13, 2006, the prosecutor presented a Motion and Order for Dismissal Without Prejudice “on the grounds and for the reason that the State is currently evaluating the feasibility of retrying this case at this time.”³ Judge Cuthbertson signed the order, filed in open court, which directed “that the above entitled action be and same is hereby dismissed without prejudice, bail is hereby exonerated.”⁴

One month later, on April 14, 2006, the prosecutor presented another “Motion and Order For Dismissal Without Prejudice.” This

property charge. See Exhibit A to Mr. Hendrickson’s Emergency Motion filed in Supreme Court Cause No. 80245-9, on July 9, 2007.

² See Judgment and Sentence Pierce County Cause No. 04-1-04088-6, filed February 3, 2006 and provided to the Court in support of Mr. Hendrickson’s Personal Restraint Petition and Petition for Writ of Mandamus for Bail Pending Appeal, in Supreme Court No. 78619-4, filed April 28, 2006.

³ See e.g. Exhibit B to Hendrickson’s Emergency Motion for Release, filed July 9, 2007. Copies of the Motion and Order are included throughout the record including Mr. Hendrickson’s original personal restraint petition in this Court, the petition he filed in the Court of Appeals and most recently his several motions for release from custody.

⁴ *Id.* On the same day, the trial court entered Findings of Fact and Conclusions of Law re: Defendant’s Motion for Directed Verdicts pursuant to which the judge memorialized his finding that the evidence insufficient to submit to the jury and ordered “Counts III, VII, VIII, IX, X, XI, XIV, and XV, the Court hereby dismisses, with prejudice, Counts III, VII, VIII, IX, X, XI, XIV, and XV.”

motion was identical to the earlier one except it inserted "Count 1."⁵ The motion stated:

Comes now the plaintiff . . . and moves the court for an order dismissing Count 1 without prejudice the above entitled action, on the grounds and for the reason that the state anticipates that some counts will be retried after appeal and this count can be refiled at the same time.^[6]

The trial court then ordered "that Count I of the above entitled action be and same is hereby dismissed without prejudice, bail is hereby exonerated." Both the Motion and the Order were dated the 14th of April

⁵ In presenting her April 14th motion and order, the deputy prosecutor explained:

[MS. PLATT:] I have also handed forward an order dismissing without prejudice Count 1. I had handed forward an order previously and the clerk's office was not satisfied with the way I had drafted it. I guess they thought it was inartful. [Defense counsel] Mr. Schoenberger has no opposition to this order being signed, and I dated it nunc pro tunc to the date of the original order of March 8th.

THE COURT: Thank you. Mr. Schoenberger, on the motion and order for dismissal of Count 1, any objection any problem with the order as currently drafted?

MR. SCHOENBERGER: No, Your Honor.

THE COURT: Thank you

4/14/06RP at 2. The prosecutor later explained, in the context of an argument on bail, that:

[t]he State will be cross-appealing Mr. Schoenberger's motions to dismiss on some of the identity theft counts, and that is in fact, the reason that I dismissed the PSP 1 without prejudice because I anticipate that I will try that again with the other identity theft two counts.

Id. at 8. No cross appeal was filed.

⁶ See e.g. Exhibit C to Petitioner's Emergency Motion for Release from Illegal Incarceration, filed July 9, 2007.

2006, but also then also included a handwritten notation below the date, “nunc pro tunc to March 8, 2006.”⁷

2. Appellate Court Proceedings.

i. Supreme Court No. 78619-4. Mr. Hendrickson promptly filed a Personal Restraint Petition in this Court challenging several aspects of his conviction and sentence on April 28, 2006. Mr. Hendrickson’s personal restraint petition also outlined his argument that the dismissal of the action on the State’s motion and Judge Cuthbertson’s order of March 13, 2006, required his release from confinement, “since this is the only cause number holding him in prison.”⁸ Mr. Hendrickson included a copy of the March 13th motion and order with the petition, as well as the April 14th motion and *nunc pro tunc* order. Id.⁹

The Pierce County Prosecutor’s office responded by requesting the petition be either dismissed based upon a generic assertion the record was

⁷ See e.g. Exhibit C to Petitioner’s Emergency Motion for Release from Illegal Incarceration, filed July 9, 2007; Appendix C to Answer to Petition for Review, filed April 7, 2008.

⁸ Mr. Hendrickson’s petition appears to have been only partially paginated. This argument is presented, according to counsel’s calculation, on the 45th page of the petition and followed by copies of the two motions and orders for dismissal.

⁹ Mr. Hendrickson also filed a personal restraint petition in the Court of Appeals on May 4, 2006, raising these and a number of other issues.

insufficient or transferred to the Court of Appeal.¹⁰ On the same day, this Court transferred the case to the Court of Appeals to be consolidated with the pending direct appeal.

ii. Court of Appeals No. 34445-9-II (direct appeal), consolidated with No. 35060-2-II (PRP). The Court of Appeals ultimately reversed another of the three remaining counts of identity theft because Mr. Hendrickson's trial attorney failed to object to inadmissible hearsay, barred at trial by the Confrontation Clause, prejudicing his rights as to that count. State v. Hendrickson, 138 Wn.App. at 831-33. The opinion never addressed the effect of the March 13th dismissal order on the lawfulness of Mr. Hendrickson's incarceration.

iii. Supreme Court Case No. 80345-9. Mr. Hendrickson sought further review of the Court of Appeals opinion in this Court.¹¹ He

¹⁰ See State's Response to Personal Restraint Petition and Emergency Motion for Release, filed on May 26, 2006.

¹¹ Mr. Hendrickson's Motion for Discretionary Review, at page 2, notes:

... the Court failed to issue any opinion on Hendrickson's claim that on March 13, 2006, the trial court signed a motion and order dismissing this entire case, and has yet to file information or indictment against him to regain jurisdiction.

With regard to the issues presented for review, Mr. Hendrickson notes:

The Court of Appeals failed to give opinion or even acknowledge the issue raised in the personal restraint petition as well as the emergency motion for release on the factual matter that the entire case was dismissed on March 13, 2006, and he is now held with no valid judgement [sic] and sentence.

also filed an Emergency Motion for Release in this Court on June 9, 2007, which again sought his immediate release from confinement on the ground that he was “being held without a valid judgment and sentence due to dismissal of entire case March 13, 2006.” Emergency Motion at 1.

At the direction of the Court, the prosecutor’s office filed an Answer to Petition for Review “regarding the dismissal order issue and . . . the Petitioner’s motion for release.” The Answer did not, however, mention the March 13th motion and order the prosecutor had proffered which directed “the above entitled action be and same is hereby dismissed without prejudice. . . .” Instead, the Answer falsely accused Mr. Hendrickson of failing to present the Court with the complete record by not including the April 14th order. That order was in fact attached as Appendix C to Mr. Hendrickson’s Motion for Emergency Release and had been included in his original personal restraint petition. The prosecutor then failed to explain how the later *nunc pro tunc* order ante dated to March 8th dismissing Count I with prejudice, without reference to the March 13th order, obviates the operability of the March 13th order expressly dismissing “the entire action.”

Motion for Discretionary Review at 3, citing State v. Corrado, 78 Wn.App. 612, 898 P.2d 860 (1995).

This Court granted review to determine “whether a *nunc pro tunc* order is the proper mechanism to amend an order dismissing action without prejudice.”¹²

C. ARGUMENT

A *NUNC PRO TUNC* ORDER WAS NOT THE PROPER MECHANISM TO AMEND THE ORDER DISMISSING THE ACTION WITHOUT PREJUDICE

1. The *nunc pro tunc* order serves only a narrow and limited purpose. Washington courts have always recognized an inherent common law power to enter judgments and orders *nunc pro tunc*.¹³ Garrett v. Byerly, 155 Wash. 351, 353-57, 284 P. 343, 68 A.L.R. 254 (1930)¹⁴ (outlining the earliest applications of the doctrine in the Washington Territory). This Court has also long recognized, however, that the limited purpose of a *nunc pro tunc* order is to record some prior act of the court which was actually performed but not entered into the record at that time. State v. Mehlhorn, 195 Wash. 690, 692-93, 82 P.2d 158 (1938).

¹² The Court subsequently appointed counsel to represent Mr. Hendrickson in this matter. As reflected in the notice of appointment, Mr. Hendrickson is no longer in custody on this matter.

¹³ The phrase *nunc pro tunc* means simply “now for then.” National Life Ins. Co. v. Kohn, 133 Ohio St. 111, 113, 11 N. E.2d 1020 (1937). This power is a discretionary and may be used “as justice may require in view of the circumstances of the particular case.” Mitchell v. Overman, 103 U.S. 62, 65, 26 L. Ed. 369 (1880).

¹⁴ The Garrett Court’s analysis regarding the statute governing automobile rights of way and contributory negligence was overruled by subsequent opinion in Martin v. Hadenfeldt, 157 Wash. 563, 568, 289 P. 533 (1930).

If the court has not rendered a judgment that it might or should have rendered, it has no power to remedy these omissions by ordering the entry *nunc pro tunc* of a proper judgment.

Id.

Having clearly established the authority of the trial courts is limited to recording judicial action actually taken, the Court has been equally clear that the purpose of the *nunc pro tunc* order or decree is not to remedy inaction. State v. Ryan, 146 Wash. 114, 116-17, 261 P. 775 (1927); Bruce v. Bruce, 48 Wn.2d 635, 636, 296 P.2d 310 (1956). In recording a prior act of the court, a *nunc pro tunc* order "may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." In re Marriage of Pratt, 99 Wn.2d 905, 911, 665 P.2d 400 (1983) (quoting Ryan, 146 Wash. at 117).¹⁵

Critically to the questions presented here, therefore, a *nunc pro tunc* order is not a proper means to remedy omissions and errors in judgments or sentences of the court. See Mehlhorn, 195 Wash. at 692-93

¹⁵ Although Washington courts have statutory authority to issue dissolution decrees *nunc pro tunc* (RCW 26.09.290), the authority is limited to circumstances involving mistake, inadvertence or neglect, and only then when necessary to validate a subsequent marriage. Pratt, at 909. The result is the same under the common law authority recognized in Garrett and Bruce as necessary to resolve the property rights issues. As noted in Osborne v. Osborne, 60 Wn.2d 163, 167, 372 P.2d 538 (1962), where the case was fully adjudicated so that a final decree should have been entered before the death of a party but the decree was not in fact entered for some reason, the courts recognize a divorce decree *nunc pro tunc* may be entered. See also In re Tabery, 14 Wn. App. 271, 275-76, 540 P.2d 474 (1975).

(where prosecutor sought resentencing because statute was *ex post facto* as to Mehlhorn's offenses, *nunc pro tunc* judgment was not proper, even where prior sentence was void because it didn't reflect the court's earlier order).¹⁶ As explained in American Jurisprudence:

The general rule is that an amendment of the record of a judgment, and a *nunc pro tunc* entry of it, may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission or an affirmative action which should have been, but was not, taken by the court, or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide, even if such failure is apparently merely an oversight:

46 American Jurisprudence Second (1994) Judgments, § 166 at 494-95.¹⁷

The error in Mr. Hendrickson's case, which the prosecutor and court sought to correct, was judicial error in the form of "an affirmative action which should have been, but was not, taken by the court ... even if

¹⁶ In State v. Petrich the Court held the State to the terms of a valid *nunc pro tunc* order because the parties agreed the order was effective from the earlier the date, and as a result the State's petition for review was untimely. State v. Petrich, 94 Wn.2d 291, 294-97, 616 P.2d 1219 (1980).

¹⁷ Similarly, Utah courts recognize the common law power of *nunc pro tunc* allows the court to correct errors so the record accurately reflects that which in fact took place. Kettner v. Snow, 13 Utah 2d 382, 384, 375 P.2d 28, 30 (1962); Preece v. Preece, 682 P.2d 298, 299 (Utah 1984). Nebraska courts recognize limitations:

Although grounds may exist for opening, modifying, or vacating the judgment itself, yet in the absence of such grounds, the court may not, under the guise of an amendment of its records, revise or change the judgment in substance and have such amended judgment entered *nunc pro tunc*.

Larson v. Bedke, 211 Neb. 247, 257 (Neb. 1982) citing 46 Am. Jur. 2d Judgments § 201 at 443-44 (1969).

such failure is apparently a mere oversight.” Id. This is not the form of error subject to correction by *nunc pro tunc* order.

Although grounds may exist for opening, modifying, or vacating the judgment itself, in the absence of such grounds, the court may not, under the guise of an amendment of its records, revise or change the judgment in substance and have such amended judgment entered *nunc pro tunc*. . . . A *nunc pro tunc* order is not appropriate to rescue subjective judicial intentions when a judge failed in any way to act on those intentions in entering judgment.

Id., (fns.omitted).¹⁸ Similarly, a *nunc pro tunc* order was not the appropriate vehicle to rescue the apparent subjective intentions of the judge or the prosecutor in Mr. Hendrickson’s case.

2. Washington Courts have further limited the application of the *nunc pro tunc* power where to moving party created the problem. The authority to issue orders *nunc pro tunc* is an equitable power entrusted to the trial judge’s discretion; the judge must still act reasonably and may enter a *nunc pro tunc* judgment "only in the furtherance of the interest of

¹⁸ In California, similar principles limit the exercise of the *nunc pro tunc* power: A court can always correct a clerical, as distinguished from a judicial error which appears on the face of a decree by a *nunc pro tunc* order. [Citations.] It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made. . . . The function of a *nunc pro tunc* order is merely to correct the record of the judgment and not to alter the judgment actually rendered--not to make an order now for then, but to enter now for then an order previously made.

Estate of Eckstrom, 54 Cal. 2d 540, 544, 7 Cal. Rptr. 124, 354 P.2d 652 (1960). The court went on to hold *nunc pro tunc* orders may not be made to "make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matters which ought to have been so pronounced." Id.

justice." State ex rel. Tufton v. Superior Court, 46 Wash. 395, 397, 90 P. 258 (1907). Application of the power is, therefore, limited in circumstances such as these where the moving party contributed to the situation or the order would unreasonably burden others.

If it appears that the party seeking the entry has himself been guilty of conduct that would make the entry improper, or that third persons have acquired interests or rights which will be injuriously affected by the entry, the application will be denied, . . .

State ex rel. Tufton, 46 Wash. at 397.

The Court in Garrett v. Byerly described a further series of equitable limitations on the invocation of the *nunc pro tunc* power:

The courts recognizing and apply the principle have somewhat narrowed its limitations. One of such limitations, and perhaps the most common one, is that the cause at the time of such death must be ripe for judgment. Another is that the delay in entering judgment must not have been caused by the party applying for the judgment, and still another, finding sanction in our own decisions, is that the judgment must not injuriously affect the subsequently acquired rights of innocent third parties.

155 Wash. at 357. In Mr. Hendrickson's case the apparent problem was caused by the prosecutor and Mr. Hendrickson certainly contends his rights have been adversely affected by the subsequent unlawful confinement.

3. Clear and convincing evidence of clerical or ministerial error is required to amend a judgment *nunc pro tunc*.

a. The error was not clerical. This Court has examined the *nunc pro tunc* power more recently in context of the criminal law in Smisaert, noting the limited circumstances in which it is available. “We have generally held that a retroactive judgment is appropriate only to correct ministerial or clerical errors.” State v. Smisaert, 103 Wn.2d 636, 640, 694 P.2d 654 (1985). See also Pratt, 99 Wn.2d at 906 (“[a] *nunc pro tunc* decree may be entered only when necessary to correct ministerial or clerical errors or when mandated by public policy considerations.”).

The court has examined potential “clerical error” in the context of CrR 7.8 and CR 60(a), the court rules governing relief from judgments or orders.¹⁹ In those circumstances, the Court looks at “whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial” to determine if the error is clerical. Presidential Estates Apartment Associates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d

¹⁹ This Court has recognized a power to vacate a previous order of dismissal under CrR 7.8, thereby reinstating an information charging first and second degree murder where the trial had previously dismissed the action on double jeopardy grounds. State v. Duncan, 111 Wn.2d 859, 867, 765 P.2d 1300 (1989). The dismissal was appealed by the State, however, and therefore, jurisdiction may not lapsed when the prosecutor sought reconsideration pursuant to CrR 7.8(b)(5).

100 (1996); State v. Rooth, 129 Wn.App. 761, 770, 121 P.3d 755 (2005).²⁰

In Rooth for example where the defendant was sentenced in accordance with the jury's verdicts which the State subsequently alleged were incorrect because of a clerical error in the verdict forms, the Court of Appeals found no basis for relief under CrR 7.8.

Nothing in the record indicates that the trial court intended to sentence in accord with the information but, through some clerical error, it wrongfully sentenced Rooth. Perhaps if the verdict forms had identified the firearm . . . there would be a basis to address clerical error. But that is not evident from the record. And "an intentional act of the court, even if in error, cannot be corrected under [CrR 7.8]. Wilson v. Henkle, 45 Wn.App. 162, 167, 724 P.2d 1069 (1986). The error in the instructions and the judgment and sentence were judicial errors, not clerical errors.

129 Wn.App. at 771.²¹

²⁰ Nebraska courts also recognize that clerical errors may be corrected by an order *nunc pro tunc*, but judicial errors may not. Judicial errors may be corrected by modification or vacation of the judgment entered. Interstate Printing Co. v. Department of Revenue, 236 Neb. 110 (Neb. 1990).

²¹ Iowa courts also recognized that it is not the purpose of *nunc pro tunc* to correct a mistake or misunderstanding of litigants, nor for the purpose of correcting judicial thinking, a judicial conclusion or mistake of law. Headley v. Headley, 172 N.W.2d 104, 1969 Iowa Sup. LEXIS 926 (1969); General Mills, Inc. v. Prall, 244 Iowa 218, 225, 56 N.W.2d 596 (1953), as follows:

It is not a proper function of a *nunc pro tunc* order to correct or change judicial acts on the basis of the judge's subjective intentions. In its original order the trial court set to the exact day the period of suspension. It did not give credit for the earlier 90-day suspension and the omission amounted to an express refusal to do so. It was error for the trial court to change the order of suspension by an order *nunc pro tunc*.

State v. Steffens, 282 N.W.2d 120, 123, 1979 Iowa Sup. LEXIS 990 (1979).

Mr. Hendrickson's case presents a similar scenario in which the prosecutor presented a motion and order seeking a specific form of relief. The judge granted that request. State v. Dennis, 67 Wn.App. 863, 865, 840 P.2d 909 (1992) (mistakes of law may not be corrected by motions governing relief from judgment). If there was error, it was not clerical.

b. General public policy exceptions will not save the order.

This Court has also recognized a line of cases citing a "public policy" exception to the limitations of the *nunc pro tunc* power. The Court continues to insist, however, that: "retroactive entry is proper only to rectify as to acts which did occur, not as to acts which should have occurred." 103 Wn.2d at 641.²² In Smissaert it was therefore an improper exercise of the *nunc pro tunc* power to enter such judgment at resentencing to correct an error on the part of the judge in sentencing the defendant originally. 103 Wn.2d at 641.

Similarly, the Court of Appeals held that where the juvenile court did not order an extension of juvenile court jurisdiction before a juvenile turned 18, a *nunc pro tunc* order was not appropriate. State v.

²² The Court did note that earlier decisions had indicated that "an important public purpose" may have been the justification for *nunc pro tunc* corrections of wrongfully imposed sentences. In re Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980) ("remanded to trial court for the purpose of resentencing petitioner *nunc pro tunc* in accordance with this opinion."); State v. Loux, 69 Wn.2d 855, 859, 420 P.2d 693 (1966), cert denied, 386 U.S. 997 (1967) (to prevent any increase in the original sentence, the words "*nunc pro tunc*" were added to a corrective order). Smissaert ultimately recognized that the *nunc pro tunc* order was not the appropriate mechanism to make these corrections. 103 Wn.2d at 641-42.

Rosenbaum, 56 Wn. App. 407, 411-12, 784 P.2d 166 (1989). The appellate court noted the absence of evidence in the record to support the entry of the order.

Nothing in the record indicates that there was even any discussion regarding the extension of jurisdiction prior to Rosenbaum's 18th birthday. We must conclude, therefore, that there had been no prior act of the court extending jurisdiction which had merely gone unrecorded.

Id. See also Bruce v. Bruce, 48 Wn.2d 635, 636, 296 P.2d 310 (1956) (judge acted within his discretion in refusing to enter *nunc pro tunc* divorce decree because party was unable to establish the statutory requirement were satisfied at the time of the original hearing and order); State v. Nicholson, 84 Wn. App. 75, 79, 925 P.2d 637 (1996) (a *nunc pro tunc* order extending juvenile court jurisdiction was improper because it did not seek to record a prior act, but to take an action the court had not made). Neither “public policy” nor generic assertions regarding the interests of justice can bridge the gap between the limitations on the *nunc pro tunc* power and the form of apparent error here.

c. Clear and convincing evidence should be required to support a nunc pro tunc order. Because the entry of a *nunc pro tunc* order amending a judgment or decree works contrary to the ordinary presumptions of finality, courts have applied the highest standards of proof. State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989).

Final judgments in both criminal and civil cases may be vacated or altered only in those limited circumstances where the interests of justice most urgently require. [citations omitted.] Modification of a judgment is not appropriate merely because it appears, wholly in retrospect, that a different decision might have been preferable.

Id.

Several states' courts who have examined the power of a court to enter *nunc pro tunc* judgments and orders have noted that it should be exercised only "upon evidence which shows clearly and convincingly that such former action was in fact taken." See e.g. Jacks v. Adamson, 56 Ohio St. 397, 402-03, 47 N. E. 48 (1897); Cleveland Trust Co. v. Forkapa, 70 Ohio Law Abs. 336, 117 N. E.2d 442 (1954).

The law requires the production of clear and convincing evidence establishing that the judgment sought to be entered *nunc pro tunc* was in fact rendered by the court as of the prior date.

Id.²³

Texas courts also recognize the need for clear and convincing evidence to support the entry of a *nunc pro tunc* order. See Riner v. Briargrove Park Prop. Owners, Inc., 976 S.W.2d 680, 682 (Tex. App.

²³ Ohio courts also require a judgment *nunc pro tunc* affirmatively show what it is intended to correct, the ground upon which the court acted, whether upon its own recollection, upon memoranda contained in the court records or upon extraneous oral evidence. State v. Coleman, 110 Ohio App. 475, 479, 169 N.E.2d 703 (1959).

1998); Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 705 (Tex. App. 1986).

In light of the presumption of finality in judgments and orders of the court, it is essential that Washington courts impose the highest standards of proof before permitting retroactive amendment. Mr. Hendrickson contends that standard was not met on this record.

4. Entry of the dismissal order deprived the court of jurisdiction to enter the subsequent *nunc pro tunc* order. It is axiomatic that in Washington a criminal action starts with the filing of the information. WASH. CONST. art. I, § 25; CrR 2.1(a). It is through the filing of the information that the court obtains jurisdiction over the matter. RCW 4.28.020 (from "time of the commencement of the action[,] a court "is deemed to have acquired jurisdiction"); Seattle Seahawks v. King County, 128 Wn.2d 915, 917, 913 P.2d 375 (1996) ("Once an action is commenced, 'the court is deemed to have acquired jurisdiction.'" (quoting RCW 4.28.020); State v. Sponburgh, 84 Wn.2d 203, 206, 525 P.2d 238 (1974) ("From the time an action is commenced, the superior court acquires jurisdiction.")²⁴

²⁴ State v. Franks, 105 Wn. App. 950, 955, 22 P.3d 269 (2001); State v. Corrado, 78 Wn. App. 612, 615, 898 P.2d 860 (1995), review denied, 138 Wn.2d 1011 (1999); Lewis County v. Growth Mgmt. Bd., 113 Wn. App. 142, 154, 53 P.3d 44 (2002).

The prosecutor may then dismiss an information without prejudice, and refile it at a later date to avoid dismissal for failure to comply with the speedy trial rule. See CrR 3.3(g)(4). The dismissal stops the speedy trial clock from running. State v. Bible, 77 Wn.App. 470, 471, 892 P.2d 116, review denied, 127 Wn.2d 1011 (1995); State v. Torres, 85 Wn.App. 231, 233, 932 P.2d 186 (1997) (filing of a new information after dismissal without prejudice was a new action). Mr. Hendrickson contends the dismissal order was effective and deprived the court of jurisdiction.²⁵ Moreover, a *nunc pro tunc* order was not the proper remedy for any potential error in that order.

The Washington cases involving the failure to extend the jurisdiction of the juvenile court illustrate this situation. Where the juvenile turns 18 before the statutory authority to extend jurisdiction is exercised, neither the court nor the parties can hide behind the *nunc pro tunc* order to extend jurisdiction of the court. Rosenbaum, 56 Wn.App. at 411-12; Nicholson, 84 Wn.App. at 77-78. Invocation of the strong policy preference for juvenile court jurisdiction was not sufficient to justify a *nunc pro tunc* order. Rosenbaum, 56 Wn.App. at 411.

²⁵ See e.g. Mr. Hendrickson's Personal Restraint Petition at 45. The argument is asserted again in Mr. Hendrickson's several motions for release in both the Court of Appeals and the Supreme Court.

Ohio appellate courts have similarly recognized that a trial court lacks jurisdiction to resurrect a case by making a *nunc pro tunc* entry 18 months after dismissing the case as the trial court purported to do in the case. Pelunis v. G.M. & M., 8 Ohio App.3d 194, 195-96, 456 N.E.2d 1232 (1982).²⁶ Those courts have further held that a trial court lacks jurisdiction to take further action after having unconditionally dismissed an entire case. State ex rel. Rice v. McGrath, 62 Ohio St.3d 70, 71, 577 N.E.2d 1100 (1991); State ex rel. Hunt v. Thompson, 63 Ohio St.3d 182, 183, 586 N.E.2d 107 (1992).²⁷ The same result should apply to Mr. Hendrickson's situation.

Finally, it must be noted that a *nunc pro tunc* judgment or order made to correct a judicial error is void. See e.g. In re Fuselier, 56 S.W.3d 265, 268 (Tex. App.--Houston [1st Dist.] 2001, orig. proceeding); In re Cherry, 2008 Tex. App. LEXIS 5218, 11-12 (Tex. App. Austin July 10, 2008). As such, the March 13th order of dismissal would remain in effect unless properly vacated or amended.

²⁶ The Ohio courts have also held that it is axiomatic that a trial court cannot simply resurrect a case and confer jurisdiction on itself by the stroke of a pen without action of the parties as in the case. See Menti v. Joy, 1994 Ohio App. LEXIS 4718 (Ohio Ct. App., Cuyahoga County Oct. 20, 1994).

²⁷ Mississippi courts reached a similar conclusion in holding that an order cannot be entered *nunc pro tunc* so as to extend a term of court after the regular term of court as fixed by the Legislature has expired. McDaniel Bros. Constr. Co. v. Jordy, 254 Miss. 839, 849-850 (Miss. 1966).

D. CONCLUSION

For the reasons outlined herein, Mr. Hendrickson asks this Court to find a *nunc pro tunc* order was not the proper mechanism to amend the order dismissing this action without prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donnan", written over a horizontal line.

David L. Donnan (WSBA 19271)
Washington Appellate Project
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

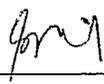
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 80245-9
v.)	
)	
KEVIN HENDRICKSON,)	
)	
PETITIONER.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 29TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> MELODY CRICK	(X)	U.S. MAIL
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TACOMA, WA 98402-2171		
<input checked="" type="checkbox"/> KEVIN HENDRICKSON	(X)	U.S. MAIL
1200 7 TH AVENUE SE	()	HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF AUGUST, 2008.

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