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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SPOKANE VALLEY, and
STATE OF WASHINGTON, ex rel., CHRIS
ANDERLIK,

Petitioners,

vs.

BALLARD BATES and DUANE
SIMMONS,

Respondents.¹

IN RE THE APPLICATION FOR A
CITIZEN COMPLAINT,

CHRIS ANDERLIK,

Petitioner.²

NO. 81295-1

MOTION TO STRIKE PORTION OF
PETITIONER'S REPLY BRIEF

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 OCT 23 PD 3:45
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I. IDENTITY OF MOVING PARTY

The Respondent, State of Washington, by and through its attorney, Pamela B. Loginsky, Special Deputy Prosecuting Attorney for the County of Spokane, asks this Court for the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

The Respondent respectfully requests that this Court strike the following portions of Chris Anderlik's Petitioner's Reply Brief:

¹This caption is the caption that appears on the order granting review.

²This caption is the name that the State believes should appear on this case. The State has a pending RAP 3.4 motion to change the title of the case.

- 1 1. Appendix A, Declaration of Chris Anderlik.
- 2 2. The last sentence of the first full paragraph on page 2 and footnote 2.
- 3 3. That portion of the paragraph on page 11 that begins with the words "At the time of filing"
- 4 and footnote 13.
- 5 4. Footnote 24 on page 25.

6 III. FACTS RELEVANT TO MOTION

7 On April 12, 2006, three cattle belonging to Ted and Judy Ward got loose from their
8 property. D.Ct. File at 340.³ One of the cattle, a 500-600 pound, un-castrated male, was slain when
9 officers attempted to subdue the bull to avert its entering traffic. D.Ct. File at 166, 178, 188, 339-42,
10 353.

11 On November 11, 2006, Chris Anderlik filed two affidavits for citizen complaints arising out
12 of the events of April 12, 2006. One complaint requested that Spokane County Sheriff Deputies
13 Ballard Bates and Damon Simmons be charged in the Spokane County District Court with a
14 violation of RCW 16.52.207. D.Ct. File 376. The other complaint requested that both officers be
15 charged in the City of Spokane Valley Municipal Court with a violation of Spokane Valley
16 Municipal Code 8.20.030. D.Ct. File 378.⁴

17 Ms. Anderlik's name does not appear as a witness on either affidavit of complaining witness.⁵
18 Ms. Anderlik's submissions contain no information regarding her interest in the matter, her address
19 or her residence. Ms. Anderlik's sole personal statement in support of the issuance of the citizen
20 complaint consists of the certification mandated by CrRLJ 2.1(c). See D.Ct. File at 377 and 379.

21 A hearing was held in the Spokane County District Court on Ms. Anderlik's application for
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23 ³The entire district court file was forwarded to the superior court pursuant to RALJ 6.2. The district court did
24 not number the pages or otherwise index the documents. Counsel for the State has numbered the documents, beginning
25 with the document entitled "Transmittal from District Court". This document, which was filed with the superior court
26 on May 24, 2007, has been assigned page "1". The district court record will be cited to in this brief as "D.Ct. File".
27 To assist the Court, an index of key documents with the page number assigned by the State appears in appendix A.

28 ⁴RCW 16.52.207 and Spokane Valley Municipal Code 8.20.030 are, as a matter of law, the same charge. The
text of both appear in appendix B. An individual cannot be convicted under both a state statute and an identical municipal
ordinance. *State v. Roybal*, 82 Wn.2d 577, 580, 512 P.2d 718 (1973).

⁵Ms. Anderlik acknowledged in open court that she had no personal knowledge of the events of April 12, 2006.
RP (01/22/07) at 24-25.

1 a citizen complaint on January 22, 2007. During this hearing, Ms. Anderlik made no statement
2 regarding her personal interest in the case.

3 Ultimately, the district court judge found that there was probable cause to authorize the filing
4 of charges. RP (01-22-07) at 32. No complaint, however, was actually filed, as the district court
5 granted a subsequent State's motion to reconsider. *See* D.Ct. File at 68, 21.

6 On April 6, 2007, Ms. Anderlik filed a notice of RALJ appeal to the superior court. CP 1.
7 She served this notice of appeal by U.S. Mail upon only one of the two deputies and upon the
8 Spokane County Prosecuting Attorney's Office. CP 3. The notice of appeal was never sent to the
9 City of Spokane Valley. None of the documents filed in the RALJ appeal contain any information
10 regarding Ms. Anderlik's address, residence, or special interest in the April 12, 2006, incident.

11 The State promptly moved to dismiss the RALJ appeal on the grounds that Ms. Anderlik
12 lacked standing to appeal the denial of the citizen complaint and that review of the citizen complaint
13 could only be obtained through the filing of a writ of review. CP 61-65. An order granting the
14 State's motion to dismiss was entered on August 1, 2007. CP 112.

15 Ms. Anderlik filed a timely notice for discretionary review to the court of appeals. CP 114.
16 Seven days later, she filed a notice of appeal. CP 118. The court of appeals rejected both notices
17 and dismissed the action as unappealable. This Court, however, granted discretionary review.

18 Subsequent to this Court granting review, Ms. Anderlik perfected the record. This record
19 consists of: (1) that portion of the Spokane County District Court record that Ms. Anderlik certified
20 to the Spokane County Superior Court as part of the RALJ appeal; (2) that portion of the Spokane
21 County Superior Court record that Ms. Anderlik designated in her RAP 9.6 designation of clerk's
22 papers; (3) a verbatim report of proceedings of the January 22, 2007, Spokane County District Court
23 hearing; and (4) a verbatim report of proceedings of the March 26, 2007, Spokane County District
24 Court hearing.

25 Absent from this record is any of the information contained in appendix A, in the last
26 sentence of the first full paragraph on page 2 and footnote 2, in that portion of the paragraph on page
27 11 that begins with the words "At the time of filing" and footnote 13, and footnote 24 on page 25,
28 of Ms. Anderlik's Petitioner's Reply Brief.

1 Ms. Anderlik has filed no motion with this Court seeking leave to expand the record. Ms.
2 Anderlik cites RAP 10.8 in her reply brief as authority for her surreptitious expansion of the record,
3 but a motion to expand the record may not be included in a brief. *See* Petitioner's Reply Brief at 2;
4 RAP 10.4(d) ("A party may include in a brief only a motion which, if granted, would preclude
5 hearing the case on the merits."). The State, therefore, is filing this timely motion to strike.

6 IV. ARGUMENT

7 The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court
8 proceedings, the papers filed with the Superior Court Clerk, and any exhibits admitted in the trial
9 court proceedings. *State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986). Matters referred to
10 in a brief but not included in the record cannot be considered on appeal. *State v. Stevenson*, 16 Wn.
11 App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977).

12 RAP 10.7 allows a party to file a motion to strike a brief that fails to comply with the content
13 requirements of the rules of appellate procedure. Reliance on issues outside the record is a violation.
14 *See* RAP 10.3(a). The State, therefore, respectfully requests that those sections of the Petitioner's
15 Reply Brief identified in section II, *supra*, be struck.

16 This request should be granted because the extraneous documents and information that Ms.
17 Anderlik has included in her reply brief do not satisfy the requirements of RAP 9.11. RAP 9.11(a)
18 allows a party to supplement the record with additional evidence if the following criteria are met:

19 (a) **Remedy Limited.** The appellate court may direct that additional evidence
20 be taken before the decision of a case on review if: (1) additional proof of facts is
21 needed to fairly resolve the issues on review, (2) the additional evidence would
22 probably change the decision being reviewed, (3) it is equitable to excuse a party's
23 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.

24 *Id.* All six criteria must be satisfied before an appellate court will accept any additional evidence.
25 *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990); *Washington Federation of State*
26 *Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 884, 665 P.2d 1337 (1983).

27 RAP 9.11 has been invoked rarely, and the published decisions do not provide much
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1 guidance as to when all six criteria are met.⁶ The rule corresponds to California Appellate Rule 23,
2 but was intended to be stricter. 3 L. Orland and K. Tegland, Wash. Prac., *Rules Practice*, Committee
3 Comment to RAP 9.11 at 210 (4th ed. 1991). The California appellate courts limit the application
4 of Rule 23 to those cases where the new evidence will terminate litigation. *People v. Pena*, 25 Cal.
5 App.3d 414, 101 Cal. Rptr. 804, 807 (1972), quoting *People v. Benford*, 53 Cal.2d 1, 6, 345 P.2d
6 928, 932 (1959).

7 The State has not found a single Washington case wherein a party was permitted to submit
8 an affidavit or declaration containing information that was all known to the party at the time she
9 initiated the suit. The most similar case, that of *Timberlane Homeowners Assn. v. Brame*, 79 Wn.
10 App. 303, 307, 901 P.2d 1074 (1995), denied the plaintiff's motion to supplement the record with
11 the declaration that would establish the plaintiff's standing to bring the case.

12 Just as the Homeowner's Association in the *Timberlane* case, Ms. Anderlik cannot satisfy
13 the third prong of RAP 9.11. Ms. Anderlik initiated the case in the Spokane District Court. She
14 selected the information to submit to that court in support of her criminal complaint. Ms. Anderlik
15 opted not to tell the court her county of residence, how she was personally impacted by the events
16 of April 12th, and what her personal interest is in the matter. It is inequitable to allow her to
17 withhold these items until this late date.

18 This is particularly true as the State's standing challenge is limited to Ms. Anderlik's ability
19 to pursue an appeal. See Brief of Respondent, at 6-8. Nonetheless, case law is clear that an
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21 ⁶Essentially, there is only one case in which a contested RAP 9.11 motion was granted in which the court
22 discussed all six factors. See *Fed'n of State Employees v. State*, 99 Wn.2d 878, 665 P.2d 1337 (1983).

23 In most RAP 9.11 cases, the court merely indicates that the moving party has not satisfied the factors. See, e.g.,
24 *In re Parentage of L.B.*, 155 Wn.2d 679, 687, 122 P.3d 161 (2005) (motion denied because the GAL report fails to meet
25 the six criteria set forth under RAP 9.11); *In re Recall of Feetham*, 149 Wn.2d 860, 872-73, 72 P.3d 860 (2003) (motion
26 to supplement the record denied because none of the six requirements were satisfied by the moving party); *Timberlane*
27 *v. Brame*, 79 Wn. App. 303, 307 n. 1, 901 P.2d 1074 (1995), *review denied*, 129 Wn.2d 1004 (1996) ("Because the
28 Association has failed to satisfy all six requirements of RAP 9.11, we deny the motion.").

In the many other RAP 9.11 cases, the court merely identifies which factors the moving party has not satisfied
without identifying whether the motion satisfied any of the other factors. See, e.g., *Avery v Dep't of Social and Health*
Servs., 150 Wn.2d 409, 414, 78 P.3d 634 (2003) (additional evidence rejected because it does not help to resolve the
issues before the court); *LaMon v. Butler*, 112 Wn.2d 193, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989) (motion
to supplement record denied because there was no excuse for the party's failure to introduce the evidence to the trial
court); *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 762 P.2d 1141 (1988) (court refused to admit insurance policy
endorsement into appellate record because it was inequitable to excuse the insurance company's failure to offer the
evidence earlier and its admission would be unfair).

1 individual's standing to bring a lawsuit may be challenged at any stage of the proceeding. *See, e.g.,*
2 *Branson v. Port of Seattle*, 152 Wn.2d 862, 875, 101 P.3d 67 (2004) ("Although the Port does not
3 claim that Branson lacks standing, Suppl. Br. of Resp't at 4, we may raise the issue sua sponte.");
4 *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213, 45 P.3d 186
5 (2002) ("The Court of Appeals, however, correctly observed that standing is a jurisdictional issue
6 that can be raised for the first time on appeal."); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702,
7 725 P.2d 411 (1986) ("If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider
8 it."); *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978) ("A party may raise
9 failure to establish facts upon which relief can be granted for the first time in the appellate court.
10 RAP 2.5(a)(2). Respondent is thus not precluded from raising appellant's failure to establish he is
11 within the protected class."); *Mitchell v. Doe*, 41 Wn. App. 846, 848, 706 P.2d 1100 (1985) ("Facts
12 establishing standing are as essential to a successful claim for relief as is the jurisdiction of a court
13 to grant it. Thus, we hold that the insufficiency of a factual basis to support standing may also be
14 raised for the first time on appeal in accordance with RAP 2.5(a)(2)."); *Mitchell v. Doe*, 41 Wn. App.
15 846, 706 P.2d 1100 (1985) ("Facts establishing standing are as essential to a successful claim for
16 relief as is the jurisdiction of a court to grant it. Thus, we hold that the insufficiency of a factual basis
17 to support standing may also be raised for the first time on appeal in accordance with RAP
18 2.5(a)(2)."). Ms. Anderlik, therefore, was on notice prior to the filing of her case that she had an
19 obligation to provide the trial court with sufficient facts to support her standing to bring the case.

20 V. CONCLUSION

21 The State respectfully requests that this Court grant its instant motion to strike the
22 identified portions of Ms. Anderlik's Petitioner's Reply Brief.

23 Respectfully submitted this 23rd day of October, 2008.

24 

25 PAMELA B. LOGINSKY
26 WSBA NO. 18096
27 Special Deputy Prosecuting Attorney
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1 PROOF OF SERVICE

2 I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below
3 and that I am competent to testify to the matters stated herein.

4 On the 23rd day of October, 2008, I e-filed a copy of the document to which this proof is
5 attached with the Washington Supreme Court by sending this document to supreme@courts.wa.gov.

6 A copy of this document was served by e-mail on counsel for Chris Anderlik, Adam Karp,
7 by sending this document to Mr. Karp at adam@animal-lawyer.com.

8 I declare under the penalty of perjury of the laws of the State of Washington that the
9 foregoing is true and correct.

10 Signed this 23rd day of October, 2008, at Olympia, Washington.

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12 Pamela B. Loginsky, WSBA 18096
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