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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON

V.

RICHARD TRACER

BRIEF OF RESPONDENT

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P.M. 11-17-2008

ORIGINAL

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A. Assignment of Errors

Counter-Assignment of Errors

1. The trial court's order denying the State's motion to vacate the guilty plea is not appealable as a matter of right.

2. An order granting the State's motion to vacate judgment would place Mr. Tracer twice in jeopardy for the same offense contrary to the Fifth Amendment.

3. Mr. Tracer has a due process right to the benefit of his plea agreement pursuant to the Fourteenth Amendment.

4. The trial court acted within its statutory and inherent authority to appoint a special prosecutor.

5. Special Prosecutor Noah Harrison was acting as a de jure official and as such his actions were lawful as to Mr. Tracer.

6. The State does not present any legal authority for the failure of the court to order a crime victim fund assessment and this court should decline to address this issue.

Issues Pertaining to Counter-Assignment of Errors

1. May the State appeal an order denying its motion to vacate Mr. Tracer's guilty plea pursuant to RAP 2.2?

2. Would an order granting the State's motion to vacate judgment place Mr. Tracer twice in jeopardy for the same offense after he has entered a knowing and voluntary guilty plea and been found guilty by the trial court?

3. Does Mr. Tracer have a due process right to the benefit of his plea agreement when he has fulfilled his end of the bargain?

4. Did the trial court act within its statutory and inherent authority to appoint a new special prosecutor when the prior special prosecutor had an illness or other disability that made it impossible to discharge her duties?

5. May the State collaterally attack the actions of Special Prosecutor Noah Harrison when he was acting with apparent authority and was a de jure prosecutor?

6. Should this Court consider the State's claim that the trial court erred by not imposing a crime victim fund assessment when the State presents no legal authority for this claim?

B. Statement of Facts

On May 25, 2007, Richard Tracer was driving a car while intoxicated. CP, 91. His blood alcohol content was .13. CP, 91. While

driving, his car was hit by a wayward meteor, causing him to get into an accident with another car and causing injury to another person. CP, 91.

Mr. Tracer was arrested for vehicular assault. CP, 1. He spent the next five days in jail. CP, 97. As a result, he missed out on a job opportunity with the Big Brother/Big Sister Program. CP, 97. Mr. Tracer is trained in the field of social work. CP, 97. Mr. Tracer was formally charged with vehicular assault on May 29, 2007. CP, 2.

For the next year, he attempted to get a job and get back on his feet. CP, 97. During that period, he obtained a drug and alcohol assessment and attended a mandatory drug and alcohol information school (ADIS). CP, 96. He also attended a DUI victim's panel to learn about the effects of drinking and driving accidents. CP, 96. While Mr. Tracer was attempting to improve himself, his attorney was investigating the accident. CP, 91. An accident reconstructionist hired by the defense determined that Mr. Tracer was not responsible for the accident. CP, 91.

The Jefferson County Prosecutor's Office recused itself from the case because of a conflict of interest. CP, 89. Mr. Tracer is the son of a Jefferson County Sheriff's Office employee. CP, 14. Attorney Andrea Vingo was appointed special prosecutor for the case. CP, 4, 89.

On December 28, 2007, Mr. Tracer appeared for a court appearance. Ms. Vingo did not appear, however, and no explanation was

offered. CP, 89. Over the next six months, the court held eight hearings. Ms. Vingo appeared in person for two of the hearings. CP, 146-47. On September 14, 2007 and November 2, 2007, Ms. Vingo failed to appear and the State was represented by the Jefferson County Prosecutor's Office with defense assent. CO, 146. On June 8, 2007, Ms. Vingo appeared in person. CP, 146. On January 4 and 11, 2008, Ms. Vingo appeared by phone. CP, 146. On March 14, 2008, Ms. Vingo failed to appear and defense counsel requested a continuance on her behalf. CP, 146. On April 11, 2008, Ms. Vingo appeared in person. CP, 146.

On the eve of Mr. Tracer's next court appearance, May 9, 2008, he secured a job. CP, 89. The job was as a social worker with Friendship Diversion in Clallam County. CP, 89. The job was contingent, however, on him resolving the case on or before his May 9, 2008 court date. CP, 89. Mr. Tracer appeared in court on May 9 highly motivated to resolve the case and "get moving on." CP, 89.

When Mr. Tracer appeared for court on May 9, 2008, however, there was no one present to represent the State of Washington. CP, 89. The trial was scheduled for May 19, 2008. CP, 14. Although Jefferson County Deputy Prosecuting Attorney Ted DeBray was present, he was unable to represent the State because of the conflict of interest. CP, 89. Once again, Ms. Vingo was absent from the proceedings without

explanation. CP, 89. Ms. Vingo later explained that she woke up ill that morning, but this information was never relayed to the judge. CP, 134. Jefferson County Judge Crad Verser expressed frustration that Mr. Tracer had appeared "many, many times," but Ms. Vingo kept missing court. CP, 89.

Mr. Davies represented to the court that the matter was set for a change of plea to an amended charge of DUI. CP, 89. The court's first response was to try and get Ms. Vingo on the phone. CP, 89. The court also commented that if Ms. Vingo could not be located, it was willing to consider appointing a different special prosecutor, such as local attorney Noah Harrison. CP, 90.[1] Attempts to contact Ms. Vingo failed, however. CP, 91. The court decided to appoint Mr. Harrison as the special prosecutor. CP, 91. The case was reset for later that afternoon. CP, 92.

When the parties appeared in the afternoon, Special Prosecutor Harrison moved to amend the charge to DUI. CP, 93, 96. He also stated that he was willing to recommend a deferred sentence. CP, 93. The court stated that although it would permit the amendment, it would not consider a deferred sentence. CP, 93.

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[1] The report of proceedings in the case contains inappropriate editorializing by the transcriptionist. See CP, 90 (commenting that the remarks were made "jokingly." Mr. Tracer objects to these editorial comments.

Mr. Tracer submitted a Statement of Defendant on Plea of Guilty. CP, 5, 94. In the Statement, he acknowledges that he is giving up his constitutional rights, including his right to proceed by trial by jury. CP, 5. The prosecutor agreed to recommend a standard first time sentence for DUI, including a mandatory minimum of one day in jail. CP, 6-7. The court reviewed the maximum penalties with him. CP, 94. The court also reviewed the consequences to his driver's license. CP, 95. Mr. Tracer signed the Statement, saying, "I make this plea freely and voluntarily. No one has threatened harm of any kind to me or to any other person to cause me to make this plea. No person has made any promises of any kind to cause me to enter this plea except as set forth in this statement." CP, 8. Judge Verser signed the Statement finding that the "defendant's plea of guilty [is] knowingly, intelligently and voluntarily made. . . The defendant is guilty as charged." CP, 8.

The court sentenced Mr. Tracer to 365 days in jail with 360 days suspended with credit for five days served. CP, 9. The court also assessed fines and costs totaling $3,757. CP, 9. The court also placed Mr. Tracer on probation and set conditions of probation. CP, 9-10.

For reasons that are not entirely clear from the record, Jefferson County Prosecutor Juelanne Dalzell was upset by the events of May 9 and filed a motion to vacate the judgment. CP, 13. Ms. Dalzell objected to the

appointment of Special Prosecutor Harrison by the court. CP, 13. The prosecutor's office appointed a new special prosecutor, Pamela Loginsky. Mr. Tracer objected to the motion, citing his interest in the "finality of his plea." CP, 148. The court denied the motion, as well as the motion to reconsider. CP, 178.

The State has filed three notices of appeal in this case. The first two are duplicative. The third notice of appeal pertains to the court's award of attorney fees to Special Prosecutor Harrison.

C. Summary of Argument

Although the State's Brief of Appellant lists twelve separate assignments of error, most of the assignments raise the same fundamental issue: the appropriateness of the trial court's appointment of Special Prosecutor Harrison. As will be argued, the State's contention should be rejected because the trial court had statutory authority pursuant to RCW 36.27.030 to appoint a special prosecutor due to "illness or other cause." The court also had inherent authority as the overseer of the courts to ensure the orderly administration of justice. Additionally, assuming arguendo that Special Prosecutor Harrison did not have actual authority to act as he did, he had apparent authority to do so, and as such acted as a de

jure official. In any event, his actions were lawful as to Mr. Tracer and the trial court correctly denied the State's motion to vacate his guilty plea.

Before reaching the merits of the State's argument, however, there are three arguments that must be addressed first. First, the State has filed a notice of appeal in a situation where it does not have the right to appeal. RAP 2.2(b). Second, Mr. Tracer entered a knowing and voluntary plea of guilty in open court to a criminal charge and a court of competent jurisdiction accepted the plea. Any attempt by the State to vacate his guilty plea violates his right to be free from double jeopardy under the Fifth Amendment. Third, Mr. Tracer has a due process right under the Fourteenth Amendment to the benefit of his plea agreement, and the arguments of the State deprive him of this due process right. The State's arguments should all be rejected and this appeal dismissed.

D. Argument

1. The trial court's order denying the State's motion to vacate the guilty plea is not appealable as a matter of right.

Pursuant to RAP 2.2(b), there are six trial court orders that may be appealed as a matter of right. They are a final decision, a pretrial order suppressing evidence, an order arresting or vacating judgment, an order granting a new trial, and a sentence, either in juvenile court or adult court,

below the standard range. In all six situations, the appeal must be dismissed if the appeal will place the defendant in double jeopardy. None of these situations apply to this situation.

Five of the six situations may be dealt with summarily. The State is not appealing a pretrial order suppressing evidence, an order arresting or vacating judgment, an order granting a new trial, and a sentence, either in juvenile court or adult court, below the standard range.

The only possible argument that the State can rely on is that the trial court's order denying their motion to vacate judgment is a final decision. The exact language of the rule is as follows: "A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information." But Judge Verser's order denying the motion to vacate judgment does not terminate the case. Mr. Tracer is still under the jurisdiction of the court. He is on probation. If he violates any conditions of his probation, he is subject to re-incarceration for up to 360 days. He is required to make regular payments on his court ordered legal financial obligations. There is nothing about the court's order that abates or discontinues this judgment. RAP 2.2(b)(1) does not apply and this case is not appealable as a matter of right.

Even if this court were to construe Judge Verser's order as arguably appealable, the catch all double jeopardy clause would apply. As will be argued in the next section, Mr. Tracer has a double jeopardy interest in his guilty plea and this appeal must be dismissed.

2. An order granting the State's motion to vacate judgment would place Mr. Tracer twice in jeopardy for the same offense.

The Double Jeopardy Clause applies in three situations: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). In Mr. Tracer's situation, it is the second scenario that is at issue, jeopardy after the acceptance of a guilty plea[2].

DUI is a lesser-included offense of vehicular assault. See Information, CP, 1, alleging Mr. Tracer caused substantial bodily injury while driving under the influence. Therefore, the two offenses are the same offense for purposes of the double jeopardy clause. Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932).

Once a court accepts a guilty plea and determines that the plea is knowing and voluntary, jeopardy has attached. United States v. Patterson,

[2] None of the cases discussed in the latter portion of the brief regarding the applicability of RCW 36.27.030 hold otherwise. For instance, in State v. Wallace, 119 Wn. 457, 206 P. 27 (1922), the indictment was dismissed on motion of the defendant. Therefore, jeopardy had not attached.

381 F.3d 859, 864 (9th Cir. 2004), rehearing denied. A court may not set aside a guilty plea on the government's motion once jeopardy has attached. Patterson at 864. Under normal circumstances, a defendant has a reasonable expectation of finality in a facially valid judgment. State v. Hardesty, 78 Wn. App. 593, 599, 897 P.2d 1282 (1995), affirmed on other grounds, 129 Wn.2d 303, 915 P.2d 1080 (1996).

The Supreme Court of Louisiana recently reinstated the defendant's guilty plea after the trial court erroneously vacated it on the motion of the government. State of Louisiana v. Peyrefitte, 885 So.2d (2004). Although the defendant had breached the plea agreement by testifying falsely at a co-defendant's trial, the proper remedy was to charge him with perjury, not vacating the guilty plea.

Where a plea has been validly accepted and the court has itself agreed on the sentence to be imposed, in the absence of fraud the court has no inherent power to set the plea aside without defendant's consent. People v. Bartley, 60 A.D.2d 283, 401 N.Y.S.2d 71 (1973).

In this case, Mr. Tracer entered a knowing and voluntary plea to a criminal charge. The trial court reviewed the written guilty plea with him, ascertained that he understood the maximum penalty and the prosecutor's recommendation. The trial court then entered an order finding that the

plea was knowing and voluntary and finding Mr. Tracer guilty of DUI. At that moment, jeopardy attached.

There is no allegation that Mr. Tracer had anything to do with the confusion on May 9, 2008. There is no allegation of fraud. See State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) (defendant has no double jeopardy interest in a judgment obtained by fraud). The State's notice of appeal should be dismissed on double jeopardy grounds.

3. Mr. Tracer has a due process right to the benefit of his plea agreement.

Plea agreements are contractual in nature and are measured by contract law standards. State v. Talley, 134 Wn.2d 176, 182, 949 P.2d 358 (1998); See also, Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 2003). Once a court has accepted an agreement, it cannot ignore the terms of the bargain. State v. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988). Even where the terms of the agreement conflict with law, it must be honored by the court if by not so doing the defendant would be injured. Id. See also, Brown v. Poole supra. Simply because the State may have made an error cannot be allowed to undermine the defendant's position. State v. Schaupp, 111 Wn.2d 34, 40, 757 P.2d 970 (1988); State v. Cosner, 85 Wn.2d 45, 51-52, 530 P.2d 317 (1975). Moreover, even where a separate governmental entity was not a party to a contract, it could be bound by the

contract due to principles of fundamental fairness. Such a result is demanded by Due Process where a defendant has given up constitutional rights in return for the agreement. State v. Bryant, 146 Wn.2d 90, 104 42 P.3d 1278 (2002). Enforcement of such agreements implicates the very "integrity of the criminal justice system and fundamental fairness." Id. The Court explained:

> There is more at stake than just the liberty of this defendant. At stake is the honor of the government[,] public confidence in fair administration of justice, and the efficient administration of justice in a federal scheme of government.'... Every agreement by which a witness or accused waives the fifth amendment right against self-incrimination in exchange for a promise by the government is subject to fundamental fairness under the due process clauses of the fifth and fourteenth amendments. A grant of informal immunity differs from a plea agreement in that it is never formalized by a guilty plea. An informal immunity agreement does not require court approval. On the contrary, it is a promise by the government to do nothing. Fundamental fairness requires that the government be scrupulously fair when honoring the terms of such proposals. In general, "fundamental fairness and public confidence in government officials require that [the government] be held to 'meticulous standards of both promise and performance.' Therefore, the principle of 'fundamental fairness' may require that the government perform a promise made by an agent who exceeded his actual authority... While courts applying fundamental fairness have not provided us with a precise test or rule, absent credible evidence that the informant testified untruthfully or otherwise failed to perform, the government must scrupulously perform its end of the bargain.

Bryant at 104-105 (citations omitted). See also, United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983) (Once a defendant has fulfilled his obligations

under such an agreement, settled notions of fundamental fairness bind the government to uphold its end of the bargain).

In Tourtellotte the Washington Supreme Court discussed the binding nature of such agreements in the context of a plea bargain. It stated that:

> An agreement between the parties which is approved by the trial judge cannot be turned aside simply because of the exigencies of the moment. Public pressure and publicity certainly cannot justify the breach of an agreement, no matter how ill-considered the agreement may appear to have been ... If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question. No attorney in the state could in good conscience advise his client to plead guilty and strike a bargain if that attorney cannot be assured that the prosecution must keep the bargain and not subvert the judicial process through external pressure whenever the occasion arises. A plea bargain is a binding agreement between the defendant and the state which is subject to the approval of the court. When the prosecutor breaks the plea bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea.

State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977). Mr. Tracer had a due process interest in the benefit of his plea bargain. To reach the merits of the State's arguments will deprive him of that benefit. The State's appeal should be dismissed.

4. The trial court acted within its statutory and inherent authority to appoint a special prosecutor.

Since the earliest days of Washington Territory, Washington has recognized the authority of the Superior Court to appoint a special prosecutor. The first such statutory enactment was in 1858 and, with minor changes in wording, such a statute has existed unabated since. See State v. Wallace, 119 Wn. 457, 206 P. 27 (1922) (tracing history of the statute).

In Wallace, the trial court dismissed an indictment obtained by a special prosecutor after the Whatcom County Prosecutor recused himself. The State appealed and the Washington Supreme Court reversed. The Court said, "[W]e are of the opinion that there is ample authority vested in the superior court to appoint a special prosecutor in all proper cases. . . [and] the superior court will be presumed to have acted within its authority until the contrary is made to appear." Wallace at 463-64.

The current statute is found at RCW 36.27.030, which reads:

> When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.
>
> When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his county, or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting

> attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he shall receive such reasonable compensation for his services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

This statute explicitly gives the trial court authority to appoint a special prosecutor when the regular prosecutor becomes unable to perform his or her duties, whether from illness or any other cause.

The court can appoint a special prosecutor to represent a party only when two conditions are met. First, the prosecutor must have the authority and the duty to represent that party in the given matter. Second, some disability must prevent the prosecutor from fulfilling that duty. Osborn v. Grant County, 130 Wn.2d 615, 926 P.2d 911 (1996). Here, there can be little doubt that the prosecutor had the authority and duty to represent the State of Washington on a criminal matter. The issue is whether there was a disability that prevented the prosecutor from fulfilling that duty.

A conflict of interest necessitating the appointment of a special prosecutor can arise when the trial court observes actions that are inconsistent with the prosecutor's duties. Westerman v. Cary, 125 Wn.2d 277, 892 P.2d 1067 (1994). A trial court has the responsibility to ensure

the orderly administration of justice and when a prosecutor, by act or omission, fails to act accordingly, the trial court does not error by appointing a special prosecutor. See Westerman at 301. The authority to determine who may or may not act as legal counsel in the courts of this state is vested exclusively in the judicial branch of state government and courts have the inherent power to make decisions accordingly. State v. Cook, 84 Wn.2d 342, 525 P.2d 761 (1974).

The elected prosecutor in Jefferson County is Juelanne Dalzell. She made it clear at an early date that she had a conflict of interest and appointed a special prosecutor, Andrea Vingo. By the time the events of May 9, 2008 took place, Ms. Vingo had committed sufficient acts and omissions for the trial court to be highly frustrated with her. She had repeatedly failed to appear in court, often without notice or explanation. When the May 9 court date arrived, she was again absent and attempts to contact her were fruitless. Defense counsel represented he believed a plea agreement involving a reduced charge had been offered and explained the reasons for the reduction in the charge. The trial date was only ten days away. It involves a considerable inconvenience and expense for a small county, which has only one Superior Court courtroom and one Superior Court judge, to call in a jury. The trial court had a reasonable expectation that the case would be completed on May 9. The trial court took a

reasonable recourse and found that Ms. Vingo was unable or unwilling to fulfill her duties and appointed a new special prosecutor. The trial court did not so error.

5. Special Prosecutor Noah Harrison was acting as a de jure official and as such his actions were lawful as to Mr. Tracer.

Even if this court were to find that Special Prosecutor Harrison was not properly appointed as a special prosecutor, his actions where acting under apparent authority of law must still be sustained. An appointment, or other grant of authority, gives the appointee at least colorable title to office and makes the appointee a de facto official. Anderson v. State of Indiana, 699 N.E.2d 257 (1998).

The State seeks to collaterally attack the acts of a de factor prosecutor. It is well established that the acts of a de facto public official may not be collaterally attacked. State of Indiana v. Waldon, 481 N.E.2d 1331 (1985); State v. Cook, 84 Wn.2d 342, 525 P.2d 761 (1974). In Cook, the trial court dismissed a criminal prosecution because the case was prosecuted by a limited practice legal intern. The Court said,

> The legal intern was authorized to engage in a limited practice of law under license issued by this court, and he was acting under color of his appointment by the prosecuting attorney. His status, therefore, was, at the minimum, that of a de facto officer or appointee. The defendant's motion to dismiss thereby became an impermissible collateral attack upon his authority. This conclusion is mandated, by analogy, by those cases

> refusing to permit a collateral attack upon the authority of a de facto public official to act, whether the latter be a private attorney, a judge, a prosecuting attorney, or other de facto officer.

State v. Cook, 84 Wn.2d 342, 349-50. 525 P.2d 761 (1974).

In a turn-of-the-century Idaho case, after the elected prosecutor advised the court of his desire to recuse himself on a murder case, the court appointed an out-of-county attorney to represent the State. The defense objected because he lived out-of-county and had once acted as the attorney for the victim. The Court rejected these contentions saying, "We think that the trial court was justified in appointing Mr. Forney to act temporarily as the prosecuting officer of Shoshone county. But, even if we be mistaken in this, he acted as such, and his acts were those of an officer de facto, and entitled to recognition as such." State of Idaho v. Corcoran, 7 Idaho 220, 228, 61 P. 1034 (1900).

In State v. Smith, 52 Wn. App. 27, 756 P.2d 1335 (1988), an unqualified Court Commissioner signed a search warrant. The Court of Appeals found that although the Commissioner was without actual legal authority to sign the warrant, the Commissioner was acting as a de facto judge and, as such, the defendant's argument constituted an unauthorized collateral attack on the warrant. The search was sustained.

Regardless of the State's statutory arguments concerning Special Prosecutor Harrison's appointment, he was clearly acting as a de facto prosecutor and the State is now precluded from raising a collateral attack on his qualifications.

6. The State does not present any legal authority for the failure of the court to order a crime victim fund assessment and this court should decline to address this issue.

In Assignments of Error Eight the State takes issue with the fact that the trial court did not order a crime victim fund assessment. The State cites no legal authority for this argument. This Court should not address this Assignment of Error because it is insufficiently presented. See In re Whitney, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (court will not address insufficiently briefed challenges). As the State presents no argument for its position, there is nothing for Mr. Tracer to rebut.

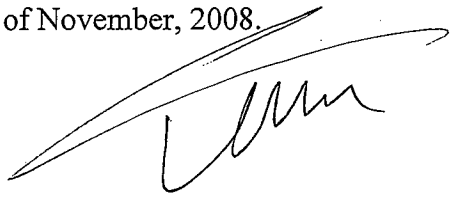
7. Mr. Tracer has no standing to argue the appropriateness of attorney fees to Special Prosecutor Harrison.

Assignments of Error Eleven and Twelve raise challenges to the trial court's award of compensation to Special Prosecutor Harrison. Mr. Tracer does not have standing to address this issue. He takes no position on the award of attorney fees.

E. Conclusion

This appeal should be dismissed as improperly filed. In the alternative, the decision of the trial court should be affirmed.

DATED this 17th day of November, 2008.



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STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RICHARD TRACER, Defendant.	Case No.: 07-1-00090-4 Court of Appeals No.: 37812-4-II AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On November 17, 2008, I sent an original and a copy postage prepaid, of the BRIEF OF RESPONDENT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

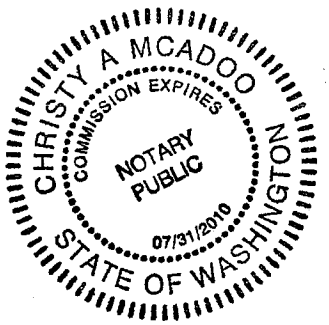
On November 17, 2008, I sent a copy, postage prepaid, of the BRIEF OF RESPONDENT, to the Jefferson County Prosecutor's Office, P.O. Box 1220, Port Townsend, WA 98368.

On November 17, 2008, I sent a copy, postage prepaid, of the BRIEF OF RESPONDENT, to Mr. Richard Tracer, 1821 East Marrowstone Road, Nordland, WA 98358.

Dated this 17th day of November, 2008.

Thomas E. Weaver
WSBA #22488
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 17th day of November, 2008.



Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 07/31/2010

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