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STATE OF WASHINGTON
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No. 87417-4

SUPREME COURT OF THE STATE OF WASHINGTON

EVAN SARGENT,

Petitioner,

v.

SEATTLE POLICE
DEPARTMENT,

Respondent.

**SEATTLE POLICE
DEPARTMENT'S
RESPONSE TO
PETITIONER'S MOTION
TO MODIFY RULING ON
MOTION TO STRIKE**

I. INTRODUCTION

Petitioner Evan Sargent's ("Sargent's") Motion to Modify this Court's order on Respondent Seattle Police Department's ("SPD's") Motion to Strike should be denied as outside the scope of the appellate rules, and because it does not undermine the assignment justice's granting of SPD's Motion to Strike.

First, RAP 17.7 permits modification only of a preliminary ruling by a Clerk or Commissioner, not modification of a final disposition of a motion to strike by a justice of this Court. This Court's order on the Motion to Strike ("Strike Order") was entered at the direction of the assignment justice. Accordingly, it is not subject to modification pursuant to RAP 17.7.

Second, even if this Court were to consider the motion, Sargent fails to advance any grounds to do so. SPD moved to strike four issues in Sargent's Supplemental Brief, but Sargent's Answer to the Motion to Strike addressed only one of those issues: references to evidence outside the record that was the subject of Sargent's unsuccessful RAP 9.11 motions. In his Motion to Modify, Sargent simply reiterates the same arguments regarding the RAP 9.11 evidence that he made in his Answer to SPD's Motion to Strike. Moreover, Sargent's Motion to Modify now attempts to advance new arguments as to why the Court should consider the three issues Sargent did not address in his Answer to the Motion to Strike. These issues were not raised in Sargent's Petition for Review or preserved for review by this Court and, thus, properly were stricken.

Sargent's Motion to Modify should be denied.

II. ARGUMENT¹

A. RAP 17.7 Does Not Permit a Motion to Modify a Decision of the Assignment Justice.

Pursuant to RAP 17.7, Sargent moves to modify the Strike Order entered at the direction of the assignment justice. But RAP 17.7 only permits motions to modify the decision of a Clerk or Commissioner:

¹ The facts relevant to Sargent's Motion to Modify are set forth in SPD's Motion to Strike. The Motion to Modify's "Facts Relevant to Motion" section severely mischaracterizes many of these facts and primarily contains argument based on Sargent's characterization of the facts. Accordingly, SPD addresses Sargent's characterization of the facts with its responsive argument.

An aggrieved person may object to *a ruling of a commissioner or clerk*, including transfer of the case to the Court of Appeals under rule 17.2(c), only by a motion to modify the ruling directed to the judges of the court served by the commissioner or clerk.

RAP 17.7 (emphasis added).

A motion to modify the decision of a single justice is permitted by the Rules of Appellate Procedure only where the justice grants a motion on the merits. *See, e.g.*, RAP 18.4(i) (“A ruling or decision denying a motion on the merits or referring the motion to the judges for decision pursuant to rule 17.2(b) is not subject to review by the judges. A ruling or decision granting a motion on the merits *by a single judge or commissioner* is subject to review as provided in rule 17.7.” (emphasis added)). No Rule of Appellate Procedure allows for modification of the assignment justice’s decision on a motion to strike.

In arguing that his motion is proper, Sargent relies on *Wash. Fed’n of State Emps., Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 884, 665 P.2d 1337 (1983), but that case is distinguishable on both factual and procedural grounds. In *Washington Federation*, this Court considered an extremely expedited request to review the Governor’s plan to implement a “lagged payroll” system, which would have broadly impacted state employees. 99 Wn.2d at 879. The day after Petitioner Washington Federal sought direct review of the trial court’s decision, the Chief Justice

heard argument on the motion for discretionary review and a motion for preliminary injunctive relief, and granted the motions in an order filed that day. *Id.* The Chief Justice's order specifically called for additional briefing on whether the injunction should be continued by the en banc court. *Id.*

In its subsequent review of the Chief Justice's order on the preliminary injunction, the Court noted that the Chief Justice granted the motion for a preliminary injunction pursuant to RAP 8.3, which permits appellate courts "to grant preliminary relief in aid of their appellate jurisdiction so as to prevent destruction of the fruits of successful appeal." *Id.* at 883. The Court observed that the Chief Justice's decision accomplished this purpose and that "[a]t the time of his emergency ruling, the Chief Justice did not have available to him the trial court's written order, the trial court's oral rulings, or the benefit of legal briefing by the parties." *Id.* The Court observed that "[s]ince the issues now before the court are here upon the referral of the Chief Justice, we treat this matter as an appeal in the nature of a motion to modify his preliminary ruling." *Id.* (citing RAP 17.7).

In contrast to the Chief Justice's ruling on the preliminary injunction in *Washington Federation*, the Strike Order was not a preliminary decision in the context of emergency expedited review. Nor

did the assignment justice refer the Motion to Strike for final consideration by the rest of the Court as did the Chief Justice in *Washington Federal*. Rather, the Strike Order constitutes a final disposition by a justice of this Court, which is not subject to modification. Sargent's Motion to Modify should be denied on this basis alone.

B. Sargent Fails to Establish Any Basis to Modify the Strike Order.

Even if this Court were to consider Sargent's Motion to Modify, that motion should be denied. For the reasons set forth below, neither the RAP 9.11 evidence nor the other three issues subject to the Strike Order are properly before this Court.

1. The Strike Order Properly Struck Consideration of the RAP 9.11 Evidence and Related Argument.

Sargent incorrectly contends that the Strike Order conflicts with the Court's September 5, 2012 order granting discretionary review in this case. *See* Mot. to Modify at 6. Sargent bases this contention on the same arguments that he advanced in his Answer to the Motion to Strike: that this Court "grant[ed] discretionary review of the three Court of Appeals orders" attached to his Petition for Review. *See id.* SPD thoroughly addressed this argument in its Reply in Support of the Motion to Strike. *See* Reply at 3-7. In short, Sargent attached these three Court of Appeals orders to a section of his Petition entitled "Court of Appeals Decisions,"

not the “Issues Presented for Review” section required by RAP 13.4. *See* Pet. for Rev. at 1, Apps. A-C. Sargent’s contention that the Court accepted review of all issues encompassed by the Court of Appeals orders attached to his Petition is inconsistent with RAP 13.4(c)(5), which requires that a Petition for Review contain “[a] concise statement of the issues presented for review.”

Sargent does not and cannot dispute that the six issues included in his Petition’s concise statement of issues do not expressly request review of the Court of Appeals’ denial of his RAP 9.11 motions or Motion for Reconsideration. *See* Answer to Motion to Strike at 3 (stating only that Issues 3 and 6 “relied in part on consideration of” evidence that was the subject of his RAP 9.11 motions). This Court’s authority is clear that only issues raised in the concise statement of issues are properly before the Court. *See, e.g., State v. Korum*, 157 Wn.2d 614, 624-25, 141 P.3d 13 (2006); *State v. Collins*, 121 Wn.2d 168, 178–79, 847 P.2d 919 (1993).

Sargent also incorrectly contends that the Strike Order conflicts with the “de novo standard of review for Public Records Act (PRA) actions under RCW 42.56.550(3), which requires consideration of the entire record before the trial court” Mot. to Modify at 1, 7. But a de novo standard of review does not absolve an appellant from properly

preserving and assigning error or allow the appellant to mix and match evidence outside the record on appeal.

Sargent also reiterates the argument that SPD did not argue, in its Answer to his Petition for Review, that Sargent had failed to preserve RAP 9.11 issue for appellate review. Mot. to Modify at 2. But SPD reasonably relied on the RAP 13.4 provision that review would be limited to issues specifically identified in Sargent's Petition. SPD had no reason to believe that Sargent would argue evidence outside the record or issues not before the Court until it received Sargent's Supplemental Brief, at which point it promptly filed its Motion to Strike.

Finally, even if the RAP 9.11 issue were properly before this Court, which it is not, Sargent's Supplemental Brief and his Answer to the Motion to Strike failed to identify any error committed by the Court of Appeals in declining to grant his RAP 9.11 motions. As set forth in SPD's Motion to Strike and Reply in Support of the Motion, Sargent has not established that this is an "extraordinary case" where supplementation of the record is necessary. *See East Fork Hills Rural Ass'n v. Clark Cnty.*, 92 Wn. App. 838, 845, 965 P.2d 650 (1998). Specifically, Sargent has not established that the evidence satisfies the six required RAP 9.11 criteria or

that consideration of that evidence would “serve the ends of justice.” *See Wash. Fed’n of State Emps., Council 28, AFL-CIO*, 99 Wn.2d at 884.²

Accordingly, the assignment justice properly granted SPD’s Motion to Strike references to this evidence, and Sargent has failed to establish any basis to modify that decision.

2. The Court Should Decline to Consider Sargent’s New Arguments Regarding the Three Other Stricken Issues.

Sargent does not dispute that his Answer to the Motion to Strike failed to provide any response to SPD’s request to strike the following three arguments from Sargent’s Supplemental Brief: that Sargent’s April 21, 2010 letter and alleged follow-up voicemail required a response under the PRA; that SPD violated RCW 42.56.080, .100, and .520; and that SPD was required to provide an exemption/production log. *See* SPD’s Mot. to Strike at 6-8. In his Motion to Modify, and for the first time, Sargent argues that he did properly present these issues for review. The Court should reject these belated and unpersuasive arguments.

² Sargent contends that SPD also referenced the RAP 9.11 motions and “related materials” in its Supplemental Brief. Mot. to Modify at 3-4. But, in contrast to Sargent, SPD did not rely on evidence outside the record to argue the merits of this appeal. Rather, SPD noted only that Sargent’s Motion for Reconsideration and RAP 9.11 motions were denied, SPD Supp. Br. at 6 n.4, 15 n.9, and that a declaration of Sargent’s attorney, filed in support of his second RAP 9.11 motion, states that he received the disciplinary investigative file, *id.* at 5 n.3; *see also id.*, App. A. SPD did not attach evidence outside the record or use any of the papers filed with the Motion for Reconsideration or RAP 9.11 motions to present any substantive argument in this appeal.

Although Sargent now contends that he discussed his April 21, 2010 letter and alleged May 14, 2010 voicemail before the trial court, *see* Mot. to Modify at 8, he did not attempt to convert those communications into PRA requests until his Motion for Reconsideration to the Court of Appeals, *see* SPD Suppl. Br., App. B (Mot. for Reconsideration) at 8-10. SPD raised this objection in both its Response to Sargent's Motion for Reconsideration and its Supplemental Brief. Mot. to Strike, App. 2 (SPD's Resp. to Mot. for Reconsideration) at 2-3; SPD Suppl. Br. at 6. In its Motion to Strike, SPD specifically objected that Sargent's Supplemental Brief misconstrued this history, because Sargent claimed that the Court of Appeals "failed to weigh" the April 21 letter and May 14 voicemail and that they were "not discussed in the decision terminating review." Mot. to Strike at 7.

Given that Sargent did not argue that these communications constituted PRA requests until he moved for reconsideration, the Court of Appeals could not have erred by failing to consider those arguments earlier. Sargent also does not dispute that his Petition for Review failed to raise the issue of whether the Court of Appeals erred in denying reconsideration of this issue. Accordingly, it was proper for this Court to strike consideration of Sargent's contention that the Court of Appeals

“failed to consider” the April 21 and May 14 communications because that argument is both misleading and not properly before the Court.

Sargent also incorrectly contends that he preserved for review the issue of whether SPD violated the “promptness” requirements of RCW 42.56.080, .100, and .520, by alleging that SPD failed to produce records within a reasonable time within the meaning of RCW 42.56.550(4). But contrary to Sargent’s suggestion, his Complaint makes no mention of RCW 42.56.080, .100, and .520, and the first time he raised an alleged violation of those statutes was in his Supplemental Brief. Accordingly, this Court properly struck Sargent’s argument because it was not preserved for review and outside the scope of this appeal.

Finally, even Sargent implicitly concedes that he never raised the issue of whether SPD was obligated to provide a production/exemption log. Sargent contends only that SPD was “on notice” of this issue as a result of his argument in the trial court that “SPD refused to respond to inquiries about hundreds of unidentified records SPD was withholding.” Mot. to Modify at 9-10. Sargent failed to raise the production/exemption log argument before the trial court and Court of Appeals, and he failed to include it as an issue in his Petition for Review.

Accordingly, this Court should disregard Sargent’s arguments relating to these issues, which were not presented for review.

3. No Clarification of the Strike Order Is Necessary.

Sargent alternatively requests that the Court modify the Strike Order “to articulate the stricken portions of the grounds previously accepted for discretionary review.” Mot. to Modify at 1-2. This request mischaracterizes the Strike Order, which does not strike portions of the issues presented for review. Rather, the Strike Order grants the relief requested in SPD’s Motion to Strike, specifically the request that the Court strike references in Sargent’s Supplemental Brief to evidence outside the record as follows:

1. Page 2, reference to records produced in November 2011;
2. Page 5, assignment of error 8(b);
3. Page 6 n.3, purporting to incorporate the “facts” in Sargent’s “two RAP 9.11 motions”; and
4. Pages 10, 11 and 19 discussing materials that were the subject of Sargent’s RAP 9.11 motions.

The Motion to Strike also requested that the Court decline to consider the following four issues raised in Sargent’s Supplemental Brief, which were not raised in his Petition for Review and not properly preserved on appeal:

1. Argument based on the RAP 9.11 evidence;
2. Argument that SPD failed to provide an exemption log;
3. Argument that Sargent’s April 21, 2010 letter and alleged follow-up voicemail required a response under the PRA; and
4. Argument that the SPD violated RCW 42.56.080, .100, and .520.

The Court granted SPD's Motion to Strike in full and, thus, ordered the relief identified above.³ As a result, the scope and effect of the Strike Order is clear and no additional guidance is necessary.⁴

III. CONCLUSION

Sargent's Motion to Modify the assignment justice's Strike Order is not permitted by the Rules of Appellate Procedure and should be denied on this basis alone. Even if the Court does not deny Sargent's Motion under RAP 17.7, the Motion fails to establish any basis to modify the Strike Order. The Motion both reiterates the same unavailing arguments that Sargent previously raised with respect to the RAP 9.11 issue and attempts to assert new arguments he failed to raise with respect to the other three issues subject to the Strike Order. Accordingly, Sargent's Motion to Modify should be denied.

³ Sargent's Supplemental Brief now appears on the Court's website with the stricken portions redacted, further eliminating any uncertainty as to the scope of the Strike Order. See <https://www.courts.wa.gov/content/Briefs/A08/874174%20supp%20brief%20of%20petitioner.pdf>.

⁴ To the extent it would be helpful to the Court, however, SPD is willing to provide a proposed order at the Court's request.

RESPECTFULLY SUBMITTED this 2nd day of January, 2013.

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PROOF OF SERVICE

I certify that on the 2nd day of January, 2013, I caused a true and correct copy of the foregoing Seattle Police Department's Response to Petitioner's Motion to Modify Ruling on Motion to Strike to be served on the following via U.S. Mail:

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DATED this 2nd day of January, 2013.



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Attached for filing in the above referenced case please find Seattle Police Department's Response to Petitioner's Motion to Modify Ruling on Motion to Strike.

Please to not hesitate to contact me if you have any difficulty receiving this attachment. Thank you.

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