

FILED
SUPREME COURT
STATE OF WASHINGTON
8/9/2019 3:14 PM
BY SUSAN L. CARLSON
CLERK

No. 97071-8

Court of Appeals Cause No. 35966-2-III

Stevens County Superior Court Cause No. 18-2-00062-7

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

vs.

**STEVENS COUNTY DISTRICT
COURT JUDGE**

Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

JERRY J. MOBERG, WSBA No. 5282

JAMES E. BAKER, WSBA No. 9459

jmoberg@jmlawps.com

jbaker@jmlawps.com

Attorneys for Appellant

P.O. Box 130 – 124 3rd Avenue S.W.

Ephrata, WA 98823

Phone: (509) 754 2356

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR1

II. STATEMENT OF THE CASE.....1

III. STANDARD OF REVIEW5

IV. ARGUMENT6

A. The Priority Action Rule.....6

B. The Priority of Action Rule Should Have Been Applied
in This Case.....8

C. The Critical Stage in the Proceedings Analysis is Used
to Determine Whether a Defendant’s Constitutional
Rights Have Been Violated – Not Whether to Apply the
Priority of Action Rule.....17

V. CONCLUSION.....21

VI. APPENDIX.....21, 23

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>City of Yakima v. Internat’l Ass’n of Fire Fighters, AFL-CIO, Local 469</i> , 117 Wn.2d 655, 818 P.2d 1076 (1991).....	7, 9
<i>Cost Mgmt. Services v. City of Lakewood</i> , 178 Wn.2d 635, 310 P.3d 804 (2013).....	6
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975).....	20
<i>Gilbert v. California</i> , 388 U.S. 263 (1967).....	19
<i>In re Pers. Restraint of Sanchez</i> , 197 Wn.App. 686, 391 P.3d 517 (2017).....	20
<i>Long v. Grill</i> , 799 N.E.2d 642 (Ohio App. 2003).....	6
<i>Matter of 13811 Highway 99, Lynnwood, Wash.</i> , 194 Wn.App. 365, 378 P.3d 568 (2016).....	15, 16
<i>Riggs v. Johnson Cnty.</i> , 73 U.S. 166, 6 Wall. 166 (1868).....	7
<i>River Park Square, LLC v. Miggins</i> , 143 Wn.2d 68, 17 P.3d 1178 (2001).....	6
<i>Sherwin v. Arveson</i> , 96 Wn.2d 77, 633 P.2d 1335 (1981).....	7
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	6
<i>State v. Birch</i> , 183 Wash. 670, 49 P.2d 921 (1935).....	11
<i>State v. Chapman</i> , 131 Wash. 581, 230 P. 833 (1924).....	10-12
<i>State v. Cummings</i> , 87 Wn.2d 612, 555 P.3d 835 (1976).....	11-13
<i>State v. Dolman</i> , 22 Wn.App. 917, 594 P.2d 450 (1979).....	13
<i>State v. Jackson</i> , 66 Wn.2d 24, 400 P.2d 774 (1965).....	20
<i>State v. Stevens Cnty. District Court Judge</i> , 7 Wn.App.2d 927, 436 P.3d 430 (2019).....	5, 17

<i>State v. Stock</i> , 44 Wn.App. 467, 722 P.2d 1330 (1986).....	14, 17-19
<i>State v. Taylor</i> , 101 Wash. 148, 172 P. 217 (1918).....	10, 11
<i>State v. Werner</i> , 129 Wn.2d 485, 918 P.2d 916 (1996).....	11

WASHINGTON CONSTITUTION

Wash. Const. Art. IV, § 6.....	13, 14, 18
Wash. Const. Art. IV, § 10.....	8
Wash. Const. Art. IV, § 12.....	9

STATUTES

RCW 3.02.010	9
RCW 3.02.020	9
RCW 3.30.080	9
RCW 3.66.020	9
RCW 3.66.060	8, 15, 18
RCW 10.43.010	12, 13
RCW 10.46.090	13

COURT RULES

JCrR 2.03(d)(2).....	14
----------------------	----

OTHER AUTHORITIES

15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3854 (4th ed. – updated April 2019).....	7
---	---

I. ASSIGNMENTS OF ERROR

A. The Court of Appeals erred when it rejected the Priority of Action Rule in this case.

B. The Court of Appeals erred when rejected the Priority of Action Rule under a “critical stage of the proceedings” analysis.

II. STATEMENT OF THE CASE

Appellant is Stevens County District Court Judge Gina Tveit (Judge Tveit). Respondent is the State of Washington (the State) on behalf of the two Superior Court Judges of Stevens County: Hon. Patrick A. Monasmith and Hon. Jessica Taylor.

For several years Stevens County District Court handled all in-custody first appearances in criminal matters for cases filed in the Superior Court or the District Court. Without any consultation with Judge Tveit the Superior Court Judges decided to change that procedure. On Jan. 29, 2018, the Stevens County Superior Court Administrator sent an email to Judge Tveit and others stating: “Beginning February 5, 2018, all in-custody first appearances (for both courts) will be heard by Superior Court” (CP 8.)

On Feb. 2, 2018, Judge Tveit sent an email to the staff of the District Court, with copies to the Superior Court Judges, stating: “Please

be notified that you are not to file any orders in a District Court case unless it has been signed by a District Court Judge or District Court Judge pro tem.” (CP 10.) Judge Tveit concluded that for a criminal case originally filed in the District Court the Superior Court had no lawful authority enter orders for filing in the District Court.

On Feb. 5, 2018, the Stevens County Superior Court judges jointly signed an “Administration Order Re Preliminary Appearances.” (CP 41-45.) The order stated in part:

PRELIMINARY APPEARANCES for all adults arrested without a judicial determination of probable cause who are being held in the custody of Stevens County Jail, and for all other persons held in custody who are entitled to a preliminary appearance, shall be heard by the Stevens County Superior Court

(CP 44.) The order stated that it “shall become immediately” and that the order “shall not be superseded by any order from a court of limited jurisdiction.” (CF 45.)

On Feb. 8, 2018, in response to Judge Tveit’s directive for the District Court to refuse to file orders signed by the Superior Court Judges, Stevens County Prosecuting Attorney Tim Rasmussen filed a “Verified Petition for Writ of Mandamus” on behalf of the State. (CP 1-6.) The Petition was verified by Mr. Rasmussen and stated in part:

4. The procedure ordered by the Stevens County Superior Court would be that . . . Stevens County Superior

Court Judge or Commissioners would hear all in-custody first appearances for all crimes, including misdemeanors and gross misdemeanors.

...

10. Respondent Gina Tveit has unlawfully ordered the Stevens County District Court to refuse filing of any orders signed by a Stevens County Superior Court Judge or Commissioner.

...

13. Respondent Gina Tveit and her subordinates have interfered with the Stevens County Prosecuting Attorney and his Deputies, in their administration of justice.

...

16. Respondent Gina Tveit and her subordinates have obstructed the regular administration of justice in Stevens County.

...

20. An Alternative Writ [of Mandamus] should be issued immediately, with an Order to Show Cause.

(CP 2-3.) On the day the ex parte application for a writ was presented, Hon. John F. Strohmaier, a visiting Judge from Lincoln County Superior Court, entered an "Alternative Writ of Mandamus." (CP 62-63.) The order required Judge Tveit to

show cause why contempt should not be found and why a Peremptory Writ of Mandamus shall not be issued, permanently, commanding the Stevens County District Court Judge to accept all orders signed by a Stevens

County Superior Court Judge or Stevens County Court
Commissioner in a Stevens County criminal matter

(CP 62-63.)

On Feb. 16, 2018, Judge Tveit filed an answer to the Alternative Writ. (CP 129-136.) Judge Tveit concluded that the Superior Court Judges lacked jurisdiction or other authority to enter orders on first appearance in cases that were originally filed in the District Court. Judge Tveit also asserted that the actions by the Superior Court Judges were *ultra vires* to their authority. The State filed a response to Feb. 26, 2018. (CP 151-158.) The State also filed a “rebuttal memorandum” on Feb. 27, 2018. (CF 159-166.)

On Feb. 28, 2018, Judge Strohmaier conducted Judge Tveit’s show cause hearing. (CP 173.) On March 7, 2018, Judge Strohmaier entered a Memorandum Opinion concluding that for cases originally filed in District Court that Judge Tveit acted within her authority to refuse the Superior Court’s attempt to hear the cases and enter orders in District Court unless the Superior Court judicial officer was acting as a District Court Judge *pro tempore*. (CP 172-178.) Judge Strohmaier stated in part:

There has been no citation of any case law or statute that would appear to grant the superior court judge or court commissioner the authority to conduct hearings in the district court absent the district court judge’s specific authorization to act as an elected judge pro tem or absent court rule.

(CP 177.) Judge Strohmaier also stated in part:

Contrary to the petitioner’s affidavit in support of the Writ of Mandamus, the district court is not subject to the direction of the superior court and respondent cannot be ‘commanded’ by the superior court to change its own docket or the time of its hearings.

(*Id.*) Unwilling to accept the well-reasoned ruling of Judge Strohmaier, the State filed a motion for reconsideration on or about March 16, 2018.

(CP 179-183.) On March 22, 2018, Judge Strohmaier reaffirmed his Memorandum Opinion. (CP 184-85.) Judge Strohmaier stated in part that “once there was an objection from the district court, the superior court is not authorized to continue in such court.” (CP 185.)

The State then sought review by the Court of Appeals. The Court of Appeals reversed the trial court. *State v. Stevens Cnty. District Court Judge*, 7 Wn.App.2d 927, 436 P.3d 430 (2019). The Court of Appeals held: “Unless a preliminary appearance has already been held, the superior court retains the power and duty to promptly hold a preliminary appearance hearing, even if a charge has been filed in district court.” 7 Wn.App. at 936.

III. STANDARD OF REVIEW

The issue before this Court is a question of law which should be reviewed *de novo*. In a mandamus action, “[t]he determination of whether

a statute specifies a duty that the person must perform is a question of law.” *Cost Mgmt. Services v. City of Lakewood*, 178 Wn.2d 635, 649, 310 P.3d 804 (2013), quoting *River Park Square, LLC v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

If this Court determines that the trial court had discretion whether to apply to Priority of Action Rule then the trial court’s decision should have been affirmed by the Court of Appeals. When the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of an abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

IV. ARGUMENT

A. The Priority Action Rule

The Priority Action Rule is also known as the Jurisdictional Priority Rule¹ or First-Filed Rule. The rule provides:

[T]he court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved. The reason for the doctrine is that

¹ In *Long v. Grill*, 799 N.E.2d 642, 649 (Ohio App. 2003), the Ohio Court of Appeals stated: “The ‘rule of priority of jurisdiction’ applies to actions pending in different Ohio courts that have concurrent jurisdiction; it does not apply when an action is pending in another state.”

it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.

City of Yakima v. Internat'l Ass'n of Fire Fighters, AFL-CIO, Local 469, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991), quoting *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981). The rule “generally applies if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief.” *City of Yakima*, 117 Wn.2d at 675. “The identity must be such that a decision of the controversy by one tribunal would, as *res judicata*, bar further proceedings in the other tribunal.” *Id.* See also 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3854 (4th ed. – updated April 2019) (“when two courts have concurrent jurisdiction over a dispute involving the same parties and issues, as a general proposition, the forum in which the first-filed action is lodged has priority”); *Riggs v. Johnson Cnty.*, 73 U.S. 166, 196, 6 Wall. 166 (1868) (“the court that first obtains possession of a controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the coordinate court”).

The Priority of Action rule applies to administrative agencies and the courts. *City of Yakima*, 117 Wn.2d at 675 (where a controversy between a public employer and a union has been submitted to the Public Employment Relations Commission (PERC), the priority of action rule

requires the Superior Court to decline the controversy in a declaratory judgment action).

B. The Priority of Action Rule Should Have Been Applied in This Case.

This case squarely addresses the issue of whether the Superior Court has any authority to make decisions and enter orders in cases that were first filed in the District Court and the Superior Court is not acting in its appellate capacity.

The starting point is Wash. Const. Art. IV, § 10, which states:

The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

The Superior Court and the District Court have concurrent jurisdiction of misdemeanor and gross misdemeanor cases. RCW 3.66.060

(Criminal jurisdiction) provides:

The district court shall have jurisdiction: (1) Concurrent with the superior court of all misdemeanors and gross misdemeanors committed in their respective counties . . . ; (2) to sit as a committing magistrate and conduct preliminary hearings in cases provided by law; (3) concurrent with the superior court of a proceeding to keep the peace in their respective counties; (4) concurrent with the superior court of all violations under 77 RCW; (5) to hear and determine traffic infractions under chapter 46.63 RCW; and (6) to take recognizance, approve bail, and arraign defendants held within its jurisdictions on warrants issued by other courts of limited jurisdiction

(Emphasis added.) Because the District Court and the Superior Court have concurrent jurisdiction to hear misdemeanors and gross misdemeanors, under the Priority of Action Rule “the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved.” *City of Yakima*, 117 Wn.2d at 675.

The District Court is a constitutional court created by the Legislature. Wash. Const. Art. IV, § 12. The District Court is not merely a division of the Superior Court. District Courts are created by statute. *See generally* RCW 3.02.010-.060, RCW Ch. 35 and RCW Ch. 35A. “Review of the proceedings in a court of limited jurisdiction shall be by the superior court” RCW 3.02.020. District Courts are authorized to adopt their own rules of procedure in addition to rules prescribed to them by the Supreme Court. RCW 3.30.080. Moreover, District Courts have civil jurisdiction over most cases up to \$100,000. RCW 3.66.020.

Because the Superior Court and the District Court have concurrent jurisdiction over misdemeanors and gross misdemeanors, this does not make them a unified court. Each is a separate constitutionally created court with concurrent jurisdiction of misdemeanors depending in which court the Prosecuting Attorney decides to file the case. The fact that the Superior Court has concurrent jurisdiction over misdemeanors gives it no

more right to enter orders in District Court cases than it would give the District Court the right to enter orders in matters originally filed in Superior Court. If, as the State argues, that having concurrent jurisdiction gives the Superior Court the right to enter orders in the District Court then the District Court would have the same authority to enter orders and make rulings regarding misdemeanors originally filed in Superior Court. This is not the way the court system was designed to work.

The question is not whether the Superior Court and District Court have concurrent jurisdiction over a matter. It is instead a matter of where the case was originally filed.

State v. Taylor, 101 Wash. 148, 172 P. 217 (1918) and *State v. Chapman*, 131 Wash. 581, 230 P. 833 (1924) are instructive and were relied upon by the trial court. The trial court noted that *Taylor* and *Chapman* each held that in the absence of a statute giving the Superior Court or the District Court exclusive jurisdiction, the court first assuming jurisdiction is entitled to exercise it to the exclusion of the other. Specifically, the Supreme Court in *Chapman* held:

[I]n the absence of a statute giving one or the other courts exclusive jurisdiction, the one first assuming jurisdiction is entitled to exercise it to the exclusion of the other.

. . . [T]he general law must apply that they have concurrent jurisdiction, and, **when the complaint was filed in the justice's court and the defendant arrested, that court**

acquired jurisdiction of him, and a subsequent dismissal of that action was a bar to any later prosecution in any court For that reason the writ should be granted under the authority of *State ex rel. Murphy v. Taylor, supra*, which held that the Supreme Court has jurisdiction to issue a writ of prohibition to the superior court where it is proceeding in a matter in excess of its jurisdiction. Let the writ issue.

Chapman, 131 Wash. at 585. (Emphasis added.) *Chapman* has never been questioned or overruled by this Court. It was cited with approval in *State v. Birch*, 183 Wash. 670, 678, 49 P.2d 921 (1935) and more recently in *State v. Cummings*, 87 Wn.2d 612, 614, 555 P.3d 835 (1976).

The State argued that under *State v. Werner*, 129 Wn.2d 485, 918 P.2d 916 (1996), it does not matter where the case was originally filed. *Werner* provides little solace. In *Werner*, the question was whether the Superior Court judge had the power to enter a search warrant in a juvenile court case. Justice Talmadge correctly noted that since the juvenile court is a division of the Superior Court the Superior Court it was proper for the Superior Court to enter a search warrant in a juvenile court case. The clear distinction between *Werner* and the case at bar is that **the District Court is not a division of the Superior Court** but is, instead, a separate court established by the Legislature.

The State argued that the holdings in *Taylor* and *Chapman* were superseded by the court rules. This argument ignores the case of *State v. Cummings*, 87 Wn.2d 612, 555 P.2d 835 (1976). *Cummings* involved a

similar procedure issue as in *Chapman*. In *Cummings*, the State filed a District Court action and thereafter filed an information in Superior Court charging the same offense. The State then dismissed the original action filed in District Court. The defendant moved to dismiss the Superior Court action on the grounds that the District Court first acquired jurisdiction by the filing of the complaint in District Court. The defendant argued that the dismissal of the District Court action barred the State from proceeding in the later filed Superior Court action. Citing *Chapman*, this Court held that the dismissal of a prosecution instituted first in justice court barred further prosecution of the information later filed in Superior Court. 87 Wn.2d at 614. Not only did the *Cummings* court reaffirm the holding in *Chapman*, the *Cummings* court went on to hold that the current criminal rules in Superior Court and District Court did not supersede the holding in *Chapman*. This court held that “the rules should be interpreted in light of the common law and decisional law of this state.” *Id.* at 617. More importantly, this court held that the criminal rules did not override the provisions of RCW 10.43.010 (since repealed) that stated in relevant part:

An order dismissing a prosecution . . . shall bar another prosecution of a misdemeanor or gross misdemeanor where the prosecution dismissed charged the same misdemeanor or gross misdemeanor; but in no other case shall such order of dismissal bar another prosecution.

Cummings, 87 Wn.2d at 613. The *Cummings* court went on to hold:

We conclude that RCW 10.43.010 and RCW 10.46.090 have been superseded only insofar as court rules conflict with them, and that RCW 10.46.090 continues to govern the authority of the prosecutor to move for dismissal in justice court, subject to the provisions of RCW 10.43.010, making a dismissal of a misdemeanor charge a bar to another prosecution for the same offense, if the latter prosecution was instituted subsequent to that which was dismissed. RCW 10.43.010 also applies to dismissals in superior court made pursuant to CrR 8.3.

The interpretation is in harmony with JCrR 2.06, which expresses the policy that a misdemeanor should be tried in the court in which the first complaint was filed.

Id. at 617. The holding in *Cummings* was reaffirmed in *State v. Dolman*, 22 Wn.App. 917, 921, 594 P.2d 450 (1979), where the Court of Appeals held that the issuance of a citation to the defendant conferred jurisdiction on the San Juan County District Court. In *Dolman*, after the citation was issued the prosecution decided to file the charges in Superior Court. The citation was never filed in District Court. The court still held that jurisdiction was conferred on the District Court once the citation was issued and accepted.

The State argued that any ruling that would deprive the Superior Court of jurisdiction over a criminal matter in favor of an inferior court would violate Wash. Const. Art. IV, § 6. The argument misses the point. In matters of concurrent jurisdiction, the Court Rules that confer

jurisdiction on the court where the case is first filed does not deprive the other court of jurisdiction in the constitutional sense. It only establishes which court will hear the case. Only one pilot at a time can fly an airplane. It is the prosecutor who has the initial choice as to where to file misdemeanors. Here, under the State's theory, if the prosecutor did not like a ruling of the District Court the prosecutor could – without an appeal – seek all further rulings in the case before a judge of the Superior Court.

Citing *State v. Stock*, 44 Wn.App. 467, 722 P.2d 1330 (1986), the State takes issue with the rule that the court where the case is filed acquires jurisdiction over the case. *Stock* is not applicable to the case at bar. Ms. Stock was convicted of first degree theft when former JCrR 2.03(d)(2) provided in part that “[j]urisdiction vests in the superior court at the time the information is filed.” 44 Wn.App. at 474-75. Evidence admitted at trial had been obtained through a search warrant issued by the District Court after the State filed the information in Superior Court. *Id.* at 473-74. Ms. Stock argued on appeal that the evidence should have been suppressed because once the State filed the case in Superior Court the District Court lost jurisdiction over the case to issue a warrant. In rejecting that argument, the *Stock* court first noted that the Superior Court has original jurisdiction over all felony cases under Wash. Const. Art 4, § 6. The law also provided in part that justice courts have jurisdiction “(2) to

sit as committing magistrates and conduct preliminary hearings in cases provided by law; (3) concurrent with the superior court of a proceeding to keep the peace in their respective counties.” *Id.* at 474, *quoting* former RCW 3.66.060. The *Stock* court concluded that the District Court’s concurrent jurisdiction with Superior Courts **to issue warrants in felony cases** did not trench upon the Superior Court’s exclusive jurisdiction over felony cases. *Id.* The court agreed with the trial court’s reasoning that the filing of a felony information in Superior Court invokes the Superior Court’s jurisdiction over the “matters concerning the trial of the case itself” but does not deprive the District Court from jurisdiction to issue warrants. *Id.* *Stock* reaffirms the concept that the court where the concurrent jurisdiction matter is first filed has jurisdiction to hear the case. It does not prevent the other court from exercising some statutorily approved ancillary action like the issuance of a search warrant. However, that is not the issue before this Court. The issue before this Court is whether a Superior Court judge can issue orders and make rulings in a District Court case independently of any special ancillary jurisdiction.

Likewise, the State’s reliance on *Matter of 13811 Highway 99, Lynnwood, Wash.*, 194 Wn.App. 365, 378 P.3d 568 (2016), is misplaced. In fact, the case acknowledges the Priority of Action Rule stating that the court which first gains jurisdiction of a case retains the exclusive authority

to deal with the case until the controversy is resolved. The relevant issue in the *Lynnwood* case was whether a search warrant issued by an inferior court pursuant to a statute would divest the Superior Court of jurisdiction to determine whether seized property should be returned. The search warrant was issued out by the City of Lakewood. The inferior court rules provided that the motion for return of property seized pursuant to a warrant should be filed in the court that issued the warrant. The Superior Court rules did not include that restriction. The court determined that the Superior Court had jurisdiction to hear and decide the motion for return of seized property in a case filed in Superior Court. The court rejected the City's claim that it had exclusive jurisdiction to hear the matter. Again, that issue is not before this Court. There is no dispute that Superior Court and District Court have concurrent jurisdiction over misdemeanors. However, once a case is filed in Superior Court or District Court that particular court is vested with the power to make all rulings on the case to the exclusion of the other court. This rule avoids potential irreconcilable conflicts in the administration of the case.

While both the Superior Court and District Court have concurrent jurisdiction over misdemeanors, both court cannot administer the same case. The court wherein the case is first filed has the jurisdiction to hear

all matters related to the case. The other court cannot “intervene” and issue out rulings and orders in the case.

C. The Critical Stage in the Proceedings Analysis is Used to Determine Whether a Defendant’s Constitutional Rights Have Been Violated – Not Whether to Apply the Priority of Action Rule.

An analysis of the “critical stage” in criminal proceedings applies to whether a defendant’s constitutional rights were violated – not whether the Priority of Action Rule should be applied.

The Court of Appeals recognized the Priority Action Rule. 7 Wn.App.2d at 933-34. However, in a decision of first impression, the court held that the Priority of Action Rule does not apply in the preliminary appearance context because a preliminary appearance was not considered to be a “critical stage” of a criminal prosecution. *Id.* at 934-35.

The court began its analysis by discussing *State v. Stock*, 44 Wn.App. 467, 722 P.2d 1330 (1986), in which Division 1 held that the Priority of Action Rule does not apply in the search warrant context. The opinion in *Stock* on the search warrant issue was not decided under a “critical stage of the proceedings” analysis – it was decided on other grounds. The opinion in *Stock* used the critical stage of the proceedings analysis for another issue that was raised: whether law enforcement’s

taking of a handwriting exemplar without the presence of counsel violated the defendant's constitutional rights.

Jurisdiction to Issue a Search Warrant – The search warrant issue was discussed at pp. 473-75 of the opinion in *Stock*. Ms. Stock was convicted in superior court of first degree theft when former JCrR 2.03(d)(2) provided in part: “Jurisdiction vests in the superior court at the time the information is filed.” Evidence admitted at trial was obtained through a search warrant issued by the district court after the State filed the information in superior court. 44 Wn.App. at 473-74. On appeal, Stock argued that the evidence should have been suppressed because once the State filed the case in superior court the district court lost its jurisdiction over the case to issue a warrant. The *Stock* court first noted that superior courts have original jurisdiction over all felony cases under Wash. Const. Art. 4, § 6. 44 Wn.App. at 474. The law also provided in part: “The justice court shall have jurisdiction: . . . (2) to sit as committing magistrates and conduct preliminary hearings in cases provided by law; (3) concurrent with the superior court of a proceeding to keep the peace in their respective counties.” *Stock*, 44 Wn.App. at 474, quoting former RCW 3.66.060. The court concluded that the district court's jurisdiction with superior courts to issue warrants in felony cases did not trench upon the superior court's exclusive jurisdiction over felony cases. *Id.* The court

agreed with the trial court's reasoning that filing a felony information in superior court invokes the superior court's jurisdiction over the "matters concerning the trial of the case itself" but does not deprive the district court from jurisdiction to issue warrants. *Id.* at 475. Had the court of appeals ruled otherwise then Ms. Stock's conviction would have been required to be overturned.

Handwriting Exemplar – The handwriting exemplar issue was discussed at pp. 471-72 of the *Stock* opinion. Ms. Stock also argued that a handwriting exemplar should be suppressed because it was obtained by the police in the absence of defense counsel after Ms. Stock requested her right to remain silent and have counsel present. *Id.* at 471. The *Stock* court called the police action "to be deplored." *Id.* However, the court held that it did not violate defendant's Fifth and Sixth Amendment rights. The court at 472 quoted *Gilbert v. California*, 388 U.S. 263, 267 (1967): "The taking of the exemplars was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel."

The "critical stage of criminal proceedings" analysis should be reserved for deciding whether a defendant's constitutional rights were violated – not for deciding whether the Priority of Action Rule should be applied.

The other cases cited by the Court of Appeals to justify its decision were *Gerstein v. Pugh*, 420 U.S. 103 (1975), *State v. Jackson*, 66 Wn.2d 24, 400 P.2d 774 (1965) and *In re Pers. Restraint of Sanchez*, 197 Wn.App. 686, 391 P.3d 517 (2017), *rev. denied* 189 Wn.2d 1023 (2017). *Gerstein* and *Jackson* do not compel the result reached by the Court of Appeals in the case at bar. These cases should be limited to when the Constitution requires that counsel be appointed. *Gerstein* and *Jackson* were discussed at length at pp. 14-18 of Judge Tweit’s Amended Petition for Review by the Supreme Court of Washington and will not be repeated here.

The Court of Appeals’ opinion in *In re Pers. Restraint of Sanchez*, *supra*, also addressed whether a defendant’s constitutional rights were violated when counsel was not appointed to represent him at his arraignment. Sanchez was convicted of aggravated first-degree murder. The Court of Appeals held that the failure to appoint counsel at defendant’s arraignment, during which he pleaded not guilty, did not constitute the denial of counsel at a “critical stage” under the circumstances of the case. *Id.* at 702. The court stated: “Only if the nature of his arraignment was such that he stood to lose important rights that might affect the outcome of his case should it be considered a critical stage.” *Id.*

Judge Strohmaier correctly ruled that Judge Tveit lawfully refused to accept orders filed by the Superior Court judges in cases that were initially filed in District Court. The trial court's ruling is consistent with law and the orderly administration of justice. If the Superior Court could intervene and issue rulings on District Court cases then how could the Superior Court fairly exercise its appellate court jurisdiction over the same cases? Could a Superior Court judge make a ruling in a District Court case and then – if the matter was appealed to Superior Court – reverse her or his ruling? Clearly not.

V. CONCLUSION

For the reasons set forth above, the Court should reverse the Court of Appeals and reinstate the ruling of the trial court.

VI. APPENDIX

Memorandum Opinion of Judge Strohmaier dated March 7, 2018.

RESPECTFULLY SUBMITTED this 9th day of August, 2019.

JERRY MOBERG & ASSOCIATES, P.S.

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

JERRY J. MOBERG, WSBA No. 5282

JAMES E. BAKER, WSBA No. 9459

Attorneys for Stevens County District Court Judge

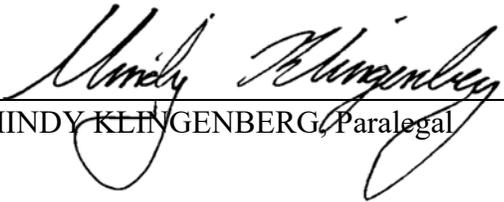
CERTIFICATE OF SERVICE

I certify that on this date I filed this document using the Washington State Appellate Court's Portal which will send notification of the filing to:

Will Morgan Ferguson, Stevens County Prosecutor's Office
will.ferguson208@gmail.com

DATED this 9th day of August, 2019 at Ephrata, WA.

JERRY MOBERG & ASSOCIATES, P.S.


MINDY KLINGENBERG, Paralegal

APPENDIX

**Superior Court of Washington
County of Stevens**

STATE OF WASHINGTON,
Petitioner,
vs.
STEVENS COUNTY DISTRICT COURT
JUDGE,
Respondent.

No. 18-2-00062-7

MEMORADUM OPINION

I. ACTION/PROCEEDINGS

On January 29, 2018, the Stevens County Court Administrator (ostensibly at the direction of the Stevens County Superior Court Judges) issued a memo to the superior and district court judges, prosecutors, and others notifying them that all in-custody first appearances for both courts are to be heard by the Superior Court at noon on Mondays through Fridays.

On February 2, 2018, Judge Tveit issued a memo to the Stevens County District Court Administrator notifying the court administrator that she is not to file any orders in District Court unless it is signed by a district court judge or district court judge pro tem. This memo was also sent to the superior court judges, prosecutor, superior court clerk and administrator, and district court clerk.

On February 5, 2018, the Stevens County Superior Court Judges jointly signed an Administrative Order Re: Preliminary Appearances directing that all preliminary appearances for all adults arrested without a judicial determination of probable cause who are being held in the custody of Stevens County Jail shall be heard by said superior court judges or by a court commissioner.

According to the Affidavit for Writ of Mandamus referenced below, on February 5, 2018, Judge Reeves of the superior court presided over an in-custody first appearance of Edwin Maesta concerning two gross misdemeanors, entered a Rule 3.2 Hearing Order Conditions of Release under Stevens County District Court Case No. SCCR16309, and set the matter over to the district court for 1:30 p.m. that day. The district court clerk did not file the order nor was the matter set on the district court's

docket that afternoon. Said affidavit also referenced two other criminal cases in which Judge Tveit disregarded said administrative order and also presided over the preliminary appearance of both matters.

On February 8, 2018, the Stevens County Prosecuting Attorney filed a Petition for Writ of Mandamus on behalf of the State of Washington directing the Stevens County District Court and District Court Judge to retract her order to the Stevens County District Court Clerk that prevented filing of orders signed by a superior court judge or court commissioners and in the alternative requested an order to show cause why a peremptory writ should not be issued.

On February 8, 2018, the undersigned judge reviewed the initial pleadings, Affidavit for Writ of Mandamus with attached documents, and Memorandum in Support of Writ of Mandamus, and approved of the Alternate Writ of Mandamus ordering the respondent to either accept, file and comply with the Stevens County Superior Court orders or show cause on February 21, 2018 why she should not be held in contempt and why a peremptory writ of mandamus should not be issued.

On February 16, 2018, respondent appeared through her attorney, Jerry Moberg, and filed an Answer to Writ of Mandamus and Respondent's Memorandum in Support of Answer to Writ of Prohibition or Mandamus and subsequently filed with the Supreme Court a Petition for Alternative Writ of Prohibition and Order to Show Cause.

On February 21, 2018, a hearing was held by telephone; and respondent, through her attorney, requested a stay until the Supreme Court could hear her petition and in the alternative requested a continuance. Petitioner argued that the district court had continued to disregard the existing Writ of Mandamus and that the refusal to allow the superior court's orders to be filed in the district court files could cause irreparable harm. Petitioner further argued that any continuance would cause confusion between the sheriff's department, prosecuting attorneys, defense counsel and their defendants as to the enforceability of separate and often conflicting orders between the two courts. This had created potential problems and liability in the failure to process and the lack of enforcement of the superior court's orders. Notwithstanding this, this court commented that the courts were free to return to the prior procedures if necessary and did not feel that one-week continuance would likely cause irreparable harm.

On February 28, 2018, the parties and their attorneys were present in court and their respective positions were argued to this court. It was noted that a hearing on the Writ of Prohibition to the Supreme Court was anticipated to be held within the next several weeks. This court then took the matter under advisement.

II. ISSUES

1. Does the Stevens County Prosecuting Attorney have standing to bring this action and/or is there an inherent conflict of interest in the Stevens County Prosecutor filing an action against the Stevens County District Court Judge?

2. Is the Writ of Mandamus a proper remedy to seek to require the respondent to comply with a superior court's administrative order?
3. Are there any genuine disputed issues of fact or are the issues primarily questions of law?
4. Does this court as a visiting superior court judge have any authority to rule on actions taken by the superior court of another county?
5. Does the superior court have the authority to require the district court judge and therefore the district court clerk to compel the performance of an act?
6. Is the district court required to comply with the superior court's administrative order and enter the superior court orders into the district court's files?

III. DISCUSSION

1. Does the Stevens County Prosecuting Attorney have standing to bring this action and/or is there an inherent conflict of interest in the Stevens County Prosecutor filing an action against the Stevens County District Court Judge?

The Stevens County Prosecuting Attorney states that its client is the State of Washington and is acting on behalf of the citizens of Stevens County and as such is acting within the executive branch. Although the primary conflict is between the superior court and district court, the inability of these two courts to work together had caused substantial problems and potential liability to the prosecuting attorney's office. If Domestic Violence Protection Orders, No-Contact Orders, Anti-harassment Orders, and other orders signed by the superior court under the caption of the district court are not being filed with the district court, the sheriff would not be routinely notified of the respective orders. Therefore, persons who are advised they are protected may be at personal risk and those who are told that there is no order against him or her may be subject to arrest if the documentation was not properly processed. Either situation could potentially create liability to the county.

This situation can be shown by deputy prosecuting attorney Erika George's Affidavit regarding a pro tem judge in district court who had denied a no-contact order previously approved by the superior court but not filed in the district court file and therefore not forwarded to the sheriff and entered into the 911 database. Based on the district court pro tem judge's apparent statement that any liability for a no-contact order not being entered falls on the prosecutor's office, it appears reasonable for the prosecutor's office to protect itself and the affected citizens who may be relying on a court order that is not being processed and enforced.

It does not appear in dispute that the county prosecuting attorney is the proper court representative for the superior court judge. See Neal v. Wallace, 15 Wn. App.

506 (1976); and the prosecuting attorney has a duty to represent the district court, see Westerman v. Carey, 125 Wn. 277 at 299 (1994).

Petitioner's citation of Grant County Prosecuting Attorney v. Jasman, 183 Wn.2d 633 (2015) does not support its being able to represent one county body against another as that action was against a deputy coroner that was not entitled to have a special prosecutor represent him.

This court is cognizant of the limitations of the prosecutor's office in representing the district court when it was being sued in its official position and simultaneously representing the sheriff against the position taken by the district court as described in Westerman, supra. It appears that the best course of action would have been for the Stevens County Prosecuting Attorney to avoid such a potential conflict of interest and withdraw from this case as the issues appear to be between the two court systems (actually there may be three entities involved as it appears that it is asserting itself in the action) and request the county commissioners appoint a special prosecutor to be paid from the prosecutor's budget as provided in Westerman at 298-305.

However, the Westerman case did not involve a lack of filing and processing court documents and transferring the necessary information between the district court and sheriff, which appears to have created a potential liability to the prosecutor if the court orders were not being processed properly. In view of the emergency nature of the conflicting court orders and the fact that each party was able to fully argue its respective position, this court believes that it is in a position to make a determination as set forth below and for the limited scope of this memorandum will accept that the prosecuting attorney is acting solely on behalf of itself and the citizens of Stevens County and the state. This determination also appears in conformity with RCW 36.27.020(13) when it references one duty of the prosecuting attorney is to seek to reform and improve the administration of criminal justice.

2. Is the Writ of Mandamus a proper remedy to seek to require the respondent to comply with a superior court's administrative order?

There is no other adequate remedy that exists at law available to review the actions of the district court and accomplish the purpose of a writ of mandamus. Absent the requested writ, the issues will be raised repeatedly until either the district court judge authorizes the superior court to act as an elected judge pro tempore in the district court, the superior court returns to the prior practice of allowing the district court to preside at all in-custody first appearances or returns to two separate court dates for each court, this court makes a final ruling on the Writ of Mandamus, or the Supreme Court enters its own orders on the Writ of Prohibition. Therefore, a separate appeal of each case that may be affected is not practical; and there is no other plain, speedy, or adequate remedy in the ordinary course of law. The only remedy available is for the Writ of Mandamus.

3. Are there any genuine disputed issues of fact or are the issues primarily questions of law?

The issues before this court are primarily legal in nature. The facts of each district court case that may have been affected by the superior court's orders not being filed in the district court are not necessary for this court to make a ruling. However, based on the current lack of cooperation, it is possible for the two courts to set their respective hearings at times inconvenient to the other or to fail to communicate on issues that need both courts' cooperation, but such issues would need to be addressed at a later date.

4. Does this court as a visiting superior court judge have any authority to rule on actions taken by the superior court of another county?

This court does not have any greater power or authority than any other superior court judge, including the two Stevens County Superior Court Judges who had both recused themselves from the present litigation but who had issued their own administrative order as referenced above.

5. Does the superior court have the authority to require the district court judge and therefore the district court clerk to compel the performance of an act?

RALJ 1.1(c) does not govern the procedure for seeking review of a decision of a court of limited jurisdiction by statutory writ; however, RCW 7.16.160 appears to provide the authority for a superior court to issue a writ of mandamus to compel the performance of an act by an inferior court, so this court does have the authority to issue such a writ if deemed appropriate.

6. Is the district court required to comply with the superior court's administrative order and enter the superior court orders into the district court's files?

It is not disputed that justices of the peace and district courts have jurisdiction concurrent with the superior court in all misdemeanors and gross misdemeanors committed in their county. This was cited with approval in State v. Taylor, 101 Wash. 148 (1918) and later in State v. Chapman, 131 Wash. 581 (1924). However, the Chapman case at 585 added the following provision to such concurrent jurisdiction, to-wit: "and inferentially adds that, in the absence of a statute giving one or the other courts exclusive jurisdiction, the one first assuming jurisdiction is entitled to exercise it to the exclusion of the other." This was later cited with approval in State v. Birch, 183 Wash. 670 (1935). This position also seems to be the majority view when considering multiple proceedings in different courts of concurrent jurisdiction as cited in 159 A.L.R. 1283.

However, in the present case, the Stevens County Superior Court is not attempting to proceed with multiple proceedings, only to issue rulings whenever an in-custody defendant is brought before the court, either on a felony or misdemeanor/gross misdemeanor charge(s). So, the issue of granting either the Stevens County District Court or the Superior Court exclusive jurisdiction depending on who first assumed the

case does not appear to be relevant to whether the district court must allow the superior court to enter orders in district court.

There has been no citation of any case law or statute that would appear to grant the superior court judge or court commissioner the authority to conduct hearings in district court and enter orders in district court absent the district court judge's specific authorization to act as an elected judge pro tem or absent court rule. The district court judge is an elected official that presides over criminal misdemeanor/gross misdemeanor charges and may conduct preliminary hearings to determine probable cause on felony complaints (CrRLJ 3.2.1(g)). Contrary to the petitioner's affidavit in support of the Writ of Mandamus, the district court is not subject to the direction of the superior court and the respondent cannot be "commanded" by the superior court to change its own docket or the time of its hearings.

The district court sets its own hours, appoints its own judge pro tem, and rules on any issue that may come up during pre-trial, trial, sentencing, or post-conviction matters. Only if the defendant seeks to review the district court's decision will the superior court act in its appellate capacity (RALJ), but such matters will then be heard in the superior court. Furthermore, if a superior court could sign orders in the district court whenever a district court defendant is in-custody and needs to be brought before the court, it could cause uncertainty, inconsistency, and may cause a conflict if the defendant files an appeal to the superior court.

Finally, the question is whether any court rule would require the district court to allow the superior court to preside over matters in district court. The superior court criminal rules (CrR) govern the procedures of courts of general jurisdiction; and specifically CrR 3.2.1 addresses procedures following a warrantless arrest and preliminary appearance. This rule requires a judicial determination of probable cause within 48 hours and the defendant to be brought before the court by the next judicial day; and at the hearing the court is to advise the defendant of the charge(s), the right to be assisted by a lawyer, the right to remain silent, and if conditions of release are needed, a determination at that time that probable cause exists.

Additionally, CrR 3.2.1 specifically references that the defendant must appear before the superior court *unless the defendant appeared or will appear before a court of limited jurisdiction for a preliminary appearance pursuant to CrRLJ 3.2.1*. In other words, if the district court does not conduct such a preliminary appearance under the criminal rules for the courts of limited jurisdiction, the superior must then timely do so. It makes no reference to the superior court taking any action or issuing any orders in the district court. It should be noted that these preliminary proceedings do not address arraignments in district courts, failure of the defendant to comply with conditions of release in district courts, subsequent arrests or any other hearings when the defendant may be in custody and then brought before the district court.

CrRLJ govern the procedures of all criminal proceedings in district court; and CrRLJ 3.2.1 requires the same considerations as the preliminary appearances under

CrR 3.2.1, except that the defendant must be brought before the court of limited jurisdiction (district court) *unless the accused has appeared or will appear before the superior court for a preliminary appearance*. The question then is under what circumstances and under what procedures are defendants to make preliminary appearances before a superior court on charges that may be brought before the courts of limited jurisdiction as defined under CrRLJ 1.1. Since the superior court has concurrent jurisdiction in such situations, superior courts may take action on such charges, but any such action must be done in superior court. In the event that there are cases filed in both courts involving the same charges, then it would appear that whatever court first assumed the case will have jurisdiction.

Contrary to the State's concern that the law enforcement agency could dictate where a criminal case could be heard, the court rules provide for the district court to bind a defendant over to superior court if it was determined the accused had committed a felony, and jurisdiction vests in the superior court at the time the information is filed. Additionally, case law specifically authorizes the filing of subsequent felony charges in superior court even after charges were dismissed in district court. See State v. Kersteter, 30 Wn. App. 84 (1981).

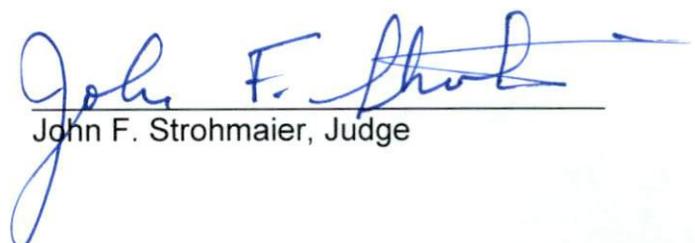
Since the district court was within its power to refuse the superior court's attempt to hear cases and enter orders in district court, the respondent may request reasonable attorney's fees and costs if supported by statute or recognized grounds in equity.

IV. SUMMARY

A Writ of Mandamus would be a proper remedy before this superior court judge to address the refusal of the district court judge to comply with the superior court's administrative order. Irrespective of whether there was an inherent conflict when the prosecutor filed its petition against the sitting district court judge, the emergency nature of the issues supports a prompt decision; and the issues were fully briefed and argued. There were no factual issues that needed testimony; however, this court would need to rule on the amount of attorney's fees and costs, if appropriate.

Although this court does not have any greater authority than the Stevens County Superior Court Judges, this court does have jurisdiction over the Stevens County District Court; and said district court is not required to recognize the superior court's orders in a district court case unless specifically authorized as a judge pro tem or court commissioner. This holding does not limit the superior court to preside over preliminary appearances on defendants charged with misdemeanors/gross misdemeanors and to try such cases in superior court on cases filed in superior court, but any such hearings would need to be held in the superior court.

Dated: March 7, 2018


John F. Strohmaier, Judge

JERRY MOBERG & ASSOCIATES, P.S.

August 09, 2019 - 3:14 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97071-8
Appellate Court Case Title: State of Washington v. Stevens County District Court Judge
Superior Court Case Number: 18-2-00062-7

The following documents have been uploaded:

- 970718_Other_20190809103120SC533852_6622.pdf
This File Contains:
Other - Appellant's Supplemental Brief
The Original File Name was Supp Brief.pdf

A copy of the uploaded files will be sent to:

- jbaker@jmlawps.com
- wferguson@stevenscountywa.gov
- will.ferguson208@gmail.com

Comments:

Sender Name: Mindy Klingenberg - Email: mklingenberg@jmlawps.com

Filing on Behalf of: Gerald John Moberg - Email: jmoberg@jmlawps.com (Alternate Email:)

Address:
PO Box 130
Ephrata, WA, 98823
Phone: (509) 754-2356

Note: The Filing Id is 20190809103120SC533852