

68502-3

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NO. 68502-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THOMAS EUGENE HALL, JR., Appellant,

v.

KING COUNTY, Respondent.

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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Regulations and Rules

CR 11.11,12,13
CR 56 (g)11,12,14
ROA 18.112

I. ASSIGNMENT OF ERROR

1. The trial court erred in entering the order of February 16, 2012 granting the county defendant/respondent's Motion for Summary Judgment of Dismissal and the Order of February 28, 2012 denying plaintiff/appellant's Motion for Reconsideration and Counter Motion for Summary Judgment and Terms.

Issues Pertaining to Assignment of Error

1. Is there any evidence at all that Mr. Hall was held in jail legally from December 31, 2008 through January 12, 2009 or that any entity but the county, through its specifically assigned deputy prosecuting attorney, is responsible for that imprisonment?

2. Should sanctions be imposed for respondent's persistent mischaracterization of authority?

II. STATEMENT OF THE CASE

Appellant/Plaintiff Hall sued King County for keeping him falsely and negligently imprisoned from December 31, 2008 through January 12, 2009. CP1. It is uncontested that early on December 31, 2008 Mr. Hall was being held in the King County Jail on just two matters.

The first hold was a Department of Corrections ("DOC" hereafter) "Order for Arrest and Detention" resulting from a December 15, 2008 arrest on allegations of malicious mischief 3 and domestic violence, which

are gross misdemeanors. CP 27. It was a probation hold alleging that the new offenses amounted to probation violations in King County Superior Court gross misdemeanor cause number 06-1-05423-3 KNT in which Judge Michael Heavey had entered a probationary disposition or sentence on November 3, 2006. That DOC Order led to a "Court-Notice of Violation" issued by a DOC probation or community corrections officer on December 23, 2008 alleging the probationary violation. CP 45-48. As stated on the Order for Arrest and Detention's page one, CP 27, the case and the allegations of probation violations were a matter of "County Jurisdiction" rather than "DOC Jurisdiction." It further stated that "County Staff Will Schedule Hearings." [sic.] The "Court-Notice of Violation," by use of the word "Court" also indicated county jurisdiction, and copies of both documents were, by their terms, directed to the county prosecutor. The first page of the "Court-Notice of Violation," CP 45, provides notice not only of the original "11/3/06" sentencing date, but also of the jurisdictional "Termination Date" of "11/2/08," which of course had passed. It also states: "Status: Filed (Tolling)," for whatever meaning or efficacy those words may have, which should be none as explained hereafter.

The second and only other hold on Mr. Hall on December 31, 2008 is evidenced by another "Order for Arrest and Detention" containing the

same allegations, except that it relates to a King County Superior Court felony sentencing in cause number 07-1-04376-1 SEA. Over these allegations of violations of the terms of community custody, DOC, not the county, had jurisdiction as stated on page one of the Order which also states "DOC Will Schedule Hearing." CP 24.

DOC had scheduled its hearing related to the felony case violations for December 31, 2008 and it resulted in its order of that date releasing Mr. Hall at that time. CP 32-33, "Release to Streets." CP 33.

Thereafter, Mr. Hall remained in jail on the Order for Arrest and Detention based on the gross misdemeanor case until Judge Heavey's Order of Immediate Release was entered on January 12, 2009 for expiration of jurisdiction. CP 43. See CP 37-46.

Mr. Hall was not released as soon as the DOC felony case release came to the attention of the defendant county's prosecutor because his specialist deputy prosecutor or staff assigned specifically to probation violation allegation matters put the gross misdemeanor case on a routine calendar on December 30, 2008. On that date they had it stricken (CP 35) and re-set on the January 12, 2009 date upon which Judge Heavey could hear it, CP 40-43., which he then did and, on Mr. Hall's motion, dismissed it without opposition from the prosecutor. CP 87.

Procedural Facts

The procedural path to the trial court's grant of summary judgment for the defendant and not for plaintiff was a bit peculiar.

As stated, plaintiff sued King County for his tortious incarceration from December 31, 2008 through January 12, 2009. CP 1-3. The county moved for summary judgment on the ground that its jail did nothing wrong by merely obeying the orders it received from DOC and the court, CP 9 (See 13), and that any wrongful imprisonment was an issue between plaintiff, DOC, the Court and the prosecutor. CP 16.

Plaintiff responded with the reminder that he had not specifically nor exclusively sued the county's jail but the county as a whole, and that indeed its deputy prosecutor was its probable agent responsible for holding plaintiff after jurisdiction to do so had expired. Plaintiff also emphasized that rather than being at fault, DOC had provided the county with notice in addition to what the county had in its own files that jurisdiction over the case had expired on November 2, 2008, two years after the original gross misdemeanor sentencing date. CP 61-65.

The county replied by asserting new grounds for its motion, and by stating the specific identity and role of the deputy prosecutor specifically assigned and experienced in handling post-sentencing matters such as, and including, plaintiff Hall's. CP 85-90. This deputy prosecutor was

established to be the person responsible for “deciding which cases should remain on the SRA [relevant] calendar....” CP 86, ll. 1-5. The defense conceded that: “In 2008, because the underlying crime was a gross misdemeanor, the violation hearing could not be addressed by a DOC administrative hearing.” CP 85, ll. 1-5 and 10-12. It further conceded that the deputy prosecutor struck plaintiff from the December 31, 2008 calendar because of a policy to have persons such as Mr. Hall appear before their sentencing judge. CP 86. In essence it conceded that she was responsible for Mr. Hall’s incarceration through January 12, 2009. Instead, the law provided that she should have presented an order for immediate release at least by December 31. The defense claims that DOC’s documents, discussed above, misled the prosecutor by alleging violations said to have occurred after the November 2, 2008 jurisdictional expiration date, and by representing that the expiration date was “Tolling” because:

“In fact, DOC jurisdiction [over the felony case as opposed to the court’s limited jurisdiction over the gross misdemeanor case] was not set to expire until 1/14/09.” *
* * * [Emphasis added.]

CP 87.

“Therefore, Ms. Petregal [the deputy prosecutor who “oversees the administration of the SRA calendar,” CP 86] was entitled to rely upon the DOC’s claim that it had

continuing jurisdiction....” [Emphasis added.]

CP 88.

The county also argued that the court as well as DOC “likely” had continuing jurisdiction by misstating the holding in a case involving materially different facts interpreting RCW 9.95.230. That case, State v. Alberts, 51 Wn. App. 450 (1988), actually notices RCW 9.95.210 at 455 which states that the court’s jurisdiction over gross misdemeanors does not exceed “the maximum term of sentence or two years, whatever is longer.” [Emphasis added] CP 88.

The deputy prosecutor who appeared on the matter before Judge Heavey on January 12, 2009 appropriately did not contest expiration of the court’s jurisdiction. CP 87.

The county next cited inapplicable authority for an unsupported claim of prosecutorial immunity and an unsupported claim that Mr. Hall’s case is barred by the Public Duty Doctrine. CP 88-89.

The county also asserted that Mr. Hall’s federal claim was factually unsupported for lack of evidence of an unconstitutional policy, CP 89, though it had conceded that it was its policy to have probationers appear before their sentencing judge which resulted in Mr. Hall being held and placed on the January 12, 2009 calendar. CP 86.

Plaintiff's rebuttal, CP 107-117, pointed out these defects in the county's reply. Nonetheless, the county's pleadings generated enough confusion that the court requested additional briefing from it. See CP 118 and 155.

That briefing is entitled "King County's Supplemental Briefing in Support of Its Motion for Summary Judgment, CP 119-143. It repeated the county's arguments with greater vehemence, offered added authority in the form of an inapplicable felony case, State v. Campbell, 95 Wn. 2d 954 (1981), a declaration addressing irrelevant DOC but not the pertinent county and court jurisdiction, and persisted in ignoring RCW 9.95.210 (1) entirely but for its unacknowledged citation by the Alberts court which appears at the end of the otherwise inapplicable authority upon which the county principally replies, State v. Alberts, 51 Wn. App. 450 at 455 FN2 (1988).

Nonetheless, the court granted the defense motion for summary judgment. CP 144. Plaintiff moved for reconsideration, summary judgment for plaintiff and terms emphasizing the misleading nature of plaintiff's briefing and its refusal to acknowledge the plain controlling language of RCW 9.95.210 (1). The basis for plaintiff's request for summary judgment was that the briefing had definitively established that there was no genuine issue of material fact in that there were no facts but

that jurisdiction over Mr. Hall had expired and he had been held illegally after December 31, 2008. CP 148 and 151. Plaintiff's motions were denied. CP 162.

III. ARGUMENT

A. Applicability of RCW 9.95.210 (1).

“Issues of statutory construction are reviewed de novo. If the plain words of a statute are unambiguous, we need not inquire further.” State v. Parent, 161 Wn. App. 210, (2011).

Plaintiff, Mr. Hall, was sentenced on November 3, 2006 on three gross misdemeanors to a concurrent 365 day sentence which was suspended “pursuant to RCW 9.95.200 and 9.95.210” [Emphasis added.] for a 24 month period of probation on certain terms the specific nature of which are not here relevant. CP 126.

RCW 9.95.200 provides the court with general authority to grant probation. RCW 9.95.210, specific to gross misdemeanors, provides:

Conditions of Probation

(1) In granting probation, the Superior Court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer. [Emphasis added.]

RCW 9.95.230 states more generally that:

The court shall have authority at any time prior to the entry of an order terminating probation to (1) revoke, modify, or change its order of suspension of imposition or execution of sentence; (2) it may at any time, when the ends of justice will be served thereby, and when the reformation of the probationer shall warrant it, terminate the period of probation, and discharge the person so held. [Emphasis added.]

RCW 9.95.210 is the more specific statute applicable to this case, limiting the court's authority to suspend, and thus to revoke a suspended sentence, to two years. The maximum term of incarceration for a gross misdemeanor was 365 days. RCW 9A.20.021 (prior to the 2011 amendment dropping it to 364 days. See Laws 2011, c. 96, §11 eff. 7/22/11).

Plaintiff's position is that the plain words of RCW 9.95.210 (1) control in this case in that if Mr. Hall's suspended sentence expired two years from the date of sentencing it no longer existed for the purposes of RCW 9.95.230. That is, by virtue of 9.95.210 Mr. Hall's suspended sentence expired on November 2, 2008 and jurisdiction did not exist for the purposes of revocation, modification, change or as a legitimate basis for continued incarceration. Therefore, after DOC ordered him released

on the only valid existing hold on December 31, 2008, King County had no basis for doing anything other than also presenting an order of termination of probation and immediate release. Indeed, it should have done so on November 2, 2008.

Should the relationship of the directives of RCW 9.95.210 and 230 be deemed subject to two interpretations, they are ambiguous and the rule of lenity would then require them to be interpreted in Mr. Hall's favor. State v. Parent, 164 Wn. App. 210 (2011).

Similarly, the rules of statutory construction compel an interpretation in favor of Mr. Hall. Words are to be given their ordinary meaning, the language of both statutes should be read as a whole, effect should be given to all of the applicable language, and language which is clear on its face does not require construction. State v. McIntyre, 92 Wn. 2d 620 (1979). Thus, RCW 9.95.230's provision allowing revocation, modification or change of probation at anytime prior to the entry of a terminating order applies to probationary periods shorter than two years and before the expiration of two years, see State v. Alberts, 51 Wn. App. 450; and RCW 9.95.210's provision automatically terminating gross misdemeanor probationary sentences after two years applies to all such sentences when two years have passed since sentencing.

The county's position has been to doggedly rely with a blind eye on the literal holding of State v. Alberts, 51 Wn. App 450 at 454 (1988), which is that pursuant to RCW 9.95.230 "[T]he trial court's jurisdiction to modify probation continues until entry of an order terminating it." It ignores the fact pattern to which it applied and ignores the court's recognition in dicta that a case like Mr. Hall's would likely call for a different result due to RCW 9.95.210, which it quotes at 455, FN2. Alberts does not apply to Mr. Hall because Alberts was not brought before the court after his jurisdictional two year probationary period had expired, but shortly after his one year probationary period had expired. Id. at 450 and 455.

B. Terms

Plaintiff asked the trial court for terms pursuant to CR 11 and 56 (g) in the form of his fees and costs incurred after the defense persisted in its abusive misuse of authority in spite of notice from plaintiff in his responsive pleadings. CP 107-110 and 151-154. Specifically, Plaintiff's attorney requested compensation for only 4.67 hours at his then \$350.00 hourly rate for rechecking the pleadings, statutes, case law and key cite material prior to preparation of Plaintiff's Motion for Reconsideration of Order Granting King County's Motion for Summary Judgment and Counter Motion for Summary Judgment and Terms. CP 151-154.

Pursuant to ROA 18.1 plaintiff re-asserts his prior request for terms and asserts a request for his fees and costs on appeal. ROA 18.1 entitles a party to attorneys' fees on appeal if a contract, statute or recognized ground in equity permits such recovery at trial and the party is the substantially prevailing party on appeal. Eller v. East Sprague Motors and R.V.'s, Inc., 159 Wn. App. 180, 194 (2010).

CR 11 states that the court "may" impose an appropriate sanction such as that requested here when an attorney signs a pleading, motion or memorandum that he knows or should have known (1) was not well grounded in fact; (2) is not warranted by existing law or a good faith argument for its change, (3) is interposed for any improper purpose or (4) where denials of factual contentions are unwarranted by the evidence. CR 56 (g) states that the court "shall forthwith" order a party employing affidavits for summary judgment purposes in bad faith or solely for the purpose of delay to pay the other party his resulting reasonable costs and fees. Further, bad faith and oppressive conduct have been recognized as independent equitable grounds for the award of fees and costs. See Seals v. Seals, 22 Wn. App. 652, 658 (1979) and Snyder v. Thompkins, 20 Wn. App. 167, 174-75 (1978) respectively. RCW 4.84.185 allows the court to award a prevailing party his expenses and reasonable attorney's fees incurred in opposing a frivolous defense which was advanced without

reasonable cause. While this latter ground was not asserted below, plaintiff now asserts it as an additional ground for recovery of his costs and fees on appeal.

Under CR 11 the imposition of sanctions is discretionary, and subject to the objective standard of whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. Eller, supra at 190. To impose sanctions for submitting pleadings or a defense not grounded in fact or law requires the additional findings that the submitting attorney failed to conduct a reasonable and competent inquiry or that the pleading was filed for an improper purpose. McNeil v. Powers, 123 Wn. App. 577, 591 (2004).

The factual and substantive portions of this brief demonstrate that the county's attorney had no bases in fact or law for his motion for summary judgment. Reasonable factual inquiry should have revealed that Mr. Hall's county gross misdemeanor probation had lasted for two years by November 2, 2008. Reasonable legal research should have revealed RCW 9.95.210, which was cited in Mr. Hall's pertinent Judgment and Sentence, and a reasonable fair reading of it and State v. Alberts, 51 Wn. App. 450 (1988) should have lead to an inescapable conclusion that the county had lost its jurisdiction over Mr. Hall by November 4, 2008, thus rendering a motion for summary judgment factually and legally baseless.

Nonetheless, it brought the motion arguing essentially that the court should confuse the two DOC holds, ignore the facts in Albert, and ignore RCW 9.95.210 in favor of the illusion that RCW 9.95.230 controlled. Arguendo, it might be said that the county's attorney believed the illusion initially; but the illusion should have vanished entirely after the county was presented with Plaintiff's Rebuttal to Defendant's Reply. CP 107-110. Nonetheless it persisted in arguing clear falsehoods. In its King County's Supplemental Briefing in Support of Motion for Summary Judgment it again repeated its clear misapplication of Alberts and even went so far as to present and argue its Declaration of Louise Love of the Department of Corrections which supports continued confusion of the felony and gross misdemeanor holds in its discussion of the tolling of a probationary period which can only be applicable to the felony case which became irrelevant on December 31, 2008 when DOC released Mr. Hall on that case. Plaintiff's Motion for Reconsideration of Order Granting King County's Motion for Summary Judgment and Counter Motion for Summary Judgment and Terms afforded the county another opportunity to come clean with the court, which it did not do. See CP 155.

It is respectfully submitted that such conduct is violative of all four independent grounds by which CR 11 may be violated, is violative of CR 56 (g) relating to its off fact declarations, is violative of the independent

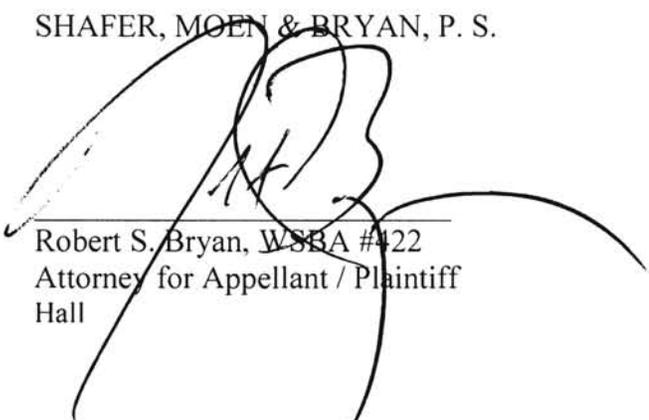
equitable grounds for sanctions of bad faith and oppressive conduct, and is violative of RCW 4.84.185 for pursuing a baseless defense. There can be no reason for such persistence but the improper purpose of promoting confusion with the court and denying plaintiff his day in court on the merits.

IV. CONCLUSION

Appellant plaintiff Thomas Hall urges this court to reverse the order of summary judgment of dismissal, award him the \$1,634.50 in terms sought below, and grant plaintiff's motion for summary judgment on liability as well as his request for terms on appeal.

RESPECTFULLY SUBMITTED this 31st day of May, 2012.

SHAFER, MOEN & BRYAN, P. S.



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IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION I,

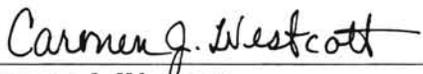
THOMAS EUGENE HALL, JR.)	
)	No. 68502-3
Appellant.)	
v.)	DECLARATION OF SERVICE
)	OF BRIEF OF APPELLANT
KING COUNTY,)	
)	
Respondent.)	

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAY 31 PM 3:20

I, Carmen J. Westcott, hereby declare under penalty of perjury of the laws of the State of Washington that I am of legal age and not a party to this action; that on the 31st day of May, 2012, I caused a copy of Brief of Appellant to be sent (by prior agreement) via email to:

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DATED at Seattle, Washington, this 31st of May, 2012.


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