

70548-2

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NO. 70548-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

IN RE MATTER OF: J.H,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

I. The issue on review is whether a juvenile court commissioner, on their own initiative, may seek out and read the sealed At-Risk Youth (ARY) file of a juvenile appearing before the court on an offender matter.

In order to reply to the Respondent's brief, the misstatements and mischaracterizations of the issue on review must first be addressed. Respondent's brief states the issue as follows: "Whether RCW 13.04.040-.050 authorizes a juvenile court commissioner to review information accessible through the Judicial Access Browser ("JABS") for the purpose of setting release conditions in an offender matter, when such information is fully disclosed to the parties prior to a hearing on the matter." Respondent's brief at 4. This is a misstatement of the issue, making it simultaneously broader (review of any information accessed through JABS) and more narrow (for the purposes of setting release conditions...when such information is fully disclosed to the parties prior to a hearing) than is the case.

Throughout the Respondent's brief the terms "electronic information" and "JABS" are used seemingly interchangeably, but without relevant definition. Therefore, statements such as "Whether electronic information may be reviewed..." *Id* at 5 and "...review of

the JABs records while setting conditions of release...” *Id* at 6, only further confuse the issue.

The issue on review is not the form of information (electronic) or the access mechanism (Judicial Access Browsing System “JABS”), but the commissioner’s *sua sponte* review of non-criminal files, particularly *sealed* files regardless of their format or access mechanism. Whether the commissioner obtained the information electronically or in paper form is of no relevance. Josiah’s argument would be no different if his ARY file had been accessed on microfiche or in hard copy from a basement filing cabinet

The Judicial Access Browsing System (JABS) displays case history for all matters filed in *all* courts throughout the state. EAC 13-07. Using JABS, a judicial officer can enter a name and search. JABS then brings up any and all court files within the state of Washington that have any association with the searched name (this includes criminal cases where the name searched is a defendant, criminal cases where the name searched is a victim, civil cases, including civil protection orders where the name searched is either the restrained or protected party, domestic and dissolution cases, probate, and sealed files including paternity, adoptions, mental illness, dependency, Child in Need of

Services (CHNS) and At-Risk Youth (ARY)). Within JABS one can then click listed cases associated with the name search and see docket-type information on that case.

Additionally, if the matter associated with the name search was filed in Whatcom County, the judicial officer is then able to find that file in Whatcom County's system, using the cause number provided by JABS, and read all documents within the file. For example, a name search of JABS may show a sealed ARY file and within JABS, one could see docket-type information for that file. Then, if that sealed ARY was filed in Whatcom County, the commissioner could (as happened in this case) use the cause number found in JABS to open that file in the county system and access not only docket information, but every document filed in the case in its entirety, including the original petition, specific contempt allegations, or anything else that happened to be filed with the court.

The point of this explanation is to clarify that the commissioner's *sua sponte* investigation of Josiah in this case was in no way limited by a type of case (JABS alerts to every kind of case and relationship possible) or whether that type of case would or should have any bearing on release conditions. Additionally, in order to review the

entirety of the file, the commissioner had to take the additional steps of opening the county system, searching by cause number, and then look into each individual document.

The relative ease with which a judicial officer is able to access information has no bearing on whether they should access it, or whether access would be legal. Independent investigation by a judicial officer is impermissible regardless of how it is done: a phone call, a search of scholarly articles, a Google search, Wikipedia, a search in JABS; it makes no difference. *See* CJC 2.9(C), comment 6.

II. Accessing non-criminal matters associated with a juvenile defendant is not expressly authorized by law.

The Washington State Code of Judicial Conduct, Canon 2.9(A), provides that “[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge's court.” Additionally, CJC 2.9(C) states that “[a] judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially

noticed, *unless expressly authorized by law.*¹” (emphasis added) Comment [6] goes on to state that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.” The question is not whether such *ex parte* information was actually detrimental to the respondent, but rather the obtaining of *ex parte* information in and of itself.

It is undisputed that a juvenile court commissioner or any judicial officer presiding over a criminal matter may (and for the purposes of setting release conditions must) review a defendant’s² criminal history because accessing and reviewing a defendant’s criminal history is expressly authorized by law. CrR3.2; RCW 13.40.040; *see* EAC 04-07. In contrast, there is *no* express authorization for juvenile court commissioner presiding over an offender matter to conduct a *sua sponte* review of non-criminal matters relating to a juvenile defendant.

In arguing that review of juvenile defendant’s non-criminal sealed files is permissible, both Commissioner Verge and Respondent

¹ The Washington State Code of Judicial Conduct, Canon 2.9(C) differs from the American Bar Association Model Code of Judicial Conduct by adding the “unless expressly authorized by law” language. EAC Opinon 13-7 at 3.

² In order to avoid confusion, juvenile respondents will be referred to as “defendants” throughout this brief.

rely on Judicial Ethics Advisory Opinion 04-07. The question posed in 04-07 uses the term “Judicial Information System screen.” However, it is clear from reading the entirety of the question, and even more so by reading the answer, that Judicial Information Systems (JIS) screen is referring only to criminal history (criminal history screen also shows warrant information). Analogizing 04-07 to the issue at bar is misleading because 04-07 is only looking at the defendant’s criminal history, which is one narrow and discrete form of court information.

Non-criminal court involvement such as ARY, dependency, CHNS or any other non-criminal matter is, by definition, not criminal and therefore non-criminal court involvement should not be treated as criminal history. EAC Opinon 04-07 deals only with criminal history and therefore does not apply to this case.

Ethics Advisory Committee (EAC) Opinion 13-07 is directly on point for this issue and states that, “In summary, a judicial officer in a juvenile matter may **not** *sua sponte* review public and/or sealed records maintained in JABS unless such review is authorized by law, i.e., by statute, court rule, or case law.” at 3 (emphasis added). There is no statute, court rule, or case law that provides for a commissioner reviewing a juvenile’s sealed ARY file.

Under Washington State ethics rules a judicial officer may review, *sua sponte*, criminal history because such a review is expressly authorized. CrR 3.2; *see* EAC Opinion 04-07. RCW 26.09.182 provides similar express authorization by requiring a judicial officer, to “determine the existence of any information and proceedings relevant to the placement of the child that are available in the judicial information system and databases” before entering a permanent parenting plan. In this case, the commissioner had no reason to access Josiah’s ARY file because it did not related to his criminal history or to any possible child placements.

There may be other examples of express authorization in particular areas of law. “However, unless there is a specific statute, court rule, or case law allowing the judicial officer to consult the judicial information system, the prohibition of CJC 2.9(C) applies to all cases.” EAC Opinion 13-07 at 4.

Nowhere within RCW 13.40.040-13.40.050 or anywhere within Chapter 13 as it pertains to juvenile offender matters is any such authorization given. The clarity of the authorization to review all files “available in the judicial information system and data-bases” in RCW 26.09.182, as well as the very express obligation and logically

necessary authorization review criminal history in CrR 3.2(c)(1)(6), make it evident that express authorizations are just that: express authorizations. If either the legislature or Washington Supreme Court intended to authorize juvenile offender courts to investigate, *sua sponte*, every court action a juvenile defendant was a party to, the subject of, or tangentially related to then they would expressly authorize such action. However, no such judicial investigatory actions have been authorized by statute, court rule, or case law. Consequently, in agreement with EAC Opinion 13-07 the commissioner's *sua sponte* investigation into Josiah's non-criminal files was *ex parte* communication and judicial investigation in violation of CJC 2.9(A) and (C).

III. This Court should review the Superior Court Judge's rulings *de novo* because the issue in this case is a matter of law.

The issue in this case is a matter of law. The motion to recuse was brought under the Washington State Code of Judicial Conduct, the Due Process Clause of the United States Constitution, and the appearance of fairness doctrine. Josiah never assigned error to any of the commissioner's findings or fact; therefore, the facts in this case are undisputed leaving only questions of law. Questions as to whether undisputed facts violate due process or the appearance of fairness

doctrine are legal and reviewed *de novo*. *In Re Discipline of King*, 168 Wn.2d 888, 899 (2010); *See City of Redmond v. Moore*, 151 Wn.2d 664, 668 (2004).

State v. Leon, 133 Wn.App. 810, 812, (2006) ; *In re Marriage of Farr*, 87 Wn.App. 177, 188(1997), review denied, 134 Wn.2d 1014 (1998); *State v. Bilal*, 77 Wn.App. 720, 722 (1995) all stand for the proposition that recusal decisions lie within the discretion of the trial court, and consequently that review of a trial court's recusal decision is for an abuse of discretion. However, in all of these cases, disputed facts were at the heart of the motion to recuse. Whereas the case at bar has no undisputed facts. This case presents a pure legal question and should be reviewed *de novo*.

In the alternative, if this Court finds that the correct standard of review is abuse of discretion, the Court should still overrule the lower court's ruling as an abuse of discretion. A trial court abuses its discretion if its decision is based on "untenable reasons," such as an incorrect standard or the facts not meeting the requirements of the correct standard. *In re Marriage of Fiorito*, 112 Wn.App. 657, 663-64 (2002) (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47 (1997)).

Superior Court Judge Garrett's ruling applied an incorrect standard of review on revision, and thus, was an abuse of discretion. RCW 2.24.050. All acts of court commissioners are subject to revision by the superior court. RCW 2.24.050. The standard of review for superior court judge's review of a superior court commissioner's ruling on revision is *de novo*. *State v. Wicker*, 105 Wn.App. 428 (2001). *De Novo* review by the superior court judge includes both the commissioner's findings of fact and conclusions of law, based upon the evidence and issues presented to the commissioner. *State v. Ramer*, 151 Wn.2d 106, 113 (2004); *In re Marriage of Dodd*, 120 Wn.App. 638 (2004).

Judge Garrett never explicitly states what standard of review she is applying, but it is evident in the transcript of her ruling that she is not looking at the issue *de novo* and is giving deference to the commissioner's ruling: "I'm reluctant to overrule a commissioner's decision when that decision was made carefully and with reference to the law and I think raises an arguable position." CP33 at 3, 19-22. Judge Garrett goes on to say, "I know that all of the judicial officers are watching that issue carefully because we have some questions, too. And given that the situation is in that posture, I don't feel it's appropriate for

the court to overrule or reverse Commissioner Verge's decision on the issue." *Id* at 4, 13-18. Clearly Judge Garrett is not reviewing the commissioner's decision *de novo*. Consequently, because the incorrect standard of review is applied, her decision is based on "untenable reasons," constituting an abuse of discretion. . *In re Marriage of Fiorito*, 112 Wn.App. 657, 663-64.

IV. This matter presents an issue of continuing and substantial public interest and involves a controlling question of law as to which there is a substantial difference of opinion. Certification for Discretionary Review CP 47.

Respondent argues that if this Court finds the commissioner's review of Josiah's ARY file legally impermissible, that this Court should somehow limit its ruling so as not to apply any other cases and/or similarly situated juveniles. This position is untenable and entirely at odds with the reason Superior Court Judge Garret certified the matter for discretionary review and the basis on which review was granted.

Judge Garret certified this matter for discretionary review in order to answer the question presented in this case: Can a judicial officer investigate, *sua sponte*, a juvenile defendant? Judge Garret did not limit this question for this particular case. Rather, she certified the

question to solve a problem that affects numerous cases. A narrow ruling in this matter is unreasonable and Respondent's arguments on the matter should be rejected.

B. CONCLUSION.

For the reasons stated above, Josiah respectfully requests this Court to rule that the commissioner's *sua sponte* review of Josiah's non-criminal file was in violation of CJC 2.9, the due process clause of the United States Constitution, and the fundamental fairness doctrine and that the case should be remanded for recusal.

DATED this 29th day of May, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Danielle Walker', is written over a horizontal line.

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