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No. 70548-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

JOSIAH HUMMEL, Appellant.

BRIEF OF RESPONDENT

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By Evan P. Jones
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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether RCW 13.40.040-.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.

C. FACTS

The appellant Mr. Hummel makes no challenge to the Findings of Fact entered by the Superior Court Commissioner following his motion to recuse. Appellant's Opening Brief at 1. These facts were accepted by Superior Court Judge Debora Garrett upon revision, and therefore form the factual basis for this appeal. *State v. Piatnitsky*, 170 Wn.App. 195, 221, 282 P.3d 1184 (Div. 1, 2012). The Findings are reproduced below for the convenience of the Court.

1. Josiah Hummel's case was first set for a capacity hearing on February 21, 2013.
2. Prior to the hearing, Commissioner Thomas Verge reviewed the Judicial Access browsing System (JABS) in reference to Josiah.
3. The Commissioner informed the deputy prosecutor and defense counsel, at an informal scheduled meeting, prior to the February 21, 2013, scheduled capacity hearing, that upon viewing JABS, the Commissioner found a recently filed and active At Risk Youth (ARY) case involving Josiah.

4. The Commissioner reviewed the entire pending ARY file to determine if any existing orders were in effect that may conflict with any upcoming release conditions.
5. The Commissioner informed both counsel that the information in the ARY file was relevant, interesting, and informative.
6. The Commissioner did not discuss the details of what he reviewed in that setting because of the sealed nature of the ARY file.
7. At the Capacity hearing (where capacity was stipulated to by the parties) and arraignment held on March 21, 2013, the Commissioner did not disclose or discuss his review of the ARY file on the record because counsel had already been made aware at the prior scheduled meeting.
8. Neither party has sought or gained access to the ARY file through this Commissioner.

Findings of Fact. CITE TO RECORD? In addition, the following

Conclusions of Law were made and entered into the court record:

1. Ethics Advisory Opinion 04-07, which refers to Judicial Information Systems (JIS) is also referring to Judicial Access Browsing System (JABS).
2. Because Ethics Advisory Opinion 04-07 is also referring to JABS (see Conclusion #1), Ethics Advisory Opinion 04-07 controls in this case.
3. Informing both parties of the Commissioner's review of the ARY file prior to the capacity hearing, directives of Ethics Advisory Opinion 04-07 were followed.
4. There is no basis to recuse.

Conclusions of Law. On May 21, 2013, the appellant sought a revision of this ruling through the Whatcom County Superior Court. The Superior

Court accepted the Facts and Conclusions presented and declined to revise, upholding the Commissioner's decision to not recuse. On July 3, 2013, review was sought in this Court.

Following the petition to this Court, the appellant plead guilty to an amended charge of Disorderly Conduct in Whatcom County Juvenile Court. The Commissioner accepted the plea and an adjudication and disposition were entered. The appellant was sentenced to a standard range disposition, recommended jointly to the court by the prosecutor and defense.

Regardless of this plea and the resulting mootness argument, a ruling granting discretionary review was entered on September 30, 2013, finding that this issue remained one of continuing and substantial public interest. In re Marriage of Horner, 151 Wn.2d 884, 892-93, 93 P.3d 124 (2004); In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). Looking at the specific facts of this case and the relevant law on the subject, no basis for recusal has been demonstrated by Mr. Hummel, and the appeal and the reasoned action of the Superior Court below should be upheld.

D. ARGUMENT

1. Decisions on recusal of a judge are reviewed for an abuse of discretion.

Recusal decisions lie within the sound discretion of the trial court. State v. Leon, 133 Wn.App. 810, 812, 138 P.3d 159 (Div 1, 2006) citing In re Marriage of Farr, 87 Wn.App. 177, 188, 940 P.2d 679 (Div. 1, 1997), review denied, 134 Wn.2d 1014 (1998); State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674 (Div 2, 1995). Review of a trial court's recusal decision is for an abuse of discretion. Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn.App. 836, 840, 14 P.3d 877 (Div 3, 2000). The court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, Whatcom County Superior Court Judge Deborra Garrett ruled that the decision of Juvenile Court Commissioner Verge not to recuse himself was proper and upheld the action. It has not been demonstrated that Judge Garrett's decision was an abuse of her discretion. Rather, the decision by Judge Garrett was proper and reflected the reality that Judges and Commissioners can review electronic information in certain circumstances, such as the ones presented here.

2. Whether electronic information may be reviewed by a judicial officer, and under what circumstances, must be determined on a case-by-case basis.

Whether judicial review of electronic material can be conducted and the limitations that apply to such review will depend upon the circumstances in each case. EAC Opinion 13-07 at 2. As such, this Court is urged to conduct an analysis of the specific circumstances that lead to the judicial review here, and for what purpose the electronic information was reviewed. Under both ethics opinions related to this topic, EAC Opinions 04-07 and 13-07, a trial judge's review of available electronic information, should be considered on a case-by-case basis, depending on the circumstances of each matter. See EAC Opinion 13-07 at 2. In some circumstances, review of the electronic information will be appropriate, while in others it will not.

Using a case-by-case analysis, judges and commissioners have been found to have authorization for the review electronic information in certain situations, including when setting conditions of release. EAC Opinion 13-07. As recognized in EAC Opinion 13-07:

...a judicial officer may consider the Judicial Information System screen when setting conditions of release because CrR 3.2, and CrRLJ 3.2 provide that judicial officers must consider a variety of factors, including criminal history, when determining the release of the accused.

EAC 13-07 at 2, citing to EAC 04-07. Another example of such authorization is RCW 26.09.182, which requires a judicial officer, before entering a permanent parenting plan, 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.” RCW 26.09.182; EAC Opinion 13-07.

Here, the review of electronic information held in the JABS electronic database was consulted by Commissioner Verge in preparation for setting conditions of release on a pending offender matter, and to prevent conflicting orders from being entered by multiple courts. This review was appropriate and authorized under the Juvenile Justice Act. RCW 13.40.040; See also Finding of Fact #4 supra.

3. Recusal was not required in this case because court review of the JABS records while setting conditions of release was expressly authorized by statute.

The judicial review of JABS in this case was appropriate because it was expressly authorized by RCW 13.40.040 and .050 while setting conditions of release, to include the potential detention of the juvenile offender. CJC 2.9(C); RCW 13.40.040; RCW 13.40.050. The Juvenile Justice Act discourages the pre-trial detention of juveniles, and provides specific circumstances under which such detention is appropriate. RCW 13.40.040. When considering pretrial release conditions, a commissioner

must make specific finding regarding the juvenile prior to holding the juvenile in detention. Those conditions are outlined in RCW 13.40.040, which states:

- (2) A juvenile may not be held in detention unless there is probable cause to believe that:
 - (a) The juvenile has committed an offense or has violated the terms of a disposition order; and
 - (i) The juvenile will likely fail to appear for further proceedings; or
 - (ii) Detention is required to protect the juvenile from himself or herself; or
 - (iii) The juvenile is a threat to community safety; or
 - (iv) The juvenile will intimidate witnesses or otherwise unlawfully interfere with the administration of justice; or
 - (v) The juvenile has committed a crime while another case was pending; or
 - (b) The juvenile is a fugitive from justice; or
 - (c) The juvenile's parole has been suspended or modified; or
 - (d) The juvenile is a material witness.

RCW 13.40.040. If such a finding is made by the commissioner, then specific conditions of release must be set according to the direction of RCW 13.40.050(6). That statute reads:

- If detention is not necessary under RCW 13.40.040, the court shall impose the most appropriate of the following conditions or, if necessary, any combination of the following conditions:
- (a) Place the juvenile in the custody of a designated person agreeing to supervise such juvenile;
 - (b) Place restrictions on the travel of the juvenile during the period of release;
 - (c) Require the juvenile to report regularly to and remain under the supervision of the juvenile court;
 - (d) Impose any condition other than detention deemed reasonably necessary to assure appearance as required;

(e) Require that the juvenile return to detention during specified hours; or

(f) Require the juvenile to post a probation bond set by the court under terms and conditions as provided in *RCW 13.40.040(4).

RCW 13.40.050(6). Under the direction of these statutes, the juvenile court commissioner is charged with the responsibility of determining certain specific information before he or she can make a release decision. This charge looks much the same as an adult court judge faces under Criminal Rule 3.2, when setting conditions of release. CR 3.2. Both judicial officers must consider the history and present status of the offender, including what other court orders might currently be in effect.

RCW 13.40.040, and .050 provided the legal authorization for Commissioner Verge to consult the electronic information available to him through the Judicial Access Browser (JABs) when setting conditions of release for Mr. Hummel. The Code of Judicial Conduct (CJC) is meant to guide the action of judges and commissioners in Washington State. CJC 2.9(C) allows for judicial ex parte review of records if and when that review is expressly authorized by law. CJC 2.9(C) states:

A judge shall not investigate facts in a matter pending or impending before the judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.

CJC 2.9(C). The language in Washington versions of CJC 2.9(C) deviates from the language in the Association Model Code of Judicial Conduct.

The Washington language provides that a judge shall not investigate facts... *unless expressly authorized by law*. CJC 2.9(C) (emphasis added).

The language in the model code omits the emphasized phrase. Thus, it is appropriate to conclude that this additional language is meaningful to the application of CJC 2.9(C) in Washington State.

The “expressly authorized by law” allowance for judges and commissioners is recognized in both EAC Opinion’s 04-07 and 13-07. In EAC Opinion 13-07, the committee concludes that:

Any review of JABS records conducted by the court should be limited to reviews expressly authorized by law or reviews conducted in accordance with the court’s decision after all parties to the case have had an opportunity to be heard.

EAC Opinion 13-07. Here, Commissioner Verge was operating in good faith and under the direction of RCW 13.40.040 and .050 while setting conditions of release. Thus, his fully disclosed review of the respondent’s At Risk Youth file (ARY) was authorized by law and appropriate.

4. Even if this Court finds the review of Respondent’s ARY file improper, the opinion should be limited to the actions of the judicial officer in this case and not written broadly to affect the ability of judicial officers in other circumstances.

Regardless of how this Court views the specific actions of Commissioner Verge in this case, the opinion should be written to follow the direction of the two ethic opinions presented. EAC Opinions 04-07,

13-07. In large effect, those opinions make clear that review of electronic information by judges and commissioners will be appropriate in certain circumstances and for specific purposes. Judges and Commissioners in this state should retain the prerogative to consult this information, when necessary and authorized, to aid in the performance of their duties. Here, Commissioner Verge was simply doing his job as directed by RCW 13.40.040, and .050, and no basis for his recusal was, or since has been, demonstrated.

E. CONCLUSION

Recusal decisions lie within the sound discretion of the trial court. Here, Judge Garrett recognized that the actions of Commissioner Verge were authorized by law and no basis for recusal was demonstrated. Thus, his decision to deny the Respondent's recusal motion was appropriate. Under the specific circumstances of this case, no prejudice or violation of the judicial cannons and the decision of Judge Garrett should be upheld.

Respectfully submitted this 25TH day of April, 2014.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Date

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