IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHELDON MARTIN, Appellant.	No. 38269-5-II UNPUBLISHED OPINION

Armstrong, J. — In 2003, the Thurston County prosecuting attorney filed a petition to commit Sheldon Martin as a sexually violent predator. Martin moved to dismiss, arguing that the prosecutor lacked statutory authority under RCW 71.09.030 to file the petition. The superior court denied his motion, but the Washington State Supreme Court agreed with Martin and reversed, remanding for the superior court to dismiss. On remand, the State moved to dismiss without prejudice, and Martin moved to dismiss with prejudice. The superior court granted the State's motion, and Martin appeals. We affirm.

FACTS

I. Background

In 1992, Martin was convicted of second degree burglary with sexual motivation and indecent exposure in Clark County, Washington. He was also convicted of first degree kidnapping and attempted first degree sexual abuse in Oregon.[1] He was sentenced to 120 months in Oregon and 30 months in Washington to be served consecutively.

[1] Martin's Oregon convictions qualify as sexually violent offenses under Washington's sexually violent predator law, chapter 71.09 RCW. His Washington convictions do not qualify as sexually violent offenses.

Near the end of his sentence, the state attorney general, on behalf of the Thurston County prosecuting attorney, filed a petition in Thurston County Superior Court to commit Martin as a sexually violent predator. Martin moved to dismiss, arguing the filing statute did not authorize the prosecuting attorney to file a commitment petition against him. The statute provided that the petition may be filed by "the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney." Former RCW 71.09.030 (2004). Martin was never charged or convicted of a sexually violent offense in Thurston County. The trial court denied his motion.

We affirmed the trial court, but the Supreme Court reversed. *See In re Det. of Martin*, 133 Wn. App. 450, 455, 136 P.3d 789 (2006), *reversed by* 163 Wn.2d 501, 516, 182 P.3d 951 (2008). The Supreme Court held that the filing statute unambiguously authorized a specific prosecuting attorney to file a sexually violent predator commitment petition, and the Thurston County prosecuting attorney lacked the statutory authority to file the petition in Martin's case. *Martin*, 163 Wn.2d at 516.[2]

II. Motion to Dismiss

The Supreme Court remanded for the superior court "to grant Sheldon Martin's motion to dismiss the State's petition." *Martin*, 163 Wn.2d at 516. Martin's original motion requested that

[2] In 2009, the legislature amended the statute to allow filing by "[t]he prosecuting attorney of a county in which . . . [t]he person committed a recent overt act, or was charged or convicted of a criminal offense that would qualify as a recent overt act, if the only sexually violent offense charge or conviction occurred in a jurisdiction other than Washington." Laws of 2009, ch. 409, § 3, *codified as* RCW 71.09.030(2)(a)(iii). The State filed a sexually violent predator petition in Clark County, under the amended filing statute.

the superior court "dismiss the petition against him, and release him immediately." Clerk's Papers (CP) at 131. On remand, the State moved to dismiss without prejudice. Martin moved to dismiss with prejudice. The trial court granted the State's motion.

ANALYSIS

I. Standard of Review

Where facts are not at issue, we review a trial court's ruling on a motion to dismiss de novo. *AOL, LLC v. Dep't of Revenue*, 149 Wn. App. 533, 541-42, 205 P.3d 159 (2009).

II. Dismissal With Prejudice

Dismissal with prejudice generally acts as a bar to a subsequent action between the same parties on the same claim. "[A] dismissal 'with prejudice' appropriately follows an adjudication on the merits, while a dismissal 'without prejudice' means that the existing rights of the parties . . . are as open to legal controversy as if no judgment or dismissal had been entered." *Parker v. Theubet*, 1 Wn. App. 285, 291, 461 P.2d 9 (1969) (citing *Maib v. Maryland Cas. Co.*, 17 Wn.2d 47, 135 P.2d 71 (1943)). Under the court rule governing involuntary dismissals, a dismissal for lack of jurisdiction, improper venue, or failure to join a party is without prejudice. CR 41(b)(3). But there may be additional instances where dismissal without prejudice is appropriate: "For example, a dismissal on the ground that the action was premature *or was brought by the wrong plaintiff* should not, on principle, be considered as a dismissal operating as an adjudication on the merits." 14A Karl B. Tegland, Washington Practice: Civil Procedure § 23:16, at 55 n.12 (2d ed. 2009) (emphasis added).

Martin argues that his original motion was essentially a motion to dismiss for failure to

state a claim, which is generally a dismissal with prejudice. But in his original motion, Martin argued, "The petition against Mr. Martin must be dismissed because the statutory requirements of chapter 71.09 RCW have not been followed or observed by the State. This court lacks jurisdiction to do anything other than enter an order of dismissal." CP at 130 (emphasis omitted). Martin's original motion essentially asked the court to dismiss for lack of jurisdiction, which is without prejudice. *See* CR 41(b)(3).

Martin also argues that the Supreme Court's directive required the trial court to dismiss the petition with prejudice. But the *Martin* court's decision was limited to determining *who* could properly file the petition:

> RCW 71.09.030 unambiguously authorizes only a specific county prosecutor to file, or request the attorney general to file, the commitment petition. The Thurston County prosecutor could not file this commitment petition, or request the attorney general's office to file it, because the Thurston County prosecutor never convicted or charged Martin with an offense. *Which prosecutor could appropriately take such an action we do not decide*.

Martin, 163 Wn.2d at 506. The Supreme Court expressly limited its holding to the Thurston County prosecuting attorney, leaving open the possibility that another prosecuting attorney in Washington could file the petition. Dismissal on the grounds that a case was filed by the wrong plaintiff should not operate as an adjudication on the merits. *See* 14A Karl B. Tegland, Washington Practice: Civil Procedure § 23:16, at 55 n.12 (2d ed. 2009).

Finally, Martin seeks support from *Foss v. Department of Corrections*, 82 Wn. App. 355, 918 P.2d 521 (1996). In *Foss*, the Department of Corrections contracted with Peninsula College to provide teachers for a correctional facility, and four nontenured teachers lost their contracts when the prison superintendent denied them access to the facility. *Foss*, 82 Wn. App. at 358.

The teachers sued the Department to regain access. *Foss*, 82 Wn. App. at 358. We held that the Department's decision was not subject to review under the Washington Administrative Procedure Act, chapter 34.05 RCW, and, alternatively, the teachers lacked standing to challenge the decision because it was not an "agency action." *Foss*, 82 Wn. App. at 362. Because the teachers had "no cognizable claim" against the Department, we dismissed the teachers' claims with prejudice. *Foss*, 82 Wn. App. at 358.

Dismissal with prejudice was appropriate in *Foss* because the Department's decision denying the teachers access to a correctional facility was not subject to review, thus no teacher would ever have statutory authority to sue for that claim. Here, the Supreme Court held only that the Thurston County prosecuting attorney lacked statutory authority to file the petition, leaving open the question of whether another prosecutor could file the petition. Because the trial court did not err in dismissing without prejudice, we affirm.

Affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, C.J.

Penoyar, J.