

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN DOES 1, 3, AND 5, individuals and residents of Stevens County, Washington;
and SILENT MAJORITY FOUNDATION, a Washington non-profit corporation,
Petitioners-Appellants,

v.

JAY INSLEE, in his official and individual capacity as Governor of the State of
Washington; and ROBERT FERGUSON, in his official capacity as Attorney General
of the State of Washington,
Respondents-Appellees,

On Appeal from the Superior Court
of the County of Stevens
No. 23-2-00092-33

Answer to Motion to Modify Commissioner's Ruling

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I. Introduction

This action concerns the constitutionality of Engrossed Substitute House Bill 1705 (“ESHB 1705”), codified primarily at RCW 9.41.010(21), (50), and (52), RCW 9.41.327, and RCW 9.41.328, along with several other modifications, and seeks a declaration that such statutes are unconstitutional.

The actions at issue in this case are: (1) the passage of laws that impair or infringe on the right to bear arms of Washington citizens, protected by Wash. Const. art. I, § 24 and U.S. Const. amend. II, and the attendant declaration sought by Petitioners that the laws are unconstitutional and invalid; (2) the enforcement of those laws, which will be carried out by local law enforcement, namely the Stevens County Sheriff who is a named defendant, and the Stevens

County Prosecuting Attorney, who is not named, but could be named as a defendant.

Currently, the State Respondents, Governor Inslee and Attorney General Ferguson, are named and thus opine that venue is proper in Thurston County, where their offices are located. This misapprehends the true nature of any enforcement action or role that they may have; as briefed by Appellants in their Motion for Discretionary Review, the general enforcement powers relied upon by State Respondents involve actions that would occur in Stevens County. Motion for Discretionary Review, at 15-20; see also RCW 43.06.010(7) and RCW 43.10.090.

This action arises under the Uniform Declaratory Judgment Act, Ch. 7.24 RCW, and any and all enforcement of the challenged statutes would occur in Stevens County. Granting a motion to transfer venue based on the public officer

statute, at the expense of the UDJA and the authority of courts to render declarations as to the constitutionality of statutes would radically alter the status quo. Discretionary review is warranted under RAP 2.3(b)(2), as correctly determined by the commissioner.

II. Argument

The order granting the motion to transfer venue marks a dramatic and wholesale change to the status quo vis-à-vis the UDJA. Now, any constitutional challenge must be brought in Thurston County according to the analysis of State Respondents. Never mind that their actual enforcement actions (if the county prosecutor fails to act) will occur in the county in which violations of the statutes are found. State Respondents contend that even though the constitutionality and the rights, status, or other legal relations of the Petitioners under the challenged statutes are the basis for the action, the

State is not the correct party of interest, but rather the governor and attorney general are. This completely glosses over the Sheriff for Stevens County, who is also a state official. See, e.g., *Whatcom County v. State*, 99 Wn. App. 237, 243, 993 P.2d 273 (2000) (finding that county prosecutor is a state official when prosecuting state law offenses; citing *McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734 (1997), (“the U.S. Supreme Court held that Alabama sheriffs represent the state, not their counties, when acting in a law enforcement capacity”)).

As briefed by Appellants, venue is proper in Stevens County as the action is a declaratory judgment action, and “[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” RCW 7.24.010. Petitioners did not simply attempt to “plead around

the public officer venue statute” as contended by State Respondents, but rather named the public officials who will actually prosecute violations under the statutes. State Respondents’ Motion to Modify, p. 20-21. As discussed in Appellants’ Motion for Discretionary Review, the enforcement authority relied upon by State Respondents, namely RCW 43.10.090 and RCW 43.06.010(7), are only triggered if Sheriff Manke and the Stevens County Prosecuting Attorney are found to be negligent or refuse to prosecute crimes. Any enforcement action brought by the attorney general would occur in Stevens County. It cannot seriously be contended that such prosecution would be official action taken from Thurston County, and not Stevens County, where the legal proceeding would occur.

State Respondents’ attempt to claim that judicial estoppel applies, and that Sheriff Manke is only a nominal

defendant is a red herring argument; while Sheriff Manke agrees that ESHB 1705 is unconstitutional, he affirmed that it is his constitutional duty to uphold the laws as they are written. Appx. 247. As discussed, Sheriff Manke is a state official when acting in a law enforcement capacity, and so too is the Stevens County Prosecuting Attorney, who would prosecute any violations of ESHB 1705.

A. The Commissioner Properly Applied the Test Required in RAP 2.3(b)(2).

State Defendants are correct that Rule of Appellate Procedure (“RAP”) 2.3(b)(2) requires probable error by the lower court in a fashion that the errant “decision must substantially alter the status quo or substantially limit the freedom of a party” and that such a decision requires an impact “*outside* of the courtroom.” State’s Mtn. *1-2 (italics in original). Yet, the State fails to recognize the effect or impact

of the lower court's decision as it denied individuals the right to seek declaratory relief against a law that deems mere possession of a non-serialized firearm a misdemeanor or a gross misdemeanor (for the second and ensuing violations). *See*, RCW 9.41.326; Appx. 19, 046-47, and 260. The same law makes manufacturing an untraceable firearm with an intent to sell a Class C Felony. *See*, RCW 9.41.325; Appx 19, 46, and 260. That the trial court, rather than addressing Petitioners' claims under the UDJA, removed the case to Thurston County, directly impacted Petitioners' as well as all Washingtonians' rights to possess and/or sell non-serialized firearms without risk of a criminal conviction. Likewise, it impacted the ability of Petitioners and all Washingtonians to bring a declaratory judgment action challenging the constitutionality of a statute in the county in which they reside. It is this probable error, removing the case to Thurston County,

which Petitioners have challenged under RAP 2.3(b)(2) because of its direct impacts inside and outside the courtroom.

1) The Stevens County Superior Court Probably Erred in Granting State Defendants’ Motion to Transfer to Thurston County.

Petitioners reassert what they recently pleaded: “Even if RCW 4.12.020(2) is the proper venue statute, the Superior Court committed probable error by disregarding that a public officer is named whose office is located in Stevens County.” Motion for Discretionary Review at 15. That venue is proper in Stevens County follows from the fact that Petitioners are subject to enforcement from their local sheriff, Respondent Manke, and the fact that the challenged laws “are to be enforced as an affirmative duty of Respondent Manke as a peace officer to seize unlawful firearms when they are found.” *Id.* at 23. Finally, because the matter was brought under the

UDJA by individuals residing in Stevens County, Stevens County is the proper venue. *Id.* at 26. These facts demonstrate the probable error leaving Petitioners only needing to demonstrate that this error likely impacted the status quo.

2) The Stevens County Superior Court’s Probable Error has Impacts Outside the Courtroom.

The probable error committed by the Stevens County Superior Court has “immediate effects outside the courtroom” and limits Washingtonians’ ability to act as it delays a decision on the merits on a matter that imposes a misdemeanor for merely possessing what was legal prior to the law. Moreover, Washingtonians are now subjected to a Class C Felony for possession of the same firearm (which was legal until the date the challenged laws became effective) with intent to sell. *In re Dependency of N.G.*, 199 Wn.2d 588, 597, 510 P.3d 335 (2022). As long as the challenged laws remain in place,

individuals are forced into a Hobson’s Choice of complying with a law it is challenging as unconstitutional or risk a fine, jailing, or both. As the Court in *Howland*, which provides the foundational analysis on the “effects outside the courtroom” held, “if a court restrains a party from disposing of his or her private property, the party’s freedom to act to conduct his or her affairs is, at least arguably, substantially limited.” *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014).¹

Howland’s limitation on disposing of property strikes here, as Petitioners cannot possess, use, or sell their property under the challenged laws, and “the court’s action has effects beyond the parties’ ability to conduct the immediate litigation.” *Id.*

¹ *Howland* has been cited with favor since its issuance in 2014. Most recently, the Washington Supreme Court in *In re Dependency of N.G.*, 199 Wn.2d 588, 590, 510 P.3d 335 (2022) and by this Court in *Sydow v. Douglass Props., LLC*, No. 38888-3-III, 2023 Wash. App. LEXIS 907 (Ct. App. May 9, 2023)

Notably, this prohibition continues, in part, due to the lower court's decision to transfer the case to Thurston County.

III. Conclusion

The Commissioner's November 15, 2023 ruling should be affirmed, and the Court should hear Appellants' Motion for Discretionary Review.

This document contains 1,418 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 26th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2023, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal, which sends a copy of uploaded files and a generated transmittal letter to active parties on the case. The generated transmittal letter specifically identifies recipients of electronic notice.

DATED this 26th day of December, 2023, at Spokane, Washington.

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