RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 24, 2013, 2:55 pm
BY RONALD R. CARPENTER
CLERK

E CDF
RECEIVED BY E-MAIL

NO. 891991

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of:

DARIN DILLINGHAM,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

SARAH SAPPINGTON
Senior Counsel
WSBA #14514, OID #91094
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2019

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Darin Dillingham is a compulsive pedophile who has been convicted of crimes against children on six occasions. Dillingham seeks review of the unpublished August 5, 2013, decision of the Court of Appeals (*In re Dillingham,* 175 Wn. App. 1067, 2013 WL 3990891 (August 5, 2013)) affirming the trial court's Order of Commitment following a unanimous jury verdict. His Petition should be denied because he fails to establish any of the criteria for review by this Court, and the Court of Appeals correctly determined that Dillingham's right to a unanimous jury was not violated.

II. COUNTERSTATEMENT OF ISSUES

The State submits that there is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If this Court were to accept review, the following issues would be presented:

A. **Was Dillingham's right to a unanimous jury violated where the State presented substantial evidence of both a mental abnormality and a personality disorder as the basis of Dillingham's commitment as a sexually violent predator?**

B. **Is a *Petrich* instruction required where the State presented evidence of only one mental abnormality?**

III. COUNTERSTATEMENT OF THE CASE

A. Factual History

Darin Dillingham was initially committed as a sexually violent predator (SVP) by stipulation in 2003, when he was 23 years old. CP at 931-39. Before being committed as an SVP, he committed numerous sexual assaults against children and others. His convictions include Indecent Liberties Against a Child Under Age 14 by Forcible Compulsion (1985)(CP at 932); Indecent Liberties (1985)(CP at 934); Rape in the Second Degree (1985)(CP at 934); Indecent Liberties and Child Molestation in the First Degree (1989)(CP at 932-33); Communication with a Minor For Immoral Purposes (1989)(CP at 934); and Attempted Indecent Liberties by Forcible Compulsion (1993). CP at 933. After several years at the Special Commitment Center (SCC), he was granted a new trial on the issue of unconditional discharge pursuant to RCW 71.09.090.[1]

At trial, the State presented the testimony of several witnesses, including that of Dr. John Hupka, a forensic psychologist with extensive

[1] Pursuant to RCW 71.09.090(3)(c), if a new trial on the issue of unconditional discharge of a (previously-committed) SVP is granted, "the burden of proof at the hearing shall be on the state to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator." While evidence of the prior commitment trial and disposition is admissible, "the recommitment proceeding shall otherwise proceed as set forth in RCW 71.09.050 and 71.09060." *Id.*

experience in the diagnosis and risk assessment of sex offenders. 12/1/2011 RP at 229-235. In formulating his opinions in this case, Dr. Hupka considered approximately 8,000 pages of materials consisting of roughly 20-years' worth of police reports, probation officers' reports, mental health records, treatment records, and prior evaluations. *Id.* at 236. These records contained the type of information commonly relied upon by mental health professionals in performing sexually violent predator evaluations. *Id.* at 237. In addition, Dr. Hupka interviewed Dillingham on two occasions and administered at least one personality test. *Id.* at 237. In formulating his opinion, he considered Dillingham's history of sexual offending, pointing to more than 13 separate victims, some of whom were victimized repeatedly over lengthy periods of time, between 1985 and 1992. *Id.* at 237-65. Dr. Hupka diagnosed Dillingham as suffering from three separate conditions: Pedophilia, which he identified as a mental abnormality[2] under the statute (*Id.* at 265-271), an Antisocial Personality Disorder (*Id.* at 284)("ASPD"), and Substance Abuse. *Id.* at 274. After four days of testimony, a unanimous jury re-committed Dillingham as an SVP. CP at 3. Dillingham appealed.

---

[2] "Mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

B. Court of Appeals' Decision

The Court of Appeals affirmed Dillingham's re-commitment, rejecting Dillingham's argument that his right to a unanimous jury had been violated by the trial court's failure to give a unanimity instruction or a special verdict form. The evidence, the court determined, "amply supports the conclusion that Dillingham's pedophilia predisposed him to commit acts of sexual violence," and that both Dillingham's antisocial personality disorder and his substance abuse "increased the risk that he would commit more acts of sexual violence." *In re Dillingham,* 2013 WL 3990891 at *6. "There is no requirement," the court wrote, "that the State prove that the antisocial personality or substance abuse, standing alone, makes Dillingham likely to reoffend," or that all of his diagnoses "must be considered without regard to one another, as if in a vacuum." *Id.* The Court also rejected Dillingham's argument that "he was entitled to a jury instruction requiring juror unanimity as to whether it found that the mental abnormality of substance abuse or pedophilia was proved," noting that, under the "means within a means" test of *In re Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009), no such instruction was required. *Id.* at *7. Finally, the court rejected Dillingham's argument that there was insufficient evidence that he continued to have a mental illness. *Id.* Dillingham now seeks review by this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Pursuant to RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Dillingham seeks review under RAP 13.4(b)(1), arguing that the Court of Appeals' opinion is in conflict with *In re Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006). Petition at 4. He also argues the review is warranted under RAP 13.4(b)(4) because the questions regarding unanimity raised by his petition present significant questions of state and federal constitutional law. *Id.* Because the issues presented in his petition do not meet any of the specified criteria for review, this Court should deny review.

A. Dillingham's Right to a Unanimous Jury Was Not Violated Where the State Presented Substantial Evidence of Both a Personality Disorder and a Mental Abnormality

Dillingham argues that his right to a unanimous jury was violated because there was neither a unanimity instruction nor a special verdict form requiring that the jury identify the precise basis for re-commitment—that is, whether he was likely to reoffend based on a personality disorder or a mental abnormality. Pet. at 7-8. Dillingham concedes that, if there is substantial evidence of both a personality disorder and a mental abnormality, no unanimity instruction is required. He argues, however, that because the term "antisocial personality disorder" merely "describes behavior" and is not a "medical disease," it is an insufficient basis for commitment and, "[i]f even one juror relied on 'personality disorder' to find Mr. Dillingham to be an SVP," the jury's verdict was not unanimous. Pet. at 8-10.

This argument is without merit, and was properly rejected by the Court of Appeals. An antisocial personality disorder is a recognized diagnosis and can form a constitutionally adequate basis for commitment. Moreover, the trial court followed well-established law in concluding that no special verdict form was required regarding jury unanimity.

An SVP is defined as "[a]ny person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental

abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility (emphasis added)." RCW 71.09.020(18). Where there is testimony at trial to the effect that the offender suffers from both a mental abnormality and a personality disorder, and where substantial evidence supports each, these two conditions "are alternative means for making the SVP determination." *Halgren,* 156 Wn.2d at 810. Relying on this decision, the Court of Appeals correctly determined that the "alternative means" of mental abnormality and personality disorder may "operate independently or may work in conjunction." *Dillingham,* 2013 WL 3990891 at *6 (citing *Halgren,* 156 Wn.2d at 810). The court also correctly determined, consistent with its earlier holding in *In re Ticeson,* 159 Wn. App. 374, 246 P.2d 550 (2011), that expert testimony that the offender's personality disorder "causes him serious difficulty controlling his sexually violent behavior" was sufficient to allow a rational juror to find that the respondent's personality disorder makes him likely to reoffend, "and thus adequately supported the verdict." *Dillingham* at *5.

1. The Diagnosis of Antisocial Personality Disorder is a Constitutionally Adequate Basis for Commitment

Dillingham first argues that commitment cannot be based upon an ASPD because that term "merely describes behavior" and "is not a

medical disease." Pet. at 8-10. The appellate courts of this state have repeatedly rejected the argument that an antisocial personality disorder is a constitutionally inadequate basis for commitment. *See e.g. In re Young*, 122 Wn.2d 1, 38, fn. 12, 857 P.2d 989 (1993); *In re Detention of Thorell*, 149 Wn.2d 724, 728, 72 P.3d 708 (2003) (upholding commitments of Casper Ross and Ken Gordon, both of whom suffered from antisocial personality disorders and neither of whom was diagnosed with a paraphilia) and *In re Sease*, *supra* (upholding commitment of Michael Sease, who was diagnosed with an antisocial and borderline personality disorder, but not a paraphilia). The appellate courts of other states have reached the same conclusion.[3] As noted by the *Thorell* Court, "there is no talismanic significance to a particular diagnosis of mental illness. No technical diagnosis of a particular 'mental abnormality' definitively renders an individual either an SVP or not...[I]t is a diagnosis

[3] *See e.g. In re Murrell*, 215 S.W.3d 96 (2007) (Missouri case upholding SVP civil commitment with no paraphilia diagnosis, ruling antisocial personality disorder (ASPD) is not too "imprecise" to serve as the basis for commitment); *In re Barnes*, 689 N.W.2d 455 (2004) (Iowa case upholding SVP civil commitment based on ASPD, finding that statute does not require the diagnosed condition to affect the emotional or volitional capacity of every person who is afflicted with the disorder); *In re Adams*, 223 Wis.2d 60, 588 N.W.2d 336 (1998) (Diagnosis of ASPD, uncoupled with any other mental disorders, may satisfy the "mental disorder" requirement of SVP statute); *In re G.R.H.*, 711 N.W.2d 587 (2006) (North Dakota case upholding SVP civil commitment based on ASPD); and *Hubbart v. Superior Court*, 19 Cal.4th 1138, 969 P.2d 584, 81 Cal.Rptr.2d 492 (1999) (The Supreme Court's holding in *Foucha vs. Louisiana,* 504 U.S. 71; 112 S. Ct. 1780; 118 L. Ed. 2d 437; 1992 U.S (1992) does not limit the range of mental impairments that may lead to the permissible confinement of dangerous and disturbed individuals.).

of a mental abnormality, coupled with a history of sexual violence, which gives rise to a serious lack of control and creates the risk a person will likely commit acts of predatory sexual violence in the future." 149 Wn.2d at 762.

Neither the mere presence of a mental disorder or risk of recidivism alone qualifies an individual for civil commitment as a sexually violent predator. Rather, there must be a link between the mental condition and the likelihood of re-offense, as well as a showing that the person has "serious difficulty" controlling that behavior. *Thorell,* 149 Wn.2d at 761-2. This link is established even if the individual's risk is linked only to a diagnosed personality disorder. *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). Accordingly, if the State can prove that Dillingham suffers from a personality disorder—here, antisocial personality disorder—that causes him serious difficulty controlling his sexually violent behavior, along with the other necessary elements, his continuing civil commitment as an SVP is appropriate.

In rejecting Dillingham's argument that an antisocial personality disorder cannot form the basis—whether in part or entirely—of commitment, the Court of Appeals reiterated its earlier holding in *In re Ticeson,* 159 Wn. App. 374, 246 P.2d 550 (2011). Ticeson, like Dillingham, had been diagnosed with both a paraphilia and a personality

disorder. 159 Wn. App. at 388. The State's expert testified that, while a personality disorder did not usually cause a person to engage in predatory acts of sexual violence, it caused Ticeson to have difficulty controlling his behavior. *Id.* at 378. Ticeson argued on appeal that there was insufficient evidence to show that his personality disorder made him likely to reoffend and that, as such, a unanimity instruction was required. *Id.* Rejecting this argument, the Court of Appeals held that expert testimony that the offender's personality disorder "causes him serious difficulty controlling his sexually violent behavior" was sufficient to allow a rational juror to find that the respondent's personality disorder makes him likely to reoffend. *Id.* at 388-89. Likewise, the Dillingham Court concluded, "Dillingham's argument that there was insufficient evidence that his personality disorder made him more likely to commit acts of sexual violence fails." *Dillingham* at *6. The court correctly determined that, "[l]ike the State's expert witness in *Ticeson,* Dr. Hupka testified that Dillingham's antisocial personality disorder increased the risk that he would commit more acts of sexual violence" and that the combination of these conditions presented a high risk. *Id.* at *6. Such testimony was sufficient to allow a rational juror to find that Dillingham's personality disorder makes him likely to reoffend. *Ticeson*, 159 Wn.App. at 388-89.

2. Evidence at Trial Established That Dillingham's Antisocial Personality Disorder Causes Him Serious Difficulty Controlling His Sexually Violent Behavior

The State presented substantial evidence to support the conclusion that antisocial personality disorder causes him serious difficulty controlling his sexually violent behavior. At trial, Dr. Hupka testified that Dillingham's pedophilia predisposes him to commit criminal sexual acts. 12/2/2011 RP at 363-365.[4] In addition to his sexual deviance, Dr. Hupka testified, Dillingham is also severely personality disordered. 12/1/2011 RP at 285. The antisocial personality disorder, combined with his deviant attraction to children and his desire for coercive sex, Dr. Hupka testified, is "a formidable combination." *Id.* at 283-285. Because of the antisocial personality disorder, "he's not the least bit motivated to change that sexual deviance....He's an irresponsible man who is quite content to live by his own rules." *Id.*

In addition to assigning a diagnosis of antisocial personality disorder, Dr. Hupka also determined that Dillingham was highly psychopathic. 12/2/2011 RP at 334. Psychopathy, he explained, is a

[4] Elsewhere, Dr. Hupka explained that pedophilia constitutes a mental abnormality under the law (12/1/2011 RP at 271-72. 275-292) and, as such, "affects "the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." 12/1/2011 RP at 287-92; see also RCW 71.09.020(8).

"personality construct" that "essentially refers to a very small percentage of the population that, for lack of a better way of describing it, don't [sic] have a conscience." *Id.* at 332. Psychopaths "are most often manipulative, cunning, and able to do all manner of antisocial behaviors with the only goal that they not get caught." *Id.* They lack the capacity to feel any sense of genuine remorse or to empathize with others. *Id* at 334. The true psychopath, Dr. Hupka noted, "is really quite rare." *Id.* Dr. Hupka testified that Dillingham had been scored on the Hare Psychopathy Checklist, an instrument developed for assessing psychopathy, by two different psychologists. *Id.* The maximum score on this instrument is 40, "which nobody ever receives. *Id.* at 334. Dillingham scored in the range of 29-33. *Id.* These scores place him between the cutoff for psychopathy or "slightly above," "which would indicate a high degree of psychopathic characteristics for this fellow." *Id.* at 335. It is rare, Dr. Hupka continued, to find both psychopathy and sexual deviancy together. *Id.* All of the research, he testified, shows that the presence of high psychopathy, when combined with pedophilia, increases an individual's risk to reoffend. *Id.* "If you combine the sexual deviance with this personality characteristic of psychopathy, this kind of lack of consciousness, this willingness to use others for their own ends, the lack of empathy and remorse, you really don't have any internal

prohibitions for someone to keep from acting out that sexual deviance. That seems to be the case with Mr. Dillingham." *Id.* at 336. In light of this testimony, the Court of Appeals correctly concluded that the testimony at trial demonstrated that Dillingham's antisocial personality disorder "increased the risk that he would commit more acts of sexual violence," and that it is "the combination of these conditions" that presented a high risk. *Dillingham* at *6. The evidence clearly demonstrated that these conditions act "in conjunction" as required by *Halgren* and, as such, no unanimity instruction was required.

B. A Unanimity Instruction is Not Required Where the State's Expert Testified That Dillingham Suffered From Only One Mental Abnormality

Dillingham next argues that that, under *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984),[5] he was entitled to an instruction specifying which one of "multiple, 'distinguishable' acts" formed the basis of the State's allegation that he suffered from a mental abnormality. Pet. at 12. This is so, he argues, because the State, in its instructions and in closing, "presented the jury with two factual options to satisfy the 'mental abnormality' means of SVP status—(1) pedophilia abnormality,

[5] *Petrich*, a criminal case, holds that where the state alleges that several distinct criminal acts have been committed by a defendant who is not charged for each act, the prosecutor must elect the acts she is relying upon, or the jury must receive a unanimity instruction.

and (2) substance abuse abnormality." Pet. at 11. This argument fails for two reasons: First, Dillingham's assertion that the state presented evidence of two separate and distinct mental abnormalities misstates the evidence. Second, even if the State had in fact done so, no unanimity instruction is required under the "means within a means" test.

First, Dillingham's assertion that the State "presented the jury with two factual options to satisfy the 'mental abnormality' means of SVP status—(1) pedophilia abnormality, and (2) substance abuse abnormality" (Pet. at 11) is not supported by the record. Dillingham fails to point to any evidence in the record suggesting that Dr. Hupka ever characterized Dillingham's substance abuse as a "mental abnormality" under the law. Dr. Hupka did, however, explain that pedophilia constitutes a mental abnormality under the law ("Well, the mental abnormality I'm referring to is pedophilia as a mental abnormality." 12/1/2011 RP at 275; *See also* 12/1/2011 RP at 271-72; 275-292) and, as such, "affects the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." *Id.* at 287-92. While Dr. Hupka also assigned a diagnosis of substance abuse (12/1/2011 RP at 274-75), he did not state that this condition constituted a mental abnormality under the law.

The State's closing was consistent with this testimony. In closing, the Assistant Attorney General (AAG) representing the State argued as follows:

> Dr. Hupka diagnosed Mr. Dillingham is [sic] suffering from three conditions. First, ***the mental abnormality of pedophilia, nonexclusive type***; and alcohol and cannabis abuse; and the personality disorder of antisocial personality disorder.

12/6/11 RP at 681 (emphasis added). The AAG then went on to describe, first, the diagnosis of pedophilia and the evidence in support of that diagnosis (*Id.* at 681-684), the fact that both experts agreed that Dillingham suffers from the "condition" of alcohol and cannabis abuse (*Id.* at 684) and the fact that both experts agreed that Dillingham suffers from an antisocial personality disorder. *Id.* at 685. There is simply nothing in the record to suggest that the State ever characterized Dillingham's substance abuse as a "mental abnormality" or argued that Dr. Hupka had diagnosed more than one mental abnormality.

Even if Dillingham were correct that the State "proffered evidence of two distinguishable facts" in support of its contention that he suffered from a mental abnormality, no unanimity instruction would be required. The Court of Appeals correctly determined that this issue is controlled by *In re Sease*, 149 Wn. App. 66, 201 P. 3d 1078 (2009), *review denied*

166 Wn.2d 1029, 217 P.3d 337 (2009).[6] *Dillingham* at *7. In *Sease*, there was no dispute that Sease suffered from one or, possibly, two personality disorders. 149 Wn. App. at 78. As such, the court determined, the jury "need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder." *Id.*

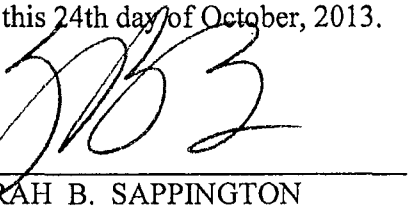
Dillingham argues at length that *Sease* was wrongly decided (Pet. at 15-17), an argument rejected by the Court of Appeals. *Dillingham* at *7. Dillingham, however, fails to show any conflict among Court of Appeals opinions or a conflict with a decision of this Court. *See* RAP 13.4(b)(1), (2). The Court of Appeals' decision in *Sease* relied on this Court's decision in *In re Jeffries*, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988), *cert.denied* 488 U.S. 948, 109 S.Ct.379, 102 L.Ed.2d 368(1988). This Court denied review in *Sease*, and there is no reason to revisit the correct *Sease* decision.

[6] The same result was reached in *In re the Detention of Pouncy,* 144 Wn. App. 609, 613, 184 P.3d 651 (2008);*reversed on other grounds* 168 Wn.2d 382, 229 P.3d 678 (2010)

V. CONCLUSION

For the reasons set forth above, this Court should deny review.

RESPECTFULLY SUBMITTED this 24th day of October, 2013.



SARAH B. SAPPINGTON
Senior Counsel
WSBA #14514, OID 91094

NO. 89199-1

WASHINGTON STATE SUPREME COURT

In re the Detention of: DARIN DILLINGHAM, Appellant.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On October 24, 2013, I deposited in the United States mail true and correct copies of State's Answer to Petition for Review and Declaration of Service, postage affixed, addressed as follows:

Oliver Davis
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of October, 2013, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON

OFFICE RECEPTIONIST, CLERK

To: Jackson, Elizabeth (ATG)
Cc: Sappington, Sarah (ATG); Martin, Allison (ATG)
Subject: RE: DILLINGHAM, Darin - 89199-1 (OIC 91094)

Rec'd 10/24/2013

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jackson, Elizabeth (ATG) [mailto:ElizabethJ@ATG.WA.GOV]
Sent: Thursday, October 24, 2013 2:37 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Sappington, Sarah (ATG); Martin, Allison (ATG)
Subject: DILLINGHAM, Darin - 89199-1 (OIC 91094)

Attached for filing: State's Answer to Petition for Review

In re the Detention of Darin Dillingham
Case no. 89199-1

Sarah Sappington, Senior Counsel
WSBA #14514, OID #91094
sarahs@atg.wa.gov
(206) 389-2019

Thank you,

Liz Jackson
Legal Assistant to Malcolm Ross, Senior Counsel | Mary Robnett, AAG

Washington State Attorney General's Office | Criminal Justice Division
800 5th Ave | Ste. 2000 | Seattle WA 98104
206.389.3821 | elizabethj@atg.wa.gov

NOTICE: This communication may contain privileged or other confidential information. If you know or believe that you have received it in error, please advise the sender by reply e-mail and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.