NO. 46524-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re Detention of Duane Brennan,

STATE OF WASHINGTON,

Respondent,

v.

DUANE BRENNAN,

Appellant.

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

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The order requiring the appellant to submit to pre-commitment penile plethysmograph (PPG) testing violated the appellant's privacy and due process rights.

2. The court erred in entering finding of fact 3, conclusion of law 2, and in ordering the appellant to submit PPG testing. CP 14.[1]

3. Counsel was ineffective for agreeing to pre-commitment testing without the statutorily-required judicial oversight.

4. The court erred in finding the appellant in contempt for failing to submit to the unlawful order.

Issues Pertaining to Assignments of Error

1. RCW 71.09.050(1), amended in 2012, now provides that following a probable cause finding and before a commitment trial, a superior court judge "may require" a 71.09 RCW respondent "to complete any or all of the following procedures or tests if requested by the evaluator: (a) A clinical interview; (b) psychological testing; (c) plethysmograph testing; and (d) polygraph testing." RCW 71.09.050(1). PPG testing interferes with the fundamental rights of a 71.09 RCW respondent. Interference with a fundamental right is constitutionally

[1] The court's written "Order Compelling Physiological Testing" is attached as Appendix A. CP 13-15. The court's oral ruling is attached as Appendix B. RP 19-21.

permissible only if the State can show that a compelling interest, and such interference is narrowly tailored to that interest.

Where the appellant demonstrated that PPG testing is widely regarded as unreliable in a forensic setting, and that the State had alternative, less intrusive means of evaluating the appellant for 71.09 RCW commitment criteria, did the court violate the appellant's constitutional rights in ordering him to undergo pre-commitment PPG testing?

2. Counsel for the appellant entered into an agreement stipulating to probable cause and stating any further evaluation "may include any of the following procedures or tests *if requested by the State's expert.*" Supp. CP 27 (emphasis added). Rather than tracking statutory language, the agreement inadvertently removed judicial oversight. Where the appellant can demonstrate there was no legitimate strategic purpose for such an agreement, and where the court relied in part on the appellant's prior agreement to order PPG testing, did the agreement constitute ineffective assistance?

3. Where the contempt order was based on an order that violated the appellant's due process rights, should this Court vacate the order of contempt as well?

B. STATEMENT OF THE CASE

On November 30, 2012, the State filed a petition to commit 32-year-old Duane Brennan under 71.09 RCW. RCW 71.09.020(18) (defining who may be committed); CP 138-39. At the time the petition was filed, Brennan was serving a Department of Corrections (DOC) sentence for two 2001 convictions for first degree child molestation, each a "sexually violent offense" under RCW 71.09.020(17). CP 138. The State also asserted Brennan suffered from mental abnormalities including pedophilia and anti-social personality disorder (APD), as diagnosed by the State's evaluator, Dr. Amy Phenix. RCW 71.09.020(8), (9); CP 138. The State alleged these conditions led Brennan to have serious difficulty controlling his behavior and made him "likely" to engage in predatory acts of sexual violence unless confined to a secure facility. RCW 71.09.020(7), (18); CP 138-39.

The State concurrently filed a certification for determination of probable cause listing the details of the 2001 offenses. CP 71-73; RCW 71.09.040(2). In 2001, Brennan was a babysitter for a seven-year-old boy and a nine-year-old boy. Two 10-year-old neighbor girls visited the boys' home. Brennan encouraged the boys to engage in sexual activity with the girls. In addition, Brennan attempted to have sex with the first girl. He also licked her vagina and had her put her mouth on his penis. CP 72. The

second girl reported Brennan touched her vagina and had her put her hand down his pants. The second girl's brother saw Brennan appear to have sex with her. Brennan pled guilty to the charges and later admitted to some of the acts forming the basis for the charges. CP 73.

According to the probable cause certification, Brennan said he had additional victims in the same age range and stated a sexual preference for nine- to 14-year-old girls. CP 74. Brennan refused treatment in the DOC's Sexual Offender Treatment Program and told a program employee he believed he would offend again if released to the community. CP 74, 137; see also CP 117-18, 121-22, 124, 126, 137 (disclosures to Dr. Phenix and prior evaluator, Dr. John Hupka, as reported in Dr. Phenix's 2012 evaluation). In a 2012 clinical interview, Brennan also told Dr. Phenix he normally masturbated to fantasies of 13- to 17-year-old girls, or women who appeared that age, but also masturbated to fantasies of pre-pubescent girls about 10 to 15 percent of the time. CP 117.

Based in part on the foregoing, Dr. Phenix concluded Brennan met the 71.09 RCW commitment criteria. CP 74-77, 123-37. Dr. Phenix also relied on Brennan's history of childhood behavior issues, his criminal history, and his behavior while incarcerated. CP 125-26 (factors supporting APD diagnosis).

On December 3, 2012, Brennan signed a "Stipulated Order Affirming the Existence of Probable Cause and Directing the Custodial Detention and Evaluation of Respondent." Supp. CP 26-28. Brennan stipulated there was probable cause to believe he met 71.09 RCW commitment criteria. Supp. CP 28. He also stipulated that:

> Consistent with RCW 71.09.050(1), Respondent shall now submit to an evaluation by an expert chosen by the State. *The evaluation may include any of the following procedures or tests if requested by the State's expert*:
>
> a. A clinical interview;
>
> b. Psychological testing
>
> c. Penile plethysmograph testing (PPG);
>
> d. Polygraph testing; and
>
> e. Any other testing by the State's expert.

Supp. CP 27 (emphasis added).

A commitment trial was originally set for early 2013, but Brennan waived his right to a speedy trial, and the court granted a continuance until January of 2014. CP 62, 69-70.

On January 8, 2014, however, the parties agreed to a continuance, CP 61, and provided the court the following information:

Brennan had reported to his expert witness, Dr. Brian Abbott, that he had exaggerated his interest in children and the number of child victims

to Dr. Phenix and to Dr. Hupka, who interviewed Brennan in 2011. CP 63. Dr. Phenix's evaluation cites and relies on a number of Brennan's statements to Hupka. E.g. CP 117-18, 122, 124. Brennan told Dr. Abbott that, in fact, he did not experience the "thoughts, urges, or behaviors" concerning prepubescent children that he previously reported. He also told Dr. Abbott that he did not, in reality, have a number of unadjudicated victims. He did not believe he would reoffend if released to the community. CP 64. Brennan made the earlier statements because he had been incarcerated most of his adolescence and adulthood and feared release to the community without resources. CP 63-64.

Following Brennan's disavowal of his prior claims, Dr. Phenix re-interviewed Brennan, who confirmed he had indeed fabricated his original statements to Phenix and Hupka. Supp. CP 3. Dr. Phenix contacted the State to request that Brennan be subjected to physiological testing, including a PPG and a sexual history polygraph. CP 65; Supp. CP 3. Brennan, however, declined to participate in such testing. Supp. CP 3.

On June 16, 2014 the State filed a motion and supporting memorandum to require Brennan to engage in the requested physiological testing with an attached declaration from Dr. Phenix. Supp. CP 3, 14-19. The declaration repeats Brennan's earlier admissions regarding the subject of his fantasies, his past victims, and his belief he would reoffend if

released. Supp. CP 15. Dr. Phenix notes that after re-interviewing Brennan in 2013 she determined "a sexual history polygraph as well as a [PPG] test battery would be appropriate to verify and/or clarify the sexual history previously reported by Mr. Brennan." Supp. CP 16. Moreover, it would help her form an opinion about Brennan's "mental state, sexual history and attitudes, and sexual arousal patterns." Supp. CP 17. Further, Dr. Phenix believed that under the law, the State had the right to a "current evaluation" following a probable cause finding. In addition, Brennan had agreed to engage in physiological testing including a PPG or polygraph testing if requested by an evaluator. Supp. CP 16.

Dr. Phenix also asserted she had an "ethical duty" to ensure her evaluation was complete and accurate via the use of such testing. According to Dr. Phenix, such testing was commonly used and accepted within the "sexual offender field" for the assessment and treatment of sexual offenders and was "endorsed as a part of a comprehensive sexual evaluation by various agencies and sexual offender organizations." Supp. CP 17. Further, a PPG could evaluate whether Brennan experienced deviant sexual arousal by measuring his responses to a variety of sexual stimuli. This would, in turn, be useful in determining whether he suffered from a mental abnormality. This would also aid in determining the risk of

reoffense, given the link between deviant arousal and re-offense risk. Supp. CP 17.

Dr. Phenix also requested a post-PPG polygraph to detect any attempt to manipulate PPG test results. Supp. CP 18. Moreover, she asserted counsel should not be in the room for the testing, as it could invalidate results. She also asserted Brennan should not be informed of the PPG test in advance so he would be unable to preemptively alter his ability to respond to stimuli. Supp. CP 18-19.

Brennan filed a response arguing such testing was unreliable, unnecessary, and violated substantive due process. CP 16-38. He attached a declaration from Dr. Abbott. CP 40-49. In the declaration, Dr. Abbott noted that while PPG testing was accepted for use in a treatment setting, it was not generally considered "reliable" for purposes of forensic evaluation of sex offenders. CP 41, 47.

The measure of reliability is the comparison of two tests ("test/retest reliability") and is measured on a scale of 0 (fails to measure sexual interests) to 1.0 (accounts for all sexual interests). CP 41. If the test were reliable, two test results would be expected to be similar. Subtracting the reliability value from 1.0 reflects the error involved in the measurement. CP 41. The single study involving a PPG used on child

molesters revealed a 47 per cent error rate. CP 42. This falls below the accepted standard of reliability, or .80. CP 42.

Further, Dr. Abbott questioned the "validity" of PPG results, that is, whether a test measures what it purports to measure, in this case deviant vs. non-deviant sexual interests. He noted that no studies demonstrated the link between PPG results and a mental abnormality (a legal, not a psychological, concept), a diagnosis of pedophilia, or sexual recidivism risk. CP 43. Dr. Abbott also observed that the actuarial instruments Dr. Phenix relied on, the Static-99R and the Static-2002R, accounted for deviancy in other ways, and consideration of additional variables (such as PPG results) did not increase the instruments' powers of prediction. CP 44-45. Another study had shown that sexual preference as measured by a PPG is not "significantly predictive of sexual recidivism," and thus two prominent researchers omitted PPG results from their Violence Risk Appraisal Guide – Revised, which replaced the prior the Sex Offender Risk Appraisal Guide (SORAG). CP 45.

Finally, while Dr. Phenix claimed an ethical duty to ensure her evaluation was as complete and accurate as possible, this ignored that current standards promulgated by the Association for the Treatment of Sexual Abusers (ATSA) did not support use of PPG in forensic

evaluations. CP 46.[2] Moreover, Dr. Abbott opined that American Psychological Association guidelines actually *prohibited* the use of PPG testing for such purposes on ethical grounds given the questionable reliability of the testing. CP 48.

The court held a hearing on June 30, 2014. Brennan's counsel argued PPGs were unreliable as a test for sexual deviancy and the actuarial instruments already had a means of identifying, and considering, sexual deviancy without resorting to unreliable PPG results. RP 8, 12, 15. Counsel acknowledged a case relied on by the State, In re Detention of Halgren,[3] approved expert testimony regarding PPG results under ER 703 (facts or data, if of a type reasonably relied upon by experts in the particular field in forming opinions, need not be admissible in evidence). But in Halgren, the PPG results were obtained during earlier treatment, an acceptable milieu, and not for the purpose of forensic evaluation. RP 11. In contrast, as set forth in Dr. Abbott's declaration, PPG results were unreliable in a forensic setting. RP 11.

In its oral ruling, the court ordered Brennan to submit to testing on the sole ground that he had previously agreed to the testing. Rather than

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[2] Compare Supp. CP 6 (State's memorandum to require physiological testing citing ATSA's 2005 practice standards) with Dr. Abbott's declaration (citing ATSA's 2014 practice standards).

[3] 156 Wn.2d 795, 805, 132 P.3d 714 (2006).

inviting additional judicial oversight for the testing, the stipulated order was "self-executing," meaning Brennan had signed an agreement to submit to whatever testing the State's evaluator wished. RP 19-21. The court's written order also noted that Dr. Phenix had requested the testing and found that "such information is routinely relied upon" by mental health professionals in conducting [71.09 RCW commitment] evaluations for purposes of assessing sexual preferences and assessing risk." CP 13-14 (Finding 3). The court therefore found "good cause" to require Brennan to submit to testing. CP 14 (Finding 3).

The court concluded that "RCW 71.09.050(1) grants [the State] the right to a current evaluation and specifically authorizes the Court to order . . . physiological testing if requested by the evaluator, which can include PPG . . . and polygraph testing." CP 14 (Conclusion 2). The court reserved ruling on any contempt finding so Brennan could decide whether to participate voluntarily. RP 30.

At a hearing a week later, defense counsel informed the court Brennan would not submit to testing and argued the stipulation purportedly agreeing to testing was contrary to RCW 71.09.050(1), which required court approval for such testing. RP 34-36, 38; see RCW 71.09.050(1) ("the judge *may* require the person to complete any or all of the following procedures or tests if requested by the evaluator.")

The court, however, declined to reconsider its ruling. RP 36-37. The court also found Brennan was in contempt and, as a sanction for failure to comply, stayed trial while he remained at the Special Commitment Center (SCC). RP 38-40. The court ruled Brennan could purge his contempt by completing the testing. RP 40; CP 10-12.

Brennan timely appealed the contempt order as well as the underlying order requiring him to submit to testing.[4] CP 2-9.

C. ARGUMENT

1. THE ORDER REQUIRING BRENNAN TO SUBMIT TO PRE-COMMITMENT PPG TESTING VIOLATES HIS SUBSTANTIVE DUE PROCESS AND PRIVACY RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The court ruled that RCW 71.09.050(1), as well as Brennan's agreement to such testing, authorized testing upon request by a State's evaluator. CP 14 (Conclusion 2); RP 19-21. But as Brennan demonstrated below, and as a number of courts and commentators have observed, PPG testing is widely regarded as unreliable in a forensic setting. Moreover, the State has alternative, less intrusive means of evaluating Brennan for 71.09 RCW commitment criteria. In failing to recognize its own discretion under the statue and in failing to apply the

[4] See Diaz v. Washington State Migrant Council, 165 Wn. App. 59, 71 n.4, 265 P.3d 956 (2011) (contempt order and underlying order are appealable of right) (citing RCW 7.21.070).

statute in a way that satisfied Brennan's due process rights, the court's order violated the statute as well as Brennan's constitutional rights.

In entering the order, moreover, the court substantially relied on Brennan's prior agreement to engage in such testing. Counsel entered into an agreement stipulating to probable cause and stating any further evaluation "may include any of the following procedures or tests *if requested by the State's expert.*" Supp. CP 27 (emphasis added). The agreement did not track the language of the statute, but inexplicably removed judicial oversight with no discernable strategic purpose. Because the court relied in part in the agreement to order such testing, counsel's ill-advised entry into such an agreement constituted ineffective assistance.

a. Chapter 71.09 RCW grants a judge discretion as to whether to order pre-trial physiological testing.

Under RCW 71.09.050(1), within 45 days after the completion of the probable cause hearing, the court shall conduct a trial to determine whether the person should be committed. "The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state." RCW 71.09.050(1).

The court "may require" the 71.09 RCW respondent "to complete any or all of the following procedures or tests if requested by the evaluator: (a) A clinical interview; (b) psychological testing; (c)

plethysmograph testing; and (d) polygraph testing." RCW 71.09.050(1).[5] The statute's plain language, while allowing for such testing, leaves the decision to the judge to determine whether such testing is required. See State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (rule's use of the word "may" denotes judicial discretion). A court's failure to exercise discretion is an abuse of discretion. In re Detention of Mines, 165 Wn. App. 112, 125, 266 P.3d 242, 248 (2011) (quoting Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999). Here, the court abused its discretion by failing to recognize its discretion and in concluding the statute alone authorized any testing requested by the State's expert. CP 14 (Conclusion 2). As discussed below, under the circumstances of this case, the order to permit such testing violated Brennan's due process and privacy rights.

b. PPG testing is highly invasive and has been described as "Orwellian."

The statute lists the types of testing a court may order if requested by the State's evaluator. PPG testing is not, however, a "run of the mill

[5] In In re Detention of Hawkins, 169 Wn.2d 796, 805, 238 P.3d 1175 (2010), the Supreme Court held that former RCW 71.09.040 prohibited the State from compelling 71.09 RCW respondents to submit to polygraph examinations. In 2012, however, the legislature amended RCW 71.09.040 and .050 to explicitly provide for polygraph and other physiological testing. Laws of 2012, ch. 257, §§ 4, 5 (eff. July 1, 2012). The Hawkins court did not address the constitutional claims raised herein.

medical procedure." United States v. Weber, 451 F.3d 552, 562 (9th Cir. 2006). The examination requires procedures that courts have generously described as "intrusive," United States v. McLaurin, 731 F.3d 258, 262-63 (2d Cir.2013), and "especially unpleasant and offensive," Berthiaume v. Caron, 142 F.3d 12, 16 (1st Cir.1998). The description of the procedure is one which "one would expect to find . . . gracing the pages of a George Orwell novel." Weber, 451 F.3d at 554.

The testing involves placing a mercury strain gauge around a man's penis. State v. Riles, 135 Wn.2d 326, 343 n.57, 957 P.2d 655 (1998). The test subject is then "instructed to become fully aroused, either via self-stimulation or by the presentation of so-called 'warm-up stimuli' in order to derive a baseline against which to compare later erectile measurements." Jason R. Odeshoo, Of Penology And Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 9 (2004). "After the individual has returned to a state of detumescence," he is presented with various "stimulus materials, auditory and visual, encouraging him to think about and look at materials indicative of sexual activity with different ages of people, different genders and different sexual activities." Odeshoo, supra, at 9; Riles, 135 Wn.2d at 343 n. 57 (quoting State v. King, 130 Wn.2d 517, 545 n. 13, 925 P.2d 606 (1996) (Sanders, J., dissenting)). Some of the scenarios

presented are extremely violent and disturbing. RP 10. The gauge then is used to "determine the man's level of sexual attraction by measuring minute changes in his erectile responses." Odeshoo, supra, at 2. One commentator has persuasively described the procedure as more invasive than body cavity or strip searches:

> It is true that cavity searches and strip searches are deeply invasive, but PPG is substantially more invasive. Cavity searches do not involve the minute monitoring of changes in the size and shape of a person's genitalia. Nor do such searches last anywhere near the two or three hours required for penile plethysmography exams. . . .

Odeshoo, supra, at 23. Moreover, whether or not PPG is more physically intrusive than other physical tests, and whether or not it is more psychologically intrusive than other psychological tests, PPG "combines these physical and psychological invasions in a way that other searches simply do not." Id.

Even incarcerated prisoners retain due process privacy rights. See, e.g., Turner v. Safley, 482 U.S. 78, 84, 94, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (inmates retain fundamental constitutional right to marriage). Yet here, the court ordered Brennan to submit to a test that will require him to place a mercury strain gauge around his penis, stimulate himself to the point of maximum engorgement, relax to a state of non-arousal, and then allow himself to be stimulated by various visual and audio stimuli

while every minute change in his arousal was measured by the gauge around his penis. Odeshoo, supra, at 9.

c. Where the court did not identify a compelling reason for the testing, and the testing is not the least intrusive means of achieving the State's interests, the court violated Brennan's substantive due process and privacy rights.

The court ruled that there was "good cause" to require based on Dr. Phenix's representation that the testing was "routinely relied upon" by evaluators assessing risk. CP 14 (Finding 3). But the court then concluded RCW 71.09.050(1) authorized testing simply upon request by a State's evaluator, without any requirement that the court exercise its discretion or any additional showing. CP 14 (Conclusion 2). The order violates substantive due process because it invades Brennan's personal autonomy without being narrowly tailored to achieve a compelling government interest. Constitutional violations are reviewed de novo. In re Detention of Strand, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009).

Substantive due process imposes limits on what a state may do regardless of what procedural protections are provided. Harrington v. Almy, 977 F.2d 37, 43 (1st Cir. 1992). To support a substantive due process claim, a litigant must establish either that the defendant's actions were sufficient to "shock the conscience" or "a violation of an identified liberty or property interest." Id. (internal citations omitted).

The Fourteenth Amendment provides "heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). The right to personal autonomy in matters of sexual activity is a fundamental liberty interest, triggering strict constitutional scrutiny. Cf. Lawrence v. Texas, 59 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to liberty under the due process clause includes the right to engage in consensual sexual conduct without interference from the government).

If the right to privacy in sexual matters protects the choice to engage in sexual conduct, it must also protect the right to refrain from sexual conduct. For example, in Harrington, the First Circuit reversed summary judgment against a suspended police officer required to submit to PPG testing as a condition of reinstatement. 977 F.2d at 44-45. The court described the PPG process as "degrading" bodily manipulation and, reversing a summary judgment in favor of the defendant city, held that a reasonable factfinder could find the requirement violated substantive due process. Id.

Article I, section 7 of Washington's constitution provides even greater protection for personal autonomy than the federal constitution. Butler v. Kato, 137 Wn. App. 515, 527, 154 P.3d 259 (2007); State v.

Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Article I, section 7 protects the right to privacy with no express limitations. State v. Ferrier, 136 Wn.2d 103, 110, 960 P.2d 927 (1998).

Interference with a fundamental right is constitutional only if the State can show that it has a compelling interest and such interference is narrowly drawn to meet the compelling state interest involved. In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) aff'd sub nom Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also Butler, 137 Wn. App. at 527 (infringement of the fundamental right to autonomy under Washington's constitution requires strict scrutiny by the courts and is impermissible unless narrowly tailored to achieve a compelling government interest). Thus, the government may not compel Brennan to engage in the sexual stimulation required for a PPG test unless the requirement is narrowly tailored to achieve a compelling government interest.

Here, the court ordered ruled that RCW 71.09.050(1) authorized PPG testing upon request by an expert. CP 14 (Conclusion 2). While the statute provides that the court *may* order such testing, the order requiring testing here does not satisfy strict scrutiny.

Brennan recognizes the State has a compelling interest both in treating sex offenders and protecting society from their actions. In re

Young, 122 Wn.2d 18, 26, 57 P.2d 989 (1993) (citing Addington v. Texas, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); Vitek v. Jones, 445 U.S. 480, 495, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980)). Although the court found Dr. Phenix had "requested" the testing, the court made no finding Dr. Phenix *needed to* rely on such invasive testing in forming her opinions.

The State may argue, as it did below, that Washington courts have previously upheld reliance on PPG testing in a forensic setting and the court's ruling should be upheld on that ground. Below, the State relied on Halgren and the Supreme Court's opinion in Riles to argue the method was commonly accepted in expert evaluation of sex offenders. RP 5, 16, 19.

> In Halgren, the Court observed that
>
> > in [Riles, 135 Wn.2d 326], this court concluded that "[p]lethysmograph testing is regarded as an effective method for *diagnosing and treating* sex offenders." Id. at 343-44 (footnote omitted) . . . . The Riles court cited extensively to psychiatric journals and cases from other jurisdictions in support of this conclusion. Id. at 343-44 nn. 57-59.

Halgren, 156 Wn.2d at 806 (emphasis added). A close examination of the cases Riles actually relied on, however, reveals the Halgren Court's reliance on Riles was misplaced, at least as to PPG use in a forensic setting.

First, consistent with Dr. Abbott's assertion that the procedure is accepted in treatment rather than a forensic setting, CP 41, 47, a number of the cited cases address treatment only. Riles, 135 Wn.2d at 344 n. 59. For example, Walrath v. United States[6] approved PPG testing against a Fourth Amendment challenge as part of a parolee's *treatment* program. Vermont v. Emery[7] likewise commented PPG testing was used in sex offender treatment programs. See also Rund v. Board of Parole and Post-Prison Supervision, 152 Or.App. 231, 953 P.2d 766 (1998) (use in treatment), opinion withdrawn (Mar. 20, 1998); Leyba v. State, 882 P.2d 863 (Wyo. 1994) (use in treatment); Von Arx v. Schwarz, 185 Wis.2d 645, 517 N.W.2d 540 (1994) (use in treatment).

While State v. S.H.[8] arguably refers to use of PPG testing in a diagnostic setting – to support a probation counselor's opinion as to a need for treatment – in that case as well, the test appears to have been used in a treatment setting.

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[6] 830 F.Supp. 444 (N.D.Ill.1993), aff'd, Walrath v. Getty, 35 F.3d 277 (7th Cir.1994).

[7] 156 Vt. 364, 593 A.2d 77 (1991).

[8] 75 Wn. App. 1, 877 P.2d 205 (1994), overruled on other grounds by State v. Sledge, 83 Wn. App. 639, 645, 922 P.2d 832 (1996).

A second category of cases deals with public expenditure of funds for such testing when requested by an accused. See State v. Young, 125 Wn.2d 688, 888 P.2d 142 (1995) (upholding ruling to permit funds for such testing); Stowers v. State, 215 Ga.App. 338, 449 S.E.2d 690 (1994) (upholding ruling *denying* a defendant's request for funds to pay for such testing to support his defense).

Finally, one of the cases cited in the Riles footnote actually militates against the use of PPG to diagnose deviancy. In People v. John W., an expert, Walker, testified that PPG testing for diagnosis and treatment of sex offenders was "widely accepted." 185 Cal.App.3d 801, 229 Cal.Rptr. 783, 785 (1986), implied overruling on other grounds by People v. Stoll, 49 Cal.3d 1136, 783 P.2d 698, 265 Cal.Rptr. 111 (1989). But the court upheld a trial court ruling *rejecting* testimony on the results of PPG testing. Id. John W. is not alone in excluding the testing as unreliable.

In Marriage of Parker, 91 Wn. App. 219, 957 P.2d 256 (1998), for example, a guardian ad litem in a dissolution action recommended a sexual deviancy evaluation based on the father's "'history of violence' and the 'largely unexplored possibility of sexual boundary issues.'" Id. at 222. The Court held a court-ordered plethysmograph violated a father's fundamental liberty interest in the custody and care of his son. As the

Parker Court aptly observed, "using a plethysmograph to monitor compliance with conditions of treatment or community placement is different from using it to determine sexual deviancy." Id. at 225-26. The Parker court rejected such use to diagnose sexual deviancy.

This Court should reject any blanket claim that Washington courts have found PPG reliable in a forensic setting. And although the superior court found that such testing is "routinely relied upon" in 71.09 RCW commitment evaluations,[9] including, presumably, those completed by Dr. Phenix herself, this does not answer the question of whether such mandatory testing satisfies strict scrutiny.

Indeed, in accord with Dr. Abbott's declaration, the reliability of penile plethysmograph testing has been strongly questioned not only by the courts but also by other experts in the field. Weber, 451 F.3d at 564. The examination is susceptible to user manipulation, as test subjects have been known to "significantly inhibit their arousal by using mental activities to distract themselves." Id. (quoting W.L. Marshall & Yolanda M. Fernandez, Phallometric Testing with Sexual Offenders: Limits to Its Value, 20 Clinical Psychol. Rev. 807, 810 (2000)). The test has also been found to suffer from a lack of "uniform administration and scoring guidelines." Weber, 451 F.3d at 565 (quoting Walter T. Simon & Peter

[9] CP 14 (Finding 3).

G.W. Schouten, The Plethysmograph Reconsidered: Comments on Barker and Howell, 21 Bull. Am. Acad. Psychiatry & L. 505, 510 (1993)). This problem is compounded by reports indicating that some clinicians who administer the test lack the requisite training. Weber, 451 F.3d at 565 (citing D. Richard Laws, Penile Plethysmography: Will We Ever Get it Right?, in Sexual Deviance: Issues and Controversies 82, 87 (Tony Ward et al. eds., 2003)). Because there are no accepted standards in the scientific community, many courts have held that the results of plethysmograph examinations are inadmissible as evidence. E.g., Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir.2000); Gentry v. Georgia, 213 Ga. App. 24, 443 S.E.2d 667, 669 (1994); see also Billips v. Virginia, 274 Va. 805, 652 S.E.2d 99, 102 (2007) (plethysmograph evidence was inadmissible because it lacked the necessary foundation); North Carolina v. Spencer, 119 N.C.App. 662, 667-68, 459 S.E.2d 812 (1995) (trial court did not abuse its discretion by excluding such evidence because it is unreliable); In re A.V., 849 S.W.2d 393, 399 (Tex. App. 1993) (the record did not establish the reliability of the penile plethysmograph).

Moreover, there are other, far less intrusive methods of assessing sexual deviancy. Weber, 451 F.3d at 567-68 (discussing alternatives to PPG testing); Odeshoo, supra, at 13-14 (same). In Weber, the court

considered whether compulsory PPG testing was permitted under federal law mandating that conditions of release involve "no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release."[10] 451 F.3d at 567. The court first discussed the "exceptionally intrusive" nature of the PPG. Id. at 563. Noting the substantial liberty interest at stake, the court stated, "Harrington[11] rests on the premise that the strong liberty interest in one's own bodily integrity is impaired by the plethysmograph. We find the First Circuit's analysis persuasive in this regard." Weber, 451 F.3d at 563-64. The Weber court went on to note that PPG testing has been declared useful in treatment. Id. at 565. But, as noted by a commentator, "plethysmograph testing should not be used to 'determine or make statements about whether someone has committed a specific sexual offense or whether someone "fits the profile" of a sexual offender.'" Id. (quoting Laws, supra, at 98).

The Weber court then employed the narrow tailoring analysis required by federal statute. Id. at 566-67. The court held that, before PPG testing could be required as a condition of supervised release, the trial court must explain on the record (1) why the test is likely to accomplish

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[10] Although Weber was decided on statutory, rather than due process grounds, the court's reasoning is also instructive in a substantive due process analysis. 451 F.3d at 563 n. 14.

[11] Harrington, 977 F.2d 37.

what it is intended to accomplish and (2) why other, less intrusive procedures would be inadequate under the circumstances. Id. at 567-68. The Weber court vacated the condition because no such findings were made. Id. at 570.

This Court should follow the analysis in Weber and hold that, for similar reasons, the superior court's order is invalid. Here, there are significant questions as to whether the procedure is reliable in a forensic setting. As Brennan has shown, prior case law, relied on by the State below, wrongly overstated the procedure's use in the diagnostic setting.

Moreover, as Brennan argued below, the State has better means available to assess whether Brennan meets commitment criteria, including the use of actuarial instruments. For example, actuarial instruments measure deviant sexual interests without resorting to unreliable PPG testing. CP 25-27 (defense response to State's motion); CP 44-45; see, e.g., Static-2002R Coding Form, accessed at http://www.static99.org/pdfdocs/static-2002rcodingform.pdf (sexual-deviancy-related items do not include physiological test results); see also Odeshoo, supra, at 13-16 (discussing alternative methods of assessment, including the "Abel Screen," which involves presenting individuals with non-erotic pictures of children and adults and determining sexual interest by measuring how long a person spends viewing each picture).

As in Weber, the trial court imposed a requirement that Brennan submit to "exceptionally intrusive" PPG testing without finding other alternatives would be inadequate.[12] The failure to consider less restrictive alternatives when a substantial liberty interest is at stake fails to pass strict scrutiny. Harrington, 977 F.2d at 44. The order should be vacated as a violation of Brennan's due process and privacy rights.

d. To the extent that counsel agreed to such testing in the stipulated order, counsel was ineffective.

The court found in its oral ruling that Brennan agreed to any and all testing requested by the State's expert. For example, while the statute states the judge "may require" the 71.09 RCW respondent "to complete various forms of testing requested by an evaluator, "any or all of the following procedures or tests if requested by the evaluator," RCW 71.09.050(1), the stipulated order states "[t]he evaluation may include any of the following procedures or tests if requested by the State's expert." Supp. CP 27. The stipulation arguably removed the judge's discretion and placed any such discretion in hands of the State's expert.

To establish ineffective assistance of counsel, a 71.09 RCW respondent must show deficient performance and resulting prejudice. In

[12] Cf. CP 14 (finding 3, finding "good cause" for testing based in part on Dr. Phenix's claim of "routine reliance" on such testing); CP 14 (conclusion 2, concluding statute requires physiological testing merely upon evaluator's request).

re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). Prejudice occurs if, but for the deficient performance, there is a reasonable probability an outcome would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

A stipulation may represent a tactical decision by counsel. State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995). A respondent, however, may show deficient performance by demonstrating the absence of a strategic basis for the challenged action. Moore, 167 Wn.2d at 122 (citing McFarland, 127 Wn.2d at 335-36).

While there may have been a valid reason to stipulate to the existence of probable cause in light of the materials submitted by the State under RCW 71.09.040(2), counsel had no legitimate reason to hand the State's expert unfettered discretion to conduct invasive testing. Rather, the agreement represents a sloppy paraphrasing of the statute, one which permitted the court to find Brennan had agreed to such testing. RP 19-21; cf. CP 14 (conclusion 2, interpreting statute consistent with stipulated agreement but not plain language of statute). The record supports the

absence of a reasoned strategy. Indeed, at the July 7 hearing, counsel (who signed the stipulated order) expressed dismay at the wording of the order and informed the court he believed the order was contrary to statute and a "mistake[]." RP 34.

Not only was counsel's performance deficient, the deficiency prejudiced Brennan. The court explicitly ruled that one of the reasons the testing should go forward because Brennan agreed to it. RP 19-21. The court later declined to reconsider its ruling. RP 36. Therefore, to the extent that Brennan's counsel agreed to any and all testing without the required judicial oversight, the agreement was constitutionally ineffective. In evaluating the court's order, this Court should not consider the appellant's purported agreement to the testing, because it was a product of ineffective assistance.

2. THE COURT ERRED IN FINDING THE APPELLANT IN CONTEMPT FOR FAILING TO SUBMIT TO THE UNLAWFUL ORDER.

"An order, though erroneous, is lawful within the meaning of contempt statutes until it is reversed by an appellate court." Deskins v. Waldt, 81 Wn.2d 1, 5, 499 P.2d 206 (1972). Here, because the underlying order was illegal, this Court should also reverse the contempt order.

D. CONCLUSION

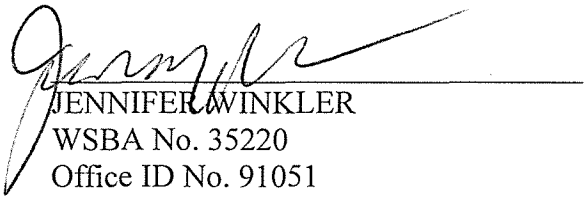
The order requiring the appellant to submit to pre-commitment penile plethysmograph PPG testing violated the appellant's privacy and due process rights, was not narrowly tailored, and should be stricken. The appellant's "agreement" to such testing, moreover, was the product of ineffective assistance and therefore does not support the order.

Because the order compelling such testing was illegal, the contempt order should likewise be stricken and the trial permitted to proceed.

DATED this 21ST day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

APPENDIX A

OK

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Superior Court of Mason Co. Wash.

STATE OF WASHINGTON
MASON COUNTY SUPERIOR COURT

In re the Detention of:	NO. 12-2-1041-6
DUANE BRENNAN,	ORDER COMPELLING PHYSIOLOGICAL TESTING
Respondent.	

THIS MATTER came before the Court on the Petitioner's Motion to Compel Physiological Testing. At the hearing on the motion, the Petitioner was represented by Assistant Attorneys General KATHARINE HEMANN and ERIN C. DYER. Respondent was present telephonically and represented in court by his counsel, PETER MACDONALD.

In ruling on the Petitioner's motion, the Court considered the motion, the response, as well as files and records herein. Based upon these, the Court enters the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. On December 3, 2012, the Court entered a stipulated probable cause order requiring the custodial detention and evaluation of Respondent, as required by RCW 71.09.040 and .050.

2. The forensic evaluator who is conducting the RCW 71.09.050 evaluation, Dr. Amy Phenix, has requested penile plethysmograph (PPG) with specific-issue polygraph

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testing and a sexual history polygraph of Respondent in order to obtain current information for his evaluation.

3. The information requested by Dr. Amy Phenix is routinely relied upon by mental health professionals in conducting sexually violent predator evaluations for purposes of assessing sexual preferences and assessing risk and, based on the evidence before the Court, there is good cause to require Respondent to comply with the requested procedures.

CONCLUSIONS OF LAW

1. The Court has personal and subject matter jurisdiction in this case.

2. RCW 71.09.050 grants Petitioner the right to a current evaluation and specifically authorizes the Court to order psychological and physiological testing if requested by the evaluator, which can include PPG testing and polygraph testing.

~~3. The results of PPG testing are admissible in evidence, under ER 703 and ER 705, in an SVP trial. *In re Detention of Halgren*, 156 Wn.2d 795, 805-07, 132 P.3d 714 (2006).~~ Reserved for trial

BASED ON THE ABOVE FINDINGS:

IT IS ORDERED:

1. As part of the RCW 71.09.050(1) examination previously ordered by this Court, Respondent shall comply with a PPG testing and a sexual history polygraph. The testing will take place at the Special Commitment Center.

2. Respondent shall comply with specific-issue polygraph testing following the PPG testing, to provide information about whether he engaged in any counter-measures.

3. Respondent's attorneys may observe the procedures but shall not interfere with or obstruct the testing in any manner. Without Respondent present, Mr. McDonald and/or Mr. Gaer may inspect the area in which the PPG and polygraph will occur before the examinations

begin. However, Mr. McDonald and/or Mr. Gaer may not accompany Respondent into the booth where the PPG examination takes place.

4. Respondent shall not be told the date or time of the PPG or the polygraph until such examination is set to begin.

5. Respondent has no blanket privilege against self-incrimination in these civil commitment proceedings. He shall answer all questions posed to him by the test administrator except those which relate to matters for which he could still be criminally prosecuted.

6. Failure to comply with this Order may result in the imposition of appropriate sanctions as described in CR 37.

DONE IN OPEN COURT this 30 day of June, 2014.

THE HONORABLE TONI SHELDON
Judge of the Superior Court

Presented by:

ROBERT W. FERGUSON
Attorney General

KATHARINE HEMANN, WSBA #46237
ERIN C. DYER, WSBA #35585
Assistant Attorneys General
Attorneys for Petitioner

Copy received; approved as to form; notice of presentation waived:

PETER MACDONALD, WSBA #30333
IVAL GAER, WSBA #31043
Attorneys for Respondent

APPENDIX B

saying all I'm looking at is whether or not -- what his scores are on the PPG and what happens on the polygraph. She has other information, including Mr. Brennan's convictions, and other things at her disposal.

But when you have statements by an individual like those made by Mr. Brennan, which at one time he says this is what I'm thinking, and at another time says I completely made that up because I wanted to be committed -- and I would disagree that that is a reasonable plan that somebody who thought I'm going to be released and out on the streets so I'll just try and get myself civilly committed indefinitely. I don't necessarily agree that that's a reasonable plan by somebody, especially when there's a review of the records and difference in -- in what Mr. Brennan wanted at the time that he was going to be released. But again, that's neither here nor there for this hearing.

So based on, I would submit, the case law in this State of In Re: Detention of Halgren, and State v. Riles, the Statute, 71.05, and Doctor Phenix's request, and her declaration of why she wants this test, I would again ask this Court to grant our motion.

MR. MacDONALD: May I respond, your Honor?

THE COURT: No. The Court will grant the motion. Looking at the stipulated order that was entered December 3, 2012 it, on page 2, paragraph 4, outlines specifically -- and maybe I need to bring that back up to the bench. If you could help me with that, thank you.

MS. HEMANN: No problem, your Honor. Do you need that other microphone?

THE COURT: No, it'll be fine.

MS. HEMANN: Okay.

THE COURT: Mr. Brennan, this is Judge Sheldon and I'm making my ruling. I am going to grant the State's motion. In looking at the question, the Court first referred to the order that was entered in this matter on December 3, 2012 entitled Stipulated Order Affirming the Existence of Probable Cause and Directing the Custodial Detention and Evaluation of Respondent. Specifically on page 2, paragraph 4, the agreement provided that the respondent shall now submit to an evaluation by an expert chosen by the State. The evaluation may include any of the following procedures or tests, if requested by the State's expert. And the two -- or at least the primary one at issue at this point is (c), the PPG, although I did read something also about the polygraph.

And then on page 3, the Order specifically says, respondent shall also participate in an evaluation as required by this order and the RCW. It doesn't say the respondent shall participate in those parts of the evaluation that are listed on paragraph 4 that the Court then later orders the respondent should participate in. This is a self-executing order. It specifically says, and he agreed to it, that he will participate in the tests if requested by the State's expert.

I also note that paragraph 5 says should the evaluation become stale prior to trial, respondent may be required to submit to supplemental evaluation procedures. And the Court finds that the original trial in this case was stricken. And now we have trial date much later. And so whether we call it being stale -- it doesn't sound like he already did the PPG, so he's not being asked to do it over again.

But yes, the Court finds that the original stipulation and order do provide that Mr. Brennan submit to any parts of the evaluation that are specifically named in that order.

MS. HEMANN: And --

MR. MacDONALD: Your Honor, I just want to clarify that -- that what the -- what -- what the -- what the Statute says is he's not just supposed to do it. He's supposed to do it if a judge orders it. So it wasn't like we're walking in here with a -- with a -- with a -- you know, already resolved issue. You could just as easily say no, he doesn't have to do it, then he wouldn't have to. That's the word --

THE COURT: That's not how I read the order, counsel.

MR. MacDONALD: Well that's the way the order is, your Honor. It says may. It says the evaluation may include any of the following procedures, may. So you --

THE COURT: If requested by the State's expert. It isn't if later ordered by the Court after argument. It's if requested by the State's expert. And so that's what provides the cue to knowing

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re Detention of Duane Brennan,	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 46524-8-II
	)	
DUANE BRENNAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF NOVEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DUANE BRENNAN
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF NOVEMBER, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 21, 2014 - 4:08 PM

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Court of Appeals Case Number: 46524-8

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