No. 93456-8

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 73337-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MEGAN ROAKE,

Respondent,

vs.

MAXWELL DELMAN,

Petitioner.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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A. Identity of Petitioner and Court of Appeals Decision.

The Court of Appeals reversed the trial court's denial of a Sexual Assault Protection Order (SAPO) and remanded for further proceedings in a published decision filed June 13, 2016. (Appendix A) The Court of Appeals denied petitioner Max Delman's timely motion for reconsideration on July 6, 2016. (Appendix B)

B. Issues Presented for Review.

RCW 7.90.020(1) requires a SAPO petition to allege 1) that a sexual assault occurred and 2) "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought."

1. Does the Court of Appeals' decision that a SAPO petitioner must allege but need not prove each statutorily-required element of the petition violate a respondent's due process right to notice of the allegations he must be prepared to meet? RAP 13.4(b)(1)-(4).

2. Does due process require that a defendant have an opportunity to challenge the legal sufficiency of a petition for relief that would significantly infringe the defendant's liberty and reputational interests? RAP 13.4(b)(1), (3)-(4).

3. Does the Court of Appeals' decision ignore the Legislature's intent that SAPOs issue only where a petitioner proves a need for the single remedy the SAPO Act provides – an order prohibiting future interaction with the petitioner? RAP 13.4(b)(4).

C. Statement of the Case.

1. The trial court denied a SAPO because petitioner neither alleged nor could prove a "reasonable fear of future dangerous acts," as required by RCW 7.90.020(1).

The parties, both freshmen at the University of Washington, had a sexual encounter on May 9, 2014. Over eight months later, on January 14, 2015, Roake filed a petition for a SAPO under RCW ch. 7.90, alleging that Delman had sexually assaulted her the previous May. (CP 1-5) The parties had had no contact in the eight months since their sexual encounter, and Delman had never violated a no-contact order issued ex parte by the UW Office of Community Standards and Student Conduct (CSSC) in September 2014. (CP 35-36) In seeking a temporary SAPO ex parte, without notice to Delman, Roake stated she sought a SAPO because resolution of her complaint with the UW-CSSC had "been taking several months." (RP 5)

That same day, a King County Court Commissioner issued a temporary order, ex parte, restraining Delman from contacting Roake. (CP 6-8) Delman was not given notice of, and as a

consequence did not appear at the hearing. (RP 4-11) Uniformed police officers served Delman with the petition and temporary SAPO during a large lecture class on January 15, 2015. (CP 12)

Delman moved to dismiss Roake's petition for a final SAPO because the petition did not allege, and Roake had not provided any evidence of, "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought," a required element of a SAPO petition under RCW 7.90.020(1). (CP 33-43)

King County Superior Court Judge Douglass North ("the trial court") presided over a hearing on February 20, 2015, to decide whether a final SAPO should issue. (RP 1) Quoting RCW 7.90.020(1), the trial court asked Roake what specific "statements or actions" proved "a reasonable fear of future dangerous acts." (RP 64-67) Roake relied on the allegation in her petition that she and Delman "can end up in the same place and similar areas of the campus," but conceded he was never "intentionally . . . in those areas." (RP 62-63) Roake argued that the alleged assault alone, coupled with the fact that she did not know Delman, or "what he is

capable of," established a reasonable fear of future dangerous acts. (RP 65-66)

Finding Roake did not meet the statute's requirement that a SAPO petitioner allege and prove specific "statements or actions which give rise to a reasonable fear of future dangerous acts," the trial court granted Delman's motion, denied Roake's petition, and allowed the temporary order to expire. (RP 76-78; CP 97-99)

2. The Court of Appeals reversed, holding that a petitioner need not prove an allegation the SAPO statute requires petitioner to plead.

The Court of Appeals issued a published decision reversing the trial court's dismissal of Roake's SAPO petition on June 13, 2016. (App. A) The Court of Appeals recognized "[t]he plain language of the statute indicates that a SAPO petition must contain two substantive allegations: (1) 'the existence of nonconsensual sexual conduct or nonconsensual sexual penetration' and (2) a statement of the 'specific statements or actions . . . which give rise to a reasonable fear of future dangerous acts.'" (App. A ¶ 12, quoting RCW 7.90.020(1) (alteration in original)) The Court of Appeals also correctly recognized that "[t]he 'specific statements or actions' must be separate from the sexual assault itself, because the requirement would otherwise be redundant." (App. A ¶ 15)

Roake's SAPO petition indisputably did not allege the second required element. The Court of Appeals nevertheless held that although a SAPO petition must *allege* "specific statements or actions, other than the assault itself, that cause the petitioner to reasonably fear future dangerous acts from the respondent" (App. A ¶ 16), the petitioner is not required to *prove* that allegation at the hearing for a final protection order:

> RCW 7.90.090 does not require that a petitioner prove each of the allegations that must be included in a SAPO petition. . . . At the hearing, a petitioner only has the burden to prove that a sexual assault occurred.

(App. A ¶¶ 21-22)

The Court of Appeals also held the trial court lacked the authority to dismiss Roake's petition as a matter of law because the parties had submitted declarations on Delman's motion to dismiss, converting a CR 12(c) motion into a CR 56 motion for summary judgment that cannot be made in a SAPO proceeding. Division One reasoned that the requirement that a motion for summary judgment "be filed and served not later than 28 calendar days before the hearing," CR 56(c), is "inconsistent with the SAPO Act, under which the court must order the full hearing to be held within fourteen days of receipt of the petition. RCW 7.90.050." (App. A ¶ 31)

D. Why This Court Should Grant Review.

1. Due process requires proof of every element of a statutory claim for relief that the petitioner is required to plead. RAP 13.4(b)(1)-(4).

The Court of Appeals' published decision deprives a SAPO respondent of the constitutional due process right to notice of the allegations that must met at the hearing for a final SAPO. In any action, criminal or civil, where a statute sets forth the elements that must be pled, due process requires that those elements must then be proved. This rule applies with full force to the SAPO Act, which creates "an action known as a petition for a sexual assault protection order," and requires an allegation of "reasonable fear" based on "specific statements or actions" of respondent. RCW 7.90.020. This Court should grant review and hold that the elements of a SAPO petition are not meaningless formalities, as the Court of Appeals' decision renders them, but critical due process protections that inform a respondent of the allegations he must defend against at the SAPO hearing. RAP 13.4(b)(1)-(4).

Due process requires that a petitioner prove what a petitioner must plead in any proceeding, criminal or civil, in which a respondent is accused of serious wrongdoing. *See, e.g., Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 219, ¶ 36, 125 P.3d 954 (2006) (bar discipline proceedings) (reversing misconduct finding based on bar

complaint that did not "accurately reflect the charge of misconduct levied;" "[t]he formal complaint must state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the allegations of misconduct," quoting ELC 10.3(a)(3)); *Detention of Lewis*, 134 Wn. App. 896, 902, ¶ 11, 143 P.3d 833 (2006) (sexually violent predator petitions must "identify[] the facts the State must allege *and prove*") (emphasis added), *aff'd*, 163 Wn.2d 188, 177 P.3d 708 (2008); *Welfare of B.P.*, No. 91925-9, 2016 WL 4054928 at *8 (Wash. July 28, 2016) (termination proceedings) ("the State must prove [the] six statutory elements" in RCW 13.34.180, which authorizes the filing of "[a] petition seeking termination of a parent and child relationship") (citing *Dependency of K.D.S.*, 176 Wn.2d 644, 652, ¶ 17, 294 P.3d 695 (2013).

These due process principles have been most fully developed in criminal cases. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard . . . are among the constitutional rights of every accused." *Cole v. State of Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948). This required notice is provided by charging documents, whose "primary purpose . . . is to supply the accused with notice of the charge that he or she must be prepared to meet." *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Charging documents must

allege the "essential elements" of a crime because "defendants are entitled to be fully informed of the nature of the accusations against them *so that they can prepare an adequate defense.*" *Kjorsvik,* 117 Wn.2d at 101 (emphasis in original).

Due process then requires that, after a charging document informs a defendant of the elements of a crime, "the State is *obliged to prove them as charged.*" *In re Francis,* 170 Wn.2d 517, 527, ¶ 19, 242 P.3d 866 (2010) (emphasis added). "[A]llegations and proof must correspond . . . so that [an accused] may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial." *Berger v. U.S.,* 295 U.S. 78, 82, 55 S. Ct. 629, 630, 79 L. Ed. 1314 (1935); *United States v. Murphy,* 406 F.3d 857, 860 (7th Cir. 2005) ("the indictment and the proof at trial [must] match . . . to give the defendant reasonable notice so that he may prepare a defense") (quotation omitted), *cert. denied,* 546 U.S. 1097 (2006).[1] As a consequence, a conviction cannot rest on elements other than those

[1] Federal cases addressing a discrepancy between charges in an indictment and at trial often rely on the Fifth Amendment's requirement for a grand jury indictment, which is itself an extension of the "right to fair notice of the criminal charges against which one will need to defend." *United States v. Combs,* 369 F.3d 925, 935 (6th Cir. 2004); *see also United States v. Kelly,* 722 F.2d 873, 876 (1st Cir. 1983) ("The sixth amendment, working in tandem with the fifth amendment, requires . . . . that allegations and proof mirror each other."), *cert. denied,* 465 U.S. 1070 (1984). Thus, cases based on the Fifth Amendment are relevant to whether an accused received constitutionally adequate notice.

alleged in the charging document. *See, e.g., City of Auburn v. Brooke*, 119 Wn.2d 623, 638, 836 P.2d 212 (1992) (reversing because citations "did not specify the elements of the offense"); *United States v. Jones*, 647 F.2d 696, 699 (6th Cir.) (reversing where judge instructed jury to "disregard" part of indictment), *cert. denied,* 454 U.S. 898 (1981); *United States v. Cancelliere,* 69 F.3d 1116, 1121-22 (11th Cir. 1995) (reversing because having alleged defendant "willfully" laundered money, government was "charged with proving it").[2]

A SAPO petition accuses the respondent of "the most heinous crime against another person short of murder." RCW 7.90.005. Aside from being branded a rapist, a respondent is registered in the State's criminal database, can be convicted of a gross misdemeanor for any contact with the petitioner, however unintentional, and is restrained from going to particular locations. RCW 7.90.160; RCW 26.50.110(1)(a); *see Kent v. Dulles*, 357 U.S. 116, 125–26, 78 S. Ct. 1113, 1118 (1958) ("Freedom of movement" is a liberty interest "of

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[2] *See also United States v. Marolda*, 615 F.2d 867, 872 (9th Cir. 1980); *United States v. Behenna*, 552 F.2d 573, 576-77 (4th Cir. 1977); *United States v. Hoover*, 467 F.3d 496, 502 (5th Cir. 2006); *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999), *cert. denied,* 531 U.S. 906 (2000); *United States v. Willoughby*, 27 F.3d 263, 267 (7th Cir. 1994); *United States v. Keller*, 916 F.2d 628, 636 (11th Cir. 1990), *cert. denied,* 499 U.S. 978 (1991); *United States v. Weissman,* 899 F.2d 1111, 1114 (11th Cir. 1990) (all reversing conviction based on charges other than those contained in indictment).

which the citizen cannot be deprived without the due process of law."). Although accused of a "heinous crime," a SAPO respondent does not have a criminal defendant's right to an attorney, and a petitioner need only prove her accusation by a preponderance of evidence that would not be admissible under the Rules of Evidence. RCW 7.90.090(1)(a); ER 1101(c)(4). There is no principled reason for also denying a SAPO respondent the minimal due process protection afforded to others accused of serious misconduct and threatened with serious limitations on liberty and harm to reputation, by requiring that a petitioner prove each statutorily-required element that must be pled.

Yet the Court of Appeals' published decision does just that, holding that a petitioner can obtain a SAPO by proving – without evidentiary safeguards or an enhanced burden of proof – much less than what a SAPO petitioner is required by RCW 7.90.020(1) to allege. Under the Court of Appeals' interpretation of RCW ch. 7.90, a SAPO respondent is never given notice of what *must be proven*, and in fact is affirmatively misled. *See State v. McCarty*, 140 Wn.2d 420, 427, 998 P.2d 296 (2000) ("Surely to ensure due process, the notice of the charge on which a defendant will be tried must logically be given at some point prior to the opening statement of the trial!").

In light of the "he said/she said" nature of sexual assault allegations, and because a petitioner can bolster her accusations of sexual assault with hearsay and other evidence that would be inadmissible in a normal civil trial, many respondents will likely, and reasonably, focus on the second element of the SAPO petition. Indeed, that is what happened here. Although Delman also denies the parties' sexual encounter was nonconsensual, or that it was as (inconsistently) described by Roake,[3] his defense focused on Roake's complete failure to allege, let alone prove, "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts," RCW 7.90.020(1), believing based on the language of the statute that this failure would be fatal to her SAPO petition.

Yet under the Court of Appeals' unprecedented analysis, the insufficiency of a SAPO petition is no defense at all, because a petitioner need not actually prove an element of a SAPO petition that

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[3] Without resolving the disputed issue of consent, the trial court denied the SAPO based on the absence of any allegation or proof of a reasonable fear, which the Court of Appeals recognized was a required element of the petition. (*See* trial court's comments at RP 70-71: "obviously, it's hotly disputed whether, in fact, a sexual assault occurred.") Indeed, the King County Prosecutor had declined to file charges against Delman, based on "both [Roake's] lengthy delay in report as well as her equivocation between rejection and acquiescence [which] compromise her testimony that sexual contact was either forcible or nonconsensual." (CP 45; *see also* Report of Prosecutor Declining to File Any Criminal Charge, No. 14-002408)

must be pled. This is precisely the prejudice the due process requirement of notice is intended to prevent – undermining a party's defense by changing the allegations midstream. *See, e.g., State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) (midtrial amendment of information to allege different crime "necessarily prejudices th[e] substantial constitutional right" to notice); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (same); *Marolda*, 615 F.2d at 872 (defendant prejudiced because he focused on allegations in indictment without knowing "the court would not allow those issues to go to the jury as defenses to the charge"); *Cancelliere*, 69 F.3d at 1122 (defendant prejudiced by redaction of "willfully" from indictment because "his whole defense to this charge rested on his lack of willfulness").

The Court of Appeals violated the "very wholesome principle" this Court has long observed "that where an act is open to two constructions, under one of which the act will be valid and under the other invalid, that construction will be adopted which will render the act constitutional." *Swanson v. White*, 83 Wn.2d 175, 183, 517 P.2d 959 (1973). Under the Court of Appeals' decision, even calling SAPO hearings "trials by ambush" is generous. A respondent is not just surprised, he is deceived by the statutory requirements for a SAPO

petition. This is a particularly egregious violation of due process because under RCW 7.90.050, a SAPO hearing can be held with only *five days' notice* to the respondent. If they rely on the required allegations of the petition, respondents have little time to prepare a defense and will likely waste it preparing to defend an allegation that need not be proven.

The very concept of not requiring a petitioner to prove what must be pled cannot be squared with the requirements of due process. **No other statutory proceeding has ever been characterized by the courts to authorize relief without proof of every allegation that the petitioner must plead.** This Court should grant review and – as due process requires – hold that petitioners are required to prove every element of a SAPO petition. RAP 13.4(b)(1)-(4).

2. Due process requires a respondent be given an opportunity to challenge a statutorily-deficient SAPO petition. RAP 13.4(b)(1), (3)-(4).

Due process requires an opportunity to defend and rebut any accusations that will support the relief requested, as this Court has unequivocally held. This Court should grant review and hold that a respondent must be allowed – as both due process and the statute require – to challenge the legal sufficiency of a SAPO petition, including

the "reasonable fear" element. RAP 13.4(b)(1), (3)-(4). The Court of Appeals' decision effectively eliminates any opportunity to challenge as a matter of law the statutorily-required elements of a SAPO petition.

This case amply demonstrates the due process dangers of the Court of Appeals' published decision. Here, a Commissioner entered a temporary order approving Roake's petition even though it failed to allege a required element. That temporary order was based, in part, on Roake's failure to disclose critical facts at the ex parte hearing, including that a UW-CSSC no-contact order was already in place (a disclosure required by RCW 7.90.020(1)) and that respondent had never violated it. (RP 4-11)[4] Under the Court of Appeals' analysis, a respondent cannot challenge an ex parte temporary order finding a petition sufficient, and must instead appear (on as little as five days' notice) and defend only against the allegation of sexual assault, with no opportunity to challenge the "reasonable fear" requirement of the petition.

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[4] Roake misled the Commissioner in other ways at the ex parte hearing, including by telling the Commissioner she had reported the assault to the police without mentioning that the King County Prosecutor had declined to charge Delman (RP 4; CP 45), and by claiming her class schedule "is something very specific that [Delman] would be aware of" (RP 7) even though Delman not only had no knowledge of Roake's class schedule, but under FERPA would have no means of obtaining it. *See* 34 C.F.R. § 99.31. Indeed, after she had obtained the temporary SAPO, Roake refused to provide her schedule even though it made it more likely Delman would inadvertently violate the temporary SAPO. (CP 12)

The Court of Appeals' published decision is in conflict with *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056 (1994). In *Soundgarden*, this Court held the "Erotic Sound Recordings" statute unconstitutional, refusing to sacrifice defendants' due process rights to a perceived need for a speedy hearing. The statute in question violated due process because it "allow[ed] the determination whether material sold is 'erotic' to be made at [an] initial civil hearing and presented as a judicial fact to a jury in a subsequent criminal proceeding." *Soundgarden*, 123 Wn.2d at 773, 778 (citing *McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976)). The statute's violation of due process was compounded because, as here, a hearing could be held on five days' notice and could proceed even without notice to all affected parties. *Soundgarden*, 123 Wn.2d at 778.

Just as in *Soundgarden*, the Court of Appeals' published decision in this case deprives a respondent of the right to challenge as a matter of law one of the required elements of a SAPO petition. Roake neither alleged nor had any evidence of the second required element of a SAPO petition, "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is

sought." RCW 7.90.020(1). Roake frankly admitted her decision to seek a SAPO, eight months after the parties' sexual encounter, was not based on a reasonable fear, but on her dissatisfaction with the UW-CSSC process. (RP 4-5) When asked what evidence she had of the "reasonable fear" she was statutorily required to plead, Roake only repeated the allegation in her petition that she "did not know . . . what he is capable of." (CP 4; RP 65) This bald assertion that the respondent might engage in unspecified conduct at an unspecified time is not the "specific statements or actions" required by RCW 7.90.020(1).

The Court of Appeals' decision also ignores that the statute itself expressly allows respondents to assert defenses to an ex parte order where the petitioner's failure to provide them notice prevented them from doing so earlier:

> . . . respondent may petition the court, to reopen the [ex parte] order if he or she did not receive actual prior notice of the hearing and if the respondent alleges that he or she had a meritorious defense to the order or that the order or its remedy is not authorized by this chapter.

RCW 7.90.130(2)(e). The Court of Appeals wrote this language out of the SAPO statute by treating Delman's motion to dismiss as one for summary judgment, holding "CR 56 does not apply" to SAPO proceedings (App. A ¶ 31), and as a consequence refusing to consider

the legal sufficiency of the petition even though a party may raise the failure to establish facts upon which relief can be granted at *any time*. *See* RAP 2.5(a) (issue may be raised for the first time on appeal).

This Court should grant review and reverse the Court of Appeals' published decision because it violates a respondent's due process right to challenge the legal sufficiency of a SAPO petition by wholesale eliminating any opportunity for challenging the basis for a claim. RAP 13.4(b)(1), (3)-(4).

3. The Court of Appeals' decision ignores the sole purpose of the SAPO statute – preventing "future interactions with the offender." RAP 13.4(b)(4).

The unequivocal purpose of RCW ch. 7.90 is to create a mechanism for requiring assailants to stay away from sexual assault victims. The purpose of RCW ch. 7.90 is not to provide compensation for victims, or to punish offenders – instead, it creates "a civil remedy requiring that the offender *stay away* from the victim," giving victims of sexual assault "safety and protection from *future interactions* with the offender." RCW 7.90.005 (emphasis added); RCW 7.90.090(5) ("Monetary damages are not recoverable as a remedy."). Yet the Court of Appeals' published decision eliminates any need to prove (or chance to disprove) that the remedy provided by the statute is needed, *i.e.*, that the petitioner has "a reasonable fear of future dangerous acts"

because of respondent's "specific statements or actions made at the same time of the sexual assault or subsequent-ly thereafter." RCW 7.90.020(1).[5] This Court should grant review and hold that a petitioner must prove, as the Legislature intended, that the sole remedy the statute provides is needed. RAP 13.4(b)(4).

The Legislature *rejected* the initial version of the statute, which would have allowed SAPOs based only on an allegation of sexual assault and a perfunctory request for relief. *See* House Bill 2576 § 5 (2006) (requiring a SAPO petition to allege only a sexual assault and "the specific facts and circumstances from which relief is sought"). The Legislature amended the bill to add the current language that requires a petitioner to allege "specific statements or actions . . . which give rise to a reasonable fear of future dangerous acts." Laws of 2006, ch. 138 § 5; *see also* Senate Bill Report SHB

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[5] By eliminating the requirement of reasonable fear of future dangerous acts, the Court of Appeals reduced the statutory remedy to an adjudication of claims of sexual assault in a forum with greatly relaxed evidentiary rules and reduced burdens of proof, contrary to the statutory language and purpose. This case demonstrates the dangers of adjudicating such a serious accusation as sexual assault without the protections of trial and the Rules of Evidence, which do not apply to protection order proceedings. ER 1101(c)(4). Roake sought to establish the assault with testimony from eight friends, none of whom witnessed the parties' sexual encounter, repeating what Roake told them occurred (recitals inconsistent with her petition and police report) and vouching for her character. (CP 15-31) This "evidence" would have been inadmissible in a trial of any other civil (much less criminal) action. *See* ER 404, 802.

necessary for issuance of a SAPO – "did the assault happen" – was resolved at the hearing for the original SAPO.

Under the Court of Appeals' analysis, a petitioner need not prove, nor can a respondent disprove, the existence of the very reason for a SAPO in the first place – a reasonable fear of future dangerous acts by the respondent. This Court should grant review and hold, as the plain language of the statute requires, that a SAPO cannot issue without proof of "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought." RAP 13.4(b)(4).

E. Conclusion.

This Court should grant review, reverse the Court of Appeals, and reinstate the trial court's dismissal of Roake's SAPO petition.

Dated this 5th day of August, 2016.

SMITH GOODFRIEND, P.S.

By: _____
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By: _____
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Attorneys for Petitioner

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 5, 2016, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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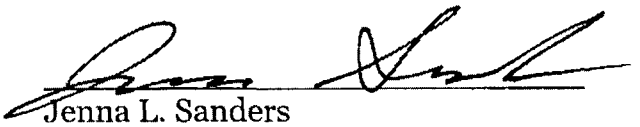
DATED at Seattle, Washington this 5th day of August, 2016.



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No. 73337–1–I
|
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Appeal from King County Superior Court, Docket No. 15–2–00899–4, Honorable Douglass a North.

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Opinion

Spearman, J.

*1 ¶ 1 The Sexual Assault Protection Order (SAPO) Act, chapter 7.90 RCW, establishes a special proceeding for a victim of sexual assault to obtain a civil protection order. Megan Roake filed a petition for a protection order under the SAPO Act. The trial court found that Roake failed to establish reasonable fear and dismissed. Because the proceeding was procedurally irregular and rested on an erroneous interpretation of the SAPO Act, we reverse and remand. [1]

1 Respondent's motion to retitle the caption of this case and to use initials in the opinion is denied.

FACTS

¶ 2 Roake and Maxwell Delman had a sexual encounter and dispute whether it was consensual. Several months after the encounter, Roake filed a petition for a protection order under RCW 7.90. Roake's petition describes the alleged sexual assault. The petition also states that Roake only knew Delman based on the evening of the sexual assault, she did not know what he was capable of, and she feared encountering him at the University of Washington, where both Roake and Delman were students. The commissioner set a hearing date and granted Roake an ex parte temporary protection order valid until the full hearing.

¶ 3 At the hearing, Roake began to testify to the alleged assault. While she was testifying, Delman objected that he had not received all of the evidence that Roake had provided the court. The trial court granted a ten-day continuance.

¶ 4 Shortly before the next hearing date, Delman filed a motion to dismiss under CR 12(c). Delman submitted documentary evidence with his motion, including several declarations testifying to his good character. He did not submit his own declaration. At the hearing, Delman argued that Roake had failed to allege or prove that Delman made specific statements or actions giving rise to a reasonable fear of future dangerous acts, as required by RCW 7.90.020. He relied on Roake's petition, the declarations she submitted, and the transcript of the ex parte hearing. He also argued that, because Roake had failed to prove reasonable fear at the ex parte hearing, the temporary protection order was invalid.

¶ 5 Roake disputed that reasonable fear is an element that must be proved at a full SAPO hearing. She relied on the plain language of RCW 7.90.090(1)(a), which states that the court shall issue a protection order if it finds by preponderance of evidence that nonconsensual sexual conduct occurred. Roake argued that her petition met the statutory requirements but that, in any case,

the sufficiency of the petition and the validity of the temporary order are moot at the full hearing. She asserted that if the court decided that reasonable fear was an issue the parties could present testimony on that issue.

¶ 6 The trial court considered Roake's petition, the timing of the petition, the declarations submitted by Roake, and the transcript of the ex parte hearing. The court granted Delman's motion to dismiss and denied Roake's SAPO petition. The court did not hear further testimony and denied Roake's request to provide further briefing. In its order, the trial court stated that Roake "failed to establish that she had any reasonable fear of future dangerous acts from the Respondent and therefore the temporary order was invalid." Clerk's Papers (CP) at 98.

*2 ¶ 7 Roake appeals. She argues that the trial court's order denying her petition rested on an incorrect interpretation of the SAPO Act and was procedurally irregular.

DISCUSSION

¶ 8 This case involves interpretation of the SAPO Act, ch. 7.90 RCW. We review questions of statutory interpretation de novo. Pham v. Corbett, 187 Wash.App. 816, 831, 351 P.3d 214 (2015) (citing State v. Wentz, 149 Wash.2d 342, 346, 68 P.3d 282 (2003)). In interpreting statutes, our aim is to discern and implement the Legislature's intent. Lake v. Woodcreek Homeowners Ass'n, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010) (citing Arborwood Idaho, LLC v. City of Kennewick, 151 Wash.2d 359, 367, 89 P.3d 217 (2004)). We begin with the plain meaning of the statute. Id. We may discern the statute's plain meaning from " 'the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.' " Id. (quoting State v. Engel, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009)). Where the plain meaning is unambiguous, we " 'will not construe the statute otherwise.' " State v. J.P., 149 Wash.2d 444, 450, 69 P.3d 318 (2003) (quoting State v. Wilson, 125 Wash.2d 212, 217, 883 P.2d 320 (1994)).

¶ 9 In construing a statute, all the statutory language must be given effect, " 'with no portion rendered meaningless or superfluous.' " J.P., 149 Wash.2d at 450, 69 P.3d 318 (quoting Davis v. Dep't of Licensing, 137 Wash.2d 957, 963, 977 P.2d 554 (1999)). Just as we cannot delete words, "we 'must not add words where the legislature has chosen not to include them.' " Lake, 169 Wash.2d at 526, 243 P.3d 1283 (quoting Rest. Dev., Inc. v. Cananwill, Inc., 150 Wash.2d 674, 682, 80 P.3d 598 (2003)). We must assume that " 'the legislature means exactly what it says.' " Davis, 137 Wash.2d at 963–64, 977 P.2d 554 (quoting State v. McCraw, 127 Wash.2d 281, 288, 898 P.2d 838 (1995)).

¶ 10 The SAPO Act establishes a special proceeding for a victim of sexual assault to obtain a civil protection order. RCW 7.90.005. The Act includes a legislative declaration recognizing that sexual assault "inflicts humiliation, degradation, and terror on victims." RCW 7.90.005. The declaration acknowledges that a victim of sexual assault may not receive relief from the criminal justice system and may not qualify for protection under other types of civil orders. RCW 7.90.005. The SAPO Act specifically applies to victims who have experienced a single incident of nonconsensual sexual conduct. RCW 7.90.030(1)(a).

¶ 11 To seek a protection order under the SAPO Act, a victim of sexual assault files a petition with the court. RCW 7.90.040(1). Upon receipt of the petition, the court must order a full hearing to be held within fourteen days. RCW 7.90.050. The SAPO Act creates a mechanism for the petitioner to receive an ex parte temporary protection order valid until the contested hearing. RCW 7.90.110(1), .120(1). If the petitioner prevails at the hearing, the Act requires the court to grant a final protection order valid for up to two years. RCW 7.90.120(2). At issue are the SAPO Act's requirements for a petition, an ex parte temporary protection order, and a final protection order.

The SAPO Petition

¶ 12 Chapter 7.90.020 RCW addresses the SAPO petition. The statute states in relevant part:

> *3 A petition for relief shall allege the existence of nonconsensual sexual conduct or nonconsensual sexual penetration, and shall be accompanied by an affidavit made under oath stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future

> dangerous acts, for which relief is sought.

RCW 7.90.020(1) (emphasis added). The plain language of the statute indicates that a SAPO petition must contain two substantive allegations: (1) "the existence of nonconsensual sexual conduct or nonconsensual sexual penetration" and (2) a statement of the "specific statements or actions ... which give rise to a reasonable fear of future dangerous acts." The clauses are joined by the word "and," indicating that both allegations must be included in the petition.

¶ 13 Roake argues that sexual assault reasonably causes the victim to fear the offender. She thus asserts that, if a petition alleges that a sexual assault occurred and states that the petitioner fears the respondent, it satisfies RCW 7.90.020. Friends of the court King County Sexual Assault Resource Center, Washington Coalition of Sexual Assault Programs, Legal Voice, Northwest Justice Project, and Pacifica Law Group support this position.

¶ 14 The amicus briefs point to research indicating that sexual assault shatters a victim's sense of safety. The vast majority of survivors experience fear and anxiety after a sexual assault, and many survivors experience post-traumatic stress disorder. Amici argue that a sexual assault in itself is sufficient to give rise to a reasonable fear of future dangerous acts by the perpetrator.

¶ 15 We do not minimize the trauma that sexual assault leaves in its wake or dispute that a survivor may reasonably fear the person who assaulted her based on the assault alone. But the plain language of RCW 7.90.020 requires that a SAPO petition allege that nonconsensual sexual contact occurred and state "the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts...." RCW 7.90.020(1). The "specific statements or actions" must be separate from the sexual assault itself, because the requirement would otherwise be redundant. We must construe statutes so that " 'no portion is rendered meaningless or superfluous.' " J.P., 149 Wash.2d at 450, 69 P.3d 318 (quoting Davis, 137 Wash.2d at 963, 977 P.2d 554).

¶ 16 The language of RCW 7.90.020 is susceptible to only one reasonable reading. Where the plain language is unambiguous, we "will not construe the statute otherwise." J.P., 149 Wash.2d at 450, 69 P.3d 318. We conclude that RCW 7.90.020(1) has two elements. A petition for a protection order under the SAPO Act must include both (1) an allegation that a sexual assault occurred and (2) the specific statements or actions, other than the assault itself, that cause the petitioner to reasonably fear future dangerous acts from the respondent.

¶ 17 The phrase "future dangerous acts" is not defined in the SAPO Act. Roake argues that the phrase should be interpreted broadly because any future interaction with the offender poses a danger to the psychological well-being of a survivor of sexual assault. Appellant's Brief at 40–41. We need not interpret "future dangerous acts" here. But we note that even if any future interaction with the respondent poses a danger, a petitioner must nevertheless allege some specific statement or action that gives rise to a reasonable fear of that danger.

The Temporary and Final Protection Orders

*4 ¶ 18 We next consider the requirements for a temporary and a final protection order under the SAPO Act. Chapter 7.90.090 RCW addresses a petitioner's burden of proof. The statute makes the issuance of a protection order mandatory if the petitioner establishes that a sexual assault occurred and meets the requirements of a referenced statute:

> If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order; provided that the petitioner must also satisfy the requirements of RCW 7.90.110 for ex parte temporary orders or RCW 7.90.120 for final orders.

RCW 7.90.090(1)(a).

¶ 19 Both referenced statutes concern notice requirements. The first, RCW 7.90.110, addresses an ex parte temporary order. It requires the petitioner to establish that a sexual assault occurred and to show that there is good cause to grant a temporary order despite any lack of service or notice:

> (1) An ex parte temporary sexual assault protection order shall issue if the petitioner satisfies the requirements of this subsection by a preponderance of the evidence. The petitioner shall establish that:
>
> (a) The petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent; and
>
> (b) There is good cause to grant the remedy, regardless of the lack of prior service of process or of notice upon the respondent, because the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief.

RCW 7.90.110(1).

¶ 20 The second referenced statute, RCW 7.90.120, addresses the notice requirements for a full hearing:

> A full hearing, as provided in this chapter, shall be set for not later than fourteen days from the issuance of the temporary order ... Except as provided in RCW 7.90.050, 7.90.052, or 7.90.053, the respondent shall be personally served with a copy of the ex parte temporary sexual assault protection order along with a copy of the petition and notice of the date set for the hearing.

RCW 7.90.120(1)(a)

¶ 21 We see no ambiguity in the burden of proof statute, RCW 7.90.090. And neither party argues that the statute is ambiguous. The plain language of the statute directs the court to issue a protection order if the petitioner proves by preponderance of the evidence that the sexual assault occurred and shows that she satisfied the Act's notice requirements. Notably, RCW 7.90.090 does not require that a petitioner prove each of the allegations that must be included in a SAPO petition.

¶ 22 As discussed, a SAPO petition must allege both (1) that a sexual assault occurred, and (2) the existence of specific statements or actions that give rise to a reasonable fear that the respondent will perpetrate future dangerous acts. RCW 7.90.020. But a petitioner is not required to prove the second allegation. At the hearing, a petitioner only has the burden to prove that a sexual assault occurred. RCW 7.90.090(1)(a). If the petitioner proves this allegation by a preponderance of the evidence and shows that he or she met the procedural requirements specific to a temporary or a final order, the court "shall issue" a protection order. RCW 7.90.090(1)(a).

*5 ¶ 23 Delman argues that a petitioner must logically prove the same allegations that must be asserted in the petition. He asserts that a requirement to prove "specific statements or actions that give rise to a reasonable fear of future dangerous acts" may be inferred from RCW 7.90.110(1)(b). Delman is mistaken.

¶ 24 RCW 7.90.110(1)(b) provides that a petitioner may obtain an ex parte temporary protection order if he or she shows "good cause to grant the remedy ... because the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief." RCW 7.90.110(1)(b). The statute addresses a petitioner's obligation to give notice to the respondent. To obtain a temporary order without providing that notice, a petitioner must show "good cause." The statute requires the petitioner to show that the "harm" which the protection order is intended to prevent would be likely to occur if the respondent were given notice. The statute does not require or create an inference that a petitioner must prove "specific statements or actions that give rise to a reasonable fear of future dangerous acts." And RCW 7.90.110 expressly applies only to a temporary protection order. There is no basis to infer that it has any application to a final protection order.

¶ 25 Delman also argues that it is absurd to read the Act as setting a lower burden to obtain a final protection order than for a petition or a temporary protection order. Delman asserts that by including "specific statements or actions that give rise to a reasonable fear of future dangerous acts" as a petition requirement in RCW 7.90.020, the Legislature implicitly included it as an allegation that must be proven under RCW 7.90.090. Thus, Delman asks us to read this allegation into RCW 7.90.090 in order to reconcile the inconsistency between the requirements for a SAPO petition and the showing necessary to issue a SAPO. [2]

2 However, an equal argument could be made to reconcile the inconsistency by removing the requirement of "specific statements or actions" from RCW 7.90.020. Arguably, this would be consistent with RCW 7.90.040(1), which mentions only an allegation of sexual assault as required in a SAPO petition.

¶ 26 But our role is " 'to interpret the statute as enacted,' " not to add words or subtract them. Woods v. Kittitas County, 162 Wash.2d 597, 614, 174 P.3d 25 (2007) (quoting Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wash.2d 542, 567, 958 P.2d 962 (1998)). "Just as we 'cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,' we may not delete language from an unambiguous statute." J.P., 149 Wash.2d at 450, 69 P.3d 318 (quoting State v. Delgado, 148 Wash.2d 723, 727, 63 P.3d 792 (2003)). When a statute is clear on its face, we must decline to change it even if we "believe[ ] the Legislature intended something else but did not adequately express it." Kilian v. Atkinson, 147 Wash.2d 16, 21, 50 P.3d 638 (2002) (quoting Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs., 133 Wash.2d 894, 904, 949 P.2d 1291 (1997)).

¶ 27 We conclude that the SAPO Act, by its plain language, requires that a petition include an allegation that the respondent made specific statements or actions giving rise to a reasonable fear of future dangerous acts. However, the Act does not require that a petitioner prove this allegation to obtain a protection order. The SAPO Act is clear that at a full hearing for a final protection order, the petitioner has the burden to prove by a preponderance of the evidence that a sexual assault occurred. The petitioner must also show that she has satisfied the Act's notice requirement. If the petitioner meets this burden, the court "shall issue" a final protection order.

The Motion for Judgment on the Pleadings Under CR 12(c)

*6 ¶ 28 We next consider whether the trial court erred in dismissing Roake's SAPO petition in response to Delman's motion for judgment on the pleadings under CR 12(c). Delman contends that the trial court properly granted his CR 12(c) motion based on both Roake's petition and all of the evidence in the record. Roake argues that the trial court's order should be reversed because the proceedings did not meet the requirements of CR 12(c) or CR 56 and were therefore irregular.

¶ 29 This court reviews a dismissal under CR 12(c) or CR 56 de novo. Didlake v. Washington State, 186 Wash.App. 417, 422, 345 P.3d 43, review denied, 184 Wash.2d 417 (2015). The civil rules apply to special proceedings except where they are inconsistent with statutory requirements specific to the special proceeding. CR 81(a); Christensen v. Ellsworth, 162 Wash.2d 365, 374–76, 173 P.3d 228 (2007). CR 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." But when matters outside the pleadings are considered the motion may no longer be treated as a motion for judgment on the pleadings and must be treated as a motion for summary judgment:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

CR 12(c).

¶ 30 In this case, matters outside the pleadings were presented to and not excluded by the court. Along with his motion, Delman attached several declarations, evidence of a University of Washington student conduct hearing, and an article concerning unfounded investigations into child sex abuse. At the hearing, Delman argued that his motion should be granted based on Roake's petition, the transcript of the ex parte hearing, and the declarations she submitted. The court considered each of these items. The motion must therefore be evaluated as a motion for summary judgment under CR 56.

¶ 31 Under CR 56(c), a motion for summary judgment "shall be filed and served not later than 28 calendar days before the hearing." CR 56(c). And a hearing on a motion for summary judgment shall be heard "more than 14 calendar days before the date set for trial." Id.

These requirements are inconsistent with the SAPO Act, under which the court must order the full hearing to be held within fourteen days of receipt of the petition. RCW 7.90.050. Accordingly, we conclude that CR 56 does not apply and that Delman's motion was not properly before the court. [3]

3 We express no opinion on whether a timely CR 12(c) motion would have been proper in the context of a SAPO proceeding.

¶ 32 Furthermore, even if Delman's motion was properly before the court, it was improperly granted. To survive a motion for summary judgment, a plaintiff must produce evidence that raises a question of material fact as to each element that must be proved. Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (citing Celotex Corp., v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

¶ 33 Delman requested dismissal arguing that Roake had failed to prove specific statements or actions giving rise to a reasonable fear of future dangerous acts. The trial court's order dismissing Roake's petition states that she "failed to establish that she had any reasonable fear of future dangerous acts from the Respondent." CP at 98. But as discussed above, the SAPO Act does not require a petitioner to prove the "specific statements or actions" allegation. The only substantive allegation Roake had to prove was that a sexual assault occurred. The record before the trial court raised a question of material fact as to that issue.

*7 ¶ 34 The trial court also indicated that it granted Delman's motion because "the temporary order was invalid." CP at 98. But the SAPO Act provides no basis for considering the validity of the temporary order in determining whether to grant a final protection order. Under RCW 7.90.090, the petitioner has the burden to prove that a sexual assault occurred and that she met the procedural requirements specific to a final order. RCW 7.90.090(1); RCW 7.90.120. The validity of the ex parte temporary order is irrelevant to this determination. The trial court erred in considering the validity of the ex parte order in determining whether to grant a final protection order under the SAPO Act.

¶ 35 Delman's motion to dismiss was not properly before the trial court and the trial court granted that motion based on an erroneous reading of the SAPO Act. We accordingly reverse and remand for further proceedings. We do not reach Roake's further arguments that the trial court erred in considering the timing of her petition and in denying her a full hearing.

¶ 36 Reverse and remand.

WE CONCUR:

Michael J. Trickey, ACJ

J. Robert Leach, J.

All Citations

--- P.3d ----, 2016 WL 3336919

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

MEGAN ROAKE, Appellant, v. MAXWELL DELMAN, Respondent.	)	No. 73337-1-I DIVISION ONE ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent Maxwell Delman filed a motion for reconsideration of the opinion filed in the above matter on June 13, 2016. A majority of the panel has determined the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion is denied.

DATED this 6th day of July 2016.

FOR THE PANEL:

Spearman, J.

Presiding Judge