69818-4

No. 69818-4-I
Island County Superior Court No. 10-2-00981-1

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

In re the Detention of

DONALD HERRICK,

Petitioner-Appellant.

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

The Honorable Alan R. Hancock, Judge

PETITIONER-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

I.
REPLY ARGUMENT

A. THE ISSUE IN THIS CASE IS NOT WHETHER THE SVP STATUTE AS A WHOLE SATISFIES DUE PROCESS. THE QUESTION IS WHETHER A STATUTE PERMITS THE COURT TO ORDER A PRETRIAL DETAINEE TO SUBMIT TO A PENILE PLETHYSMOGRAPH UPON REQUEST BY THE STATE.

The State's argument that RCW 71.09.050(1) is constitutional comes down to this statement in its brief:

> It goes no further than what is already accepted for sentencing conditions where PPG testing can be compelled if requested by a treatment provider.

State's Brief at 11. This is simply wrong.

First, the State fails to distinguish between a convicted defendant who is required to engage in treatment as a condition of his or her sentence and a pre-trial detainee in a civil proceeding. The State spends considerable time discussing other due process protections in the overall SVP statutory scheme but never the specifics of a PPG test. The State never once acknowledges that when considering whether a person can be compelled to submit to similar invasive medical procedures, the Supreme Court has required the State to do more than simply ask. In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), the Supreme Court considered the constitutional interest inherent in avoiding unwanted

bodily intrusions or manipulations. Those cases establish that non-routine manipulative intrusions on bodily integrity must be subject to heightened scrutiny to determine whether there are less intrusive alternatives available.[1]

Second, the decision in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655, 664 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010), has little or no application to the analysis of the constitutionality of RCW 71.09.050(1). In *Riles*, the question was whether, under the SRA, the sentencing court could order PPG testing as an affirmative condition of sentencing. The Court stated that such testing could be ordered, but only under strict conditions.

> It is not permissible for a court to order plethysmograph testing without also imposing crime-related treatment which reasonably would rely upon plethysmograph testing as a physiological assessment measure. Unlike polygraph testing, plethysmograph testing does not serve a monitoring purpose. It is a gauge for determining immediate sexual arousal level in response to various stimuli used as part of a treatment program for sex offenders. Plethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions. It is instead a treatment device that can be imposed as part of crime-related treatment or counseling under RCW 9.94A.120(9)(c)(iii).

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[1] The State does not contest that a PPG involves mental and physical manipulation of the detainee in what quite clearly an embarrassing and invasive manner.

Riles, 135 Wn.2d at 345. But the *Riles* court said nothing about the propriety of forcing a pretrial detainee to submit to a PPG test in pursuit of the State's efforts to commit him.

And the decision in *State v. Johnson*, 184 Wn. App. 777, 779, 340 P.3d 230, 230 (2014), actually supports Herrick's position. In that case the Court made it clear that a CCO could not force a defendant to submit simply upon request. Rather, that Court emphasized that a CCO can order plethysmograph testing only for the purpose of sexual deviancy treatment.

Similarly, in *State v. Land*, 172 Wn. App. 593, 295 P.3d 782, *review denied*, 177 Wn.2d 1016, 304 P.3d 114 (2013), the defendant argued that requiring him to submit to plethysmograph testing at the discretion of a community corrections officer violates his constitutional right to be free from bodily intrusions. The Court said:

> We agree. Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider. But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.

Land, 172 Wn. App. at 605 (citations omitted).

Contrary to the State's argument, *United States v. Weber*, 451 F.3d 552, 554 (9th Cir. 2006), is extremely persuasive authority on this question. Regarding PPG testing in particular, the Ninth Circuit, relying on *Rochin* and *Winston*, held that convicted sex offenders retain a

significant liberty interest in being free from plethysmograph testing. Weber explained that the defendant enjoyed "heightened procedural protections" before a district court could mandate submission to PPG testing if a sex offender treatment program used the procedure. *Id.* at 570. These protections required that the district court undertake a "consideration of evidence that plethysmograph testing is reasonably necessary for the particular defendant based upon his specific psychological profile." *Id.* at 569-70. Weber further explained that under the governing statute a district court needed to consider available alternatives to PPG testing, such as self-reporting interviews, polygraph testing, and "Abel testing," which measures the time a defendant looks at particular photographs. *Id.* at 567-68.

Herrick is not presently under any order to engage in treatment. He is a pretrial detainee. Thus, a statute requiring him to submit to a PPG simply upon a request by the State is unconstitutional because it does not require a heightened level of scrutiny. The remedy for holding a statute facially unconstitutional is to render the statute inoperative. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875, 878 (2004).[2]

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[2] *In Re the Detention of Brennan*, 190 Wn. App. 1038 (2015), *review denied*, 185 Wn.2d 1021, 369 P.3d 500 (2016), has no application here because in that case the court noted that Brennan agreed to the PPG testing.

B. THE STATE'S ARGUMENT THAT HERRICK WAIVED THIS ISSUE IS FRIVOLOUS

The State tries to argue that Herrick somehow "waived" his argument that the statute was unconstitutional as applied to him. The State cites to only a portion of the extensive discussion of the argument on February 21, 2013. Defense counsel's argument was in regard to the State's request that it be allowed to have its expert draw an adverse inference from Mr. Herrick's refusal to do a penile plethysmograph when testifying. The State also wanted their expert to testify that Herrick "manipulated" the 2009 PPG.

Read in full, it is clear that defense counsel was not conceding anything. First, counsel noted that the 2009 PPG result was inconclusive and could not be used by the State to establish that Herrick suffered from a mental abnormality – a critical element of the petition for commitment. Thus, he acknowledged that the State likely needed a new PPG in order to prove their case. But counsel made it clear that the mere fact that the State "needed" more evidence did not mean that they were entitled to new, invasive testing. Defense counsel concluded his argument by stating:

> I am sure Mr. Ross needed a confession from my client, and we could send an officer in with a rubber hose and beat it out of him . . .

3 RP 17. But counsel pointed out that:

> We have constitutional protections against such invasive testing.

3 RP 17. He went on to state that "we have a new statute that needs to be addressed as to whether the State can compel" the PPG exams for "precommitment diagnostic purposes in adult rapists."

C. THE ADDITIONAL "PROTECTIONS" ADDED BY THE COURT ACTUALLY INCREASE THE HUMILITATING ASPECTS OF A PPG EXAM

The State suggests that all of this is somehow remedied by the fact that the trial court said that Herrick could have two representatives present at the PPG testing. Generally speaking, having two lawyers present when a pressure-sensitive device is placed on Herrick's penis and while he views an array of sexually stimulating images in order to determine his level of sexual attraction by measuring minute changes in his erectile responses would *increase* the humiliating and invasive nature of this testing. Moreover, it is unclear how PPG testing accomplished under these circumstances would be valid.

D. THE STATE'S ARGUMENTS REGARDING THE LEGISLATIVE "LOGROLLING" WHEN ENACTING RCW 71.09.050(1) ARE UNCONVINCING

Transferring financial responsibility for funding SVP evaluations from DSHS to the Office of Public Defense has nothing to do with the

content of the evaluations. Thus, this Court should find that the bill violates Const. art. II, § 19.

II.
CONCLUSION

For the foregoing reasons, the trial court order requiring Mr. Herrick to submit to a PPG should be reversed.

DATED this 21 day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where indicated and by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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