Supreme Court No. 94495-4
Court of Appeals No. 69818-4-I

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

In re the Detention of:

DONALD HERRICK,

Petitioner.

PETITION FOR REVIEW

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1. Is RCW 71.09.050(1), which allows the trial court to order a pre-commitment detainee to submit to a PPG upon a request by the State's evaluator, unconstitutional on its face because it violates the pretrial detainee's state and federal constitutional rights to privacy and due process of law?

2. In the alternative, is RCW 71.09.050(1) unconstitutional as applied to Herrick under the specific facts of this case?

IV.
STATEMENT OF THE CASE

In November 2010, the State filed a petition seeking to commit Donald Herrick as a sexually violent predator pursuant to RCW 71.09.

Herrick stipulated to probable cause and has been housed at the Special Commitment Center ever since. The petition alleged that in 1997 Herrick was convicted of first-degree rape. The petition also alleged that in February and June 2010 he committed new "overt" acts of stalking. And, finally, the petition alleged that Herrick suffered from a mental abnormality: Paraphilia not otherwise specified and antisocial personality disorder. Herrick stipulated to probable cause. CP 661-663.

Prior to filing the petition, the State's expert, psychologist Dr. Brian Judd, completed a clinical evaluation record review. In an evaluation dated October 9, 2010, Dr. Judd opined that Herrick met the diagnostic criteria for paraphilia not otherwise specified (NOS), alcohol abuse, cannabis abuse, voyeurism (provisional), and antisocial personality disorder not otherwise specified (NOS). Of these disorders, Dr. Judd determined that paraphilia NOS met the criteria for a mental abnormality as defined in RCW 71.09. His opinion was based on Herrick's predicate offenses, the 2009 PPG testing, which he said demonstrated that Herrick had a preference for coercive sexuality, and actuarial testing. Dr. Judd opined that Herrick's results on these tests predicted a high risk of recidivism.

Dr. Judd completed an updated clinical evaluation using 2,000 pages of Herrick's previous records. He met with Herrick but Herrick

declined to participate in a clinical interview. In April 2012, Dr. Judd provided an addendum and again opined that Herrick met the definition of a sexually violent predator. Dr. Judd used the Structured Risk Assessment, the Static 99 and the SORAG. He also relied on the results of Herrick's 2009 PPG, which he characterized as demonstrating a clear arousal to humiliation rape of an adult female and rape of a female minor, despite apparent attempts to suppress arousal. CP 675-683.

In May 2012, defense expert, Stephen Jensen, M.A., criticized Dr. Judd's report as it related to the 2009 PPG. Mr. Jensen opined that he concurred with the Northwest Treatment Associates evaluator who found the PPG inconclusive:

> The [PPG] assessment was conducted appropriately and followed ... standards. The conclusions by the evaluators appear to accurately reflect the assessment data. The data was correctly assessed as "inconclusive," which indicated it is not clinically predictive. Dr. Judd incorrectly concluded that this data reflected a preference for aberrant sexual behavior, while in reality no preference was clear to any form of sexual behavior.

CP 688-694.

Herrick deposed Dr. Judd on November 28, 2012. In that deposition he stated that:

> Now with regard to the PPG, that is utilized, from my standpoint for identification of range of deviancy, In some cases it is also utilized for confirmation of a diagnostic formulation, and also looking at the -- ensuring that I have

> an understanding of the full range of deviancy and that I can actual target the treatment to those specific areas where the individual is having difficulty.

CP 458.

On December 10, 2012, about 90 days before trial, the State moved for an order requiring Herrick to submit to a second PPG pursuant to RCW 71.09.050(1). CP 684-86. In support of this motion the State submitted a declaration from Dr. Judd signed the day after his deposition. He said:

> In order to provide the most current information possible, I am requesting another PPG of Mr. Herrick and a follow-up clinical interview.

Id. No other justification was given.

Herrick objected to the second PPG. He also provided an expert declaration from Dr. Joseph Plaud, a certified sex offender treatment provider. Dr. Plaud stated that he used PPGs in his practice and had conducted evaluations at the Washington at the Special Commitment Center. He stated that in his professional opinion:

> The PPG is not like other forms of psychological assessment. It is an extremely invasive procedure which must be conducted by competently trained evaluators in a safe and secure environment, and with the full and free consent of the individual being assessed. The validity of the PPG is largely dependent upon these factors being present. The process of obtaining consent through the coercion of a court-ordered PPG evaluation would violate these principles and therefore under most circumstances would be considered both unethical (from a psychological

> professional standpoint) and invalid (from a procedural standpoint). In my professional experience over the past approximately 25 years of conducting PPG evaluations, I have never encountered a situation at the pre-commitment stage involving any client (whether in clinical or forensic professional contexts) in which PPG results were created from the coercion of a court order.

CP 504-507.

On January 22, 2013, the trial court granted the State's motion to compel PPG testing. In his oral ruling the judge said he understood that Dr. Judd relied on the prior PPG to formulate his position that Herrick should be committed, but that it was "understandable" that he would want an "updated" PPG. 1/22/13 RP 27. He also stated that "the statute provides for it." In sum, the judge said:

> I do find there is good cause to order the testing in the present case given the prior plethysmograph, which was before this case was filed. The statute allows for the Court to order such testing. Dr. Judd has indicated in his declaration that he requests that this testing be undertaken as part of the formulation of his analysis here. So I find that there is good cause.

Id. The trial court did not place any limits on the subject matter or duration of the testing.

V.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS OPINION ADDRESSES CONFLICTS WITH SETTLED SUPREME COURT PRECEDENT, IS CONFUSING AND READS LIMITATIONS INTO THE STATUTE THAT DO NOT EXIST. RAP 13.4(3) & (4).

In the Court of Appeals Herrick argued that RCW 71.09.050(1) is either unconstitutional on its face or unconstitutional as applied to him because it violated his Fourteenth Amendment and Const. Art. 1, § 7 rights to due process and privacy. He argued that the state and federal constitutions required heightened scrutiny of any order for the application of an intrusive bodily procedure and that the statute did not contain a requirement of heightened scrutiny. Herrick also argued that as applied to him the statute was unconstitutional. The Court of Appeals rejected both arguments and affirmed.

The Court of Appeals looked at the statute and seemed to hold that the statute requires a heightened level of scrutiny before the trial court can order a PPG. But that is not entirely clear from the published decision. Slip Opinion at 6. The Court's reasoning is confusing and contrary to law. Thus, this Court should accept review to clarify that the statute is unconstitutional on its face. Further, this Court should hold that any statute that permits PPG testing requires that the party seeking such testing

meet heightened standards of scrutiny to establish that such a request is reasonable and that the PPG is the least intrusive test available.

First, the Court of Appeals failed to reference settled principles of statutory construction. To evaluate a statute's constitutionality, a court's task is to look at its plain wording. *In re Detention of Campbell*, 139 Wn.2d 341, 348, 986 P.2d 771, 775 (1999), *as corrected* (Dec. 14, 1999), *cert. denied*, 531 U.S. 1125, 121 S.Ct. 880, 148 L.Ed.2d 789 (2001). Here, the Court of Appeals appears to have ignored the fact that there is no guidance on the level of scrutiny a trial court must engage in before granting a request by the State for PPG testing of a pretrial detainee.

In seeking to get around the lack of heightened scrutiny in the statute, the Court of Appeals held that the statute did not give the trial court unfettered discretion to order a PPG. The Court reasoned that it can be ordered "only in the context of determining whether a person named in the SVP petition is an SVP." Slip Opinion at 6-7. This "reasoning" makes no sense at all. That is simply a description of the context in which the State might ask for a PPG. It is not a "limitation."

Second, the Court reasoned that the statute is constitutional because the State must ask a judge for an order for testing. Slip Opinion at 6. The Court says that because the State must ask the trial court for an order, the decision is not "unfettered." But again, that is not Herrick's

complaint. His argument is that *the statute* does not incorporate constitutional limitations on the judge's power to grant the State's request. The statute itself does not provide any guidance as to how the trial court's discretion is limited by the nature of the test and constitutional principles.

That led the Court to its third mistake – dismissing Herrick's reliance on *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006), and failing to make any mention of *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Herrick relied on *Weber* to establish that PPGs involve a significant bodily intrusion. The State did not dispute that conclusion. Herrick's position is that statutes that permit bodily intrusions are subject to heightened constitutional standards. But the Court of Appeals failed to discuss that claim.

The seminal case regarding the constitutionality of bodily intrusions is *Schmerber v. California*, supra. In *Schmerber*, the defendant challenged his conviction for driving while intoxicated on the ground that the warrantless "seizure" of his blood over his objection violated his rights under the Fourth Amendment. The *Schmerber* Court rejected the defendant's claim that the seizure of blood was an unreasonable search and seizure. The court identified three requirements deemed critical to the reasonableness of the bodily intrusion in question. First, there must be a

"clear indication" that, in fact, the desired evidence will be found. Second, the test chosen to measure the defendant's blood alcohol level must be a reasonable one. Third, the test must be performed in a reasonable manner. *Schmerber*, 384 U.S. at 770-71.

In *Rochin,* the police entered the defendant's bedroom and saw him put two capsules into his mouth. Three officers "jumped upon him" and unsuccessfully tried to extract the capsules. The defendant was taken to a hospital and forced to ingest an emetic solution through a tube. Rochin then vomited up the capsules containing morphine. The Supreme Court characterized the officers' conduct as "brutal" and shocking to its conscience, and held that their method of retrieving the evidence was "too close to the rack and the screw" not to have violated due process of law. *Rochin v. California*, 342 U.S. at 172-74.

Based upon *Schmerber* and *Rochin*, the Ninth Circuit reached the conclusion that convicted sex offenders retain a significant liberty interest in being free from PPG 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.

It is unclear why the Court of Appeals ignored *Schmerber* and *Rochin.* Certainly a blood test is far less intrusive than PPG testing. And, while it may be a closer question as to whether it is more or less intrusive than in *Rochin*, having your brain and genitals manipulated by a machine and visual images so that the expert can judge one's thoughts is humiliating.

The Court of Appeals also suggested that, despite the bodily intrusions inherent in PPG testing, there were "heightened" standards in the statute because a PPG can only be administered at the request of an expert. But the fact that an evaluator requests the test does nothing to limit the intrusion. Most procedures involving bodily intrusion and manipulation are conducted by experts.

This Court should accept review and find that RCW 71.09.050 is unconstitutional. This Court should also find that the Legislature should amend the statute and expressly provide that a trial court may only order pre-trial detainees to submit to PPG testing if the requesting party

establishes that PPG testing is reasonably necessary for the particular defendant based upon his specific psychological profile and that there are no other available alternatives to PPG testing.

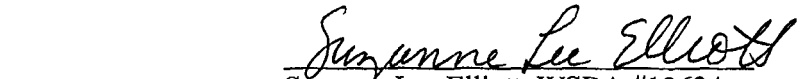
Finally, in this case, even if this Court were to read those constitutional limitations into the statute, it would be compelled to find that the trial court's order in this case did not reflect a heightened level of scrutiny. There was no evidence that a new PPG was reasonably necessary or would produce reliable results and the trial court did not consider any alternatives to this invasive type of testing. The State's expert has already opined that Herrick meets the definition of an SVP. Thus, there is no basis for a second, compelled PPG test.

VI.
CONCLUSION

This Court should grant review of this important question that is likely to recur.

DATED this 28th day of April, 2017.

Respectfully submitted,



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

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

In re the Detention of Donald Herrick	)	No. 69818-4-I
STATE OF WASHINGTON,	)	
Respondent,	)	
v.	)	
DONALD HERRICK,	)	PUBLISHED OPINION
Appellant.	)	FILED: April 3, 2017

VERELLEN, C.J. — Donald Herrick appeals a pretrial order compelling penile plethysmograph (PPG) and polygraph testing as part of a sexually violent predator (SVP) civil commitment evaluation. He argues that the statute granting trial courts discretion to compel PPG testing is unconstitutional on its face and particularly as applied to him. Herrick fails to meet his burden of proving that RCW 71.09.050(1) is unconstitutional beyond a reasonable doubt. Herrick also argues that RCW 71.09.050(1) was unconstitutionally amended in 2012 to permit the court to compel PPG testing in violation of the single subject rule of article II, section 19 of the Washington Constitution. But the title of Senate Bill 6493 is general, and rational unity among the matters within the bill exist, including SVP experts and testing.[1] Therefore, we affirm.

[1] S.B. 6493, 62nd Leg., Reg. Sess. (Wash. 2012).

FACTS

The underlying facts are not in dispute. In 1997, Herrick was convicted of rape in the first degree. He was released from incarceration for that offense in September 2006. Three months after his release, Herrick stalked a 16-year-old. He pleaded guilty to voyeurism and was sentenced to 22 months. Following his release, Herrick entered outpatient sexual deviancy treatment with Northwest Treatment Associates. In March 2009, as part of his treatment, he participated in PPG testing.

In February and June 2010, Herrick violated his conditions of community placement by engaging in stalking. He was ordered to serve 120 days' confinement for the violations.

In November 2010, in anticipation of Herrick's release, the State petitioned to civilly commit him as an SVP under chapter 71.09 RCW. The petition identified Herrick's prior sexually violent offenses and alleged that he suffers from a mental abnormality and/or personality disorder that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. Prior to filing the petition, the State's expert, psychologist Dr. Brian Judd, completed a clinical evaluation record review. Dr. Judd opined that Herrick met the diagnostic criteria for paraphilia not otherwise specified (nonconsent), alcohol abuse, cannabis abuse, voyeurism (provisional), and antisocial personality disorder. Of these disorders, Dr. Judd determined that paraphilia not otherwise specified (nonconsent) met the criteria for abnormality as defined in chapter 71.09 RCW. His opinion was based on the predicate offenses, the 2009 PPG testing, which demonstrated a preference for coercive sexuality, and actuarial testing, which predicted a high risk of recidivism.

In January 2011, Herrick stipulated to the existence of probable cause and agreed to undergo an evaluation by the State's expert.[2] He was ordered to be held at the Special Commitment Center for custodial detention and evaluation.

Dr. Judd completed an updated clinical evaluation, including an interview of Herrick and a records review. In April 2012, Dr. Judd provided an addendum, again opining that Herrick met the definition of an SVP, relying in part on the results of the 2009 PPG, which he characterized as detecting a clear arousal to humiliation rape of an adult female and rape of a female minor, despite apparent attempts to suppress arousal.

In May 2012, defense expert Stephen Jensen, M.A., criticized Dr. Judd's report as it related to the 2009 PPG. Mr. Jensen concurred with the Northwest Treatment Associates evaluator, who found the PPG inconclusive:

> The [PPG] assessment was conducted appropriately and followed . . . standards. The conclusions by the evaluators appear to accurately reflect the assessment data. The data was correctly assessed as "inconclusive," which indicates it is not clinically predictive. Dr. Judd incorrectly concluded that this data reflected a preference for aberrant sexual behavior, while in reality no preference was clear to any form of sexual behavior.[3]

In December 2012, the State moved for an order requiring Herrick to submit to a PPG and a specific-issue polygraph as part of the evaluation in anticipation of trial. Dr. Judd requested the PPG and a follow-up interview to provide the most current information possible:

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[2] On February 15, 2013, the State filed an amended petition, alleging an additional recent overt act: that in December 2009, while under conditions of community placement, Herrick engaged in stalking behaviors towards a female employee of Work Source.

[3] Clerk's Papers (CP) at 694.

> Mr. Herrick has a history of apparently attempting to manipulate and suppress his arousal when assessed on the PPG and has previously made efforts to obtain information on how to dissimulate on the PPG. As such, I believe that independent verification of Mr. Herrick's participation in the PPG consistent with the examiner's instructions is necessary to ensure that Mr. Herrick does not use countermeasures to minimize deviant arousal during the PPG. This can be assessed through a post-PPG specific-issue polygraph administered immediately following the PPG.[4]

Dr. Judd's statement about Herrick's previous "efforts to obtain information on how to dissimulate on the PPG" referred to an August 2010 recorded jail phone call in which Herrick asked his girlfriend to research ways to "beat," "cheat," or "win" the PPG.[5]

On January 22, 2013, the trial court granted the State's motion to compel PPG and specific-issue polygraph testing. Herrick moved for discretionary review of the order. A court commissioner initially denied review, but a panel from this court granted Herrick's motion to modify the ruling.

ANALYSIS

Herrick challenges the constitutionality of RCW 71.09.050(1). Constitutional challenges are questions of law that are reviewed de novo.[6] "A statute is presumed constitutional, and the party challenging it bears the burden of proving it is unconstitutional beyond a reasonable doubt."[7]

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[4] CP at 686.

[5] CP at 701, 703-04; CP at 678, n.19.

[6] State v. McCuistion, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012).

[7] In re Det. of Bergen, 146 Wn. App. 515, 524, 195 P.3d 529 (2008).

argument on the motion and ordered the temporary stay of all trial court proceedings continued pending further briefing on discretionary review.

On October 2, 2013, the court commissioner denied Herrick's motion for discretionary review. The court commissioner then directed the parties to address whether the contempt order was appealable. After both parties agreed the order is appealable as a matter of right, the court commissioner directed the court clerk to set a perfection schedule.

On November 1, 2013, Herrick moved to modify the ruling denying discretionary review of the PPG order.[8]

On January 28, 2014, this court sua sponte stayed consideration of the motion to modify the ruling denying discretionary review pending the filing of the opening brief in this case.

On July 30, 2015, this court lifted the stay of consideration of the motion to modify the ruling denying discretionary review, granted the motion to modify, and accepted review.

Herrick appeals the contempt order.

ANALYSIS

CONTEMPT ORDER

Contempt of court includes the intentional disobedience of any lawful judgment.[9] If the court finds "that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court" and

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[8] In re Det. of Herrick, No. 69818-4-I.

[9] RCW 7.21.010(1)(b).

> person is a sexually violent predator. . . . The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. The judge *may* require the person to complete any or all of the following procedures or tests *if requested by the evaluator*: . . . (c) plethysmograph testing; and (d) polygraph testing.[14]

Contrary to Herrick's assertions, this statute does not allow PPG testing whenever requested by the State. The statute applies only in the context of determining whether the person named in the SVP petition is an SVP. Significantly, this statutory evaluative process occurs after the completion of the probable cause hearing held pursuant to RCW 71.09.040 and a finding of probable cause. Also, PPG and polygraph testing must be "requested by the evaluator," who must:

> (1) Have demonstrated expertise in conducting evaluations of sex offenders, including diagnosis and assessment of reoffense risk;
>
> (2) Have demonstrated expertise in providing expert testimony related to sex offenders or other forensic topics; and
>
> (3) Provide documentation of such qualification.[15]

Finally, the court, not the State, makes the decision to allow PPG testing, and its decision is discretionary: "The judge *may* require the person to complete any or all of the following procedures or tests."[16] Thus, the statue does not give the State unfettered authority to order PPG testing.

Herrick relies heavily on United States v. Weber.[17] Weber concerned a challenge to a federal sentence requiring PPG testing as a condition of supervised

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[14] (Emphasis added.)

[15] WAC 388-880-033 (rule establishing evaluator qualifications).

[16] RCW 71.09.050(1).

[17] 451 F.3d 552 (9th Cir. 2006).

release.[18] The appellant objected to PPG testing based on "*statutory* grounds-that such testing is not reasonably related to the goals of supervised release."[19] The Weber court mentioned "heightened procedural protections" but did not analyze a constitutional challenge; it interpreted a federal sentencing statute, 18 U.S.C. § 3583.[20] Weber held that before PPG testing can be imposed as a term of supervised release under § 3583, a district court must make an individualized determination that the testing is necessary.[21] Weber "express[es] no opinion on the question whether requiring plethysmograph testing as a condition of supervised release amounts to a substantive due process violation."[22] Although Weber expressed concern about the invasive nature of PPG testing, it acknowledged that PPG testing "has become routine in the treatment of sexual offenders and is often imposed as a condition of supervised release."[23]

Further, Herrick fails to demonstrate how Weber, which addressed PPG testing as a condition of release, is applicable to civil commitment proceedings under chapter 71.09 RCW. RCW 71.09.050(1) explicitly authorizes PPG testing. Herrick fails to provide authority requiring a court to make an individualized determination regarding the

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[18] Id. at 555-56.

[19] Id. at 563, n.14.

[20] Id. at 557. Similarly, we do not find any support in United States v. Cheever, 2016 WL 3919792, at *11 (D. Colo. July 18, 2016), aff'd, 2016 WL 7367766 (10th Cir. Dec. 20, 2016) (applying a federal sentencing statute and refusing to include PPG testing as a condition of supervised release).

[21] Id. at 569-70.

[22] Id. at 563, n.14.

[23] Id. at 554.

necessity of PPG testing in SVP civil commitment proceedings.[24] Therefore, Weber is not compelling.

Herrick fails to carry his burden of showing that RCW 71.09.050(1) is facially unconstitutional beyond a reasonable doubt.

RCW 71.09.050(1) Is Constitutional As Applied To Herrick

In the alternative, Herrick argues that RCW 71.09.050(1) is unconstitutional as applied to him. He argues that the "court's blanket finding that Washington courts have found PPG tests reliable in a forensic setting is not sufficiently specific to justify PPG testing without reference to the specific individual and the facts of his case."[25]

But here, the court found "based on the evidence before the Court, there is good cause to require" Herrick to submit to PPG and polygraph testing.[26] The court explained its reasons for ordering the testing: (1) the previous PPG test was conducted before the SVP petition was filed and was conducted for treatment as opposed to evaluation purposes, (2) the record reflected efforts by Herrick to manipulate the PPG results, (3) the Supreme Court in In re the Detention of Halgren[27] approved the use of a PPG for diagnostic purposes, (4) the Supreme Court's observation in State v. Riles[28] indicates that the PPG is an effective method for diagnosing sex offenders, (5) the statute

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[24] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent research, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

[25] Appellant's Br. at 16.

[26] CP at 354.

[27] 156 Wn.2d 795, 806-07, 132 P.3d 714 (2006).

[28] 135 Wn.2d 326, 352, 957 P.2d 655 (1998).

provides for the testing, and (6) Dr. Judd, the State's expert, requested it as part of his evaluation.[29] Accordingly, Herrick's as applied challenge to RCW 71.09.050(1) fails.

Reliability of PPG Testing

Herrick challenges the reliability of PPG testing. Although Herrick identifies criticisms of PPG testing, he does not establish that it is no longer accepted in the scientific community or authorized in case law.

Herrick appears to attack the trial court's reliance on Halgren in finding good cause to order the PPG testing. In Halgren, our Supreme Court unequivocally held that PPG testing is useful as part of a diagnostic process.[30] Herrick argues this court should reject Halgren because the court relied on case law addressing PPG testing in a treatment setting rather than in a forensic setting. But we are bound to follow the express decisions of our Supreme Court.[31]

Further, our legislature has expressly authorized the use of PPG testing as part of the evaluative process.[32]

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[29] Report of Proceedings (Jan. 22, 2013) at 26-30.

[30] Halgren, 156 Wn.2d at 807; see also Riles, 135 Wn.2d at 352 ("Plethysmograph testing is regarded as an effective method for diagnosing and treating sex offenders."); cf. State v. Johnson, 184 Wn. App. 777, 780, 340 P.3d 230 (2014) (holding PPG testing is a valid condition of community placement "'within the context of a comprehensive evaluation or treatment process'") (quoting Riles, 135 Wn.2d at 352); State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007) (holding that PPG testing is a valid sentencing condition and "is regarded as a 'treatment device' for diagnosing and treating sex offenders") (citing Riles, 135 Wn.2d at 345).

[31] 1000 Virginia Ltd. P'Ship v. Vertecs Corp., 158 Wn.2d 566, 590, 146 P.3d 423 (2006).

[32] RCW 71.09.050(1); see In re Det. of Hawkins, 169 Wn.2d 796, 803, 238 P.3d 1175 (2010) (noting that the legislature deems an evaluation method permissible when a statute specifically authorizes the method).

In essence, Herrick alleges the PPG should not be a generally accepted diagnostic test, but our Supreme Court has recognized that it is. His challenge to the reliability goes to the weight of the evidence, not its admissibility.[33] The weight of evidence is an issue reserved for the finder of fact.[34]

Therefore, Herrick's challenge to the reliability of PPG testing fails.

Article II, Section 19

Herrick argues Senate Bill 6493 violated the single subject rule of article II, section 19 of the Washington Constitution. Section 19 reads, in part, "No bill shall embrace more than one subject." "The purpose of the single subject clause is to prohibit the enactment of an unpopular provision pertaining to one subject by attaching it to a more popular provision whose subject is unrelated."[35]

In determining whether an enactment relates to one general subject or multiple specific subjects, Washington courts look to the title of the enactment for guidance.[36] "A general title is broad, comprehensive, and generic as opposed to a restrictive title that is specific and narrow."[37] The title of Senate Bill 6493 is general: "AN ACT Relating to sexually violent predator civil commitment cases."[38]

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[33] See In re Det. of Berry, 160 Wn. App. 374, 382, 248 P.3d 592 (2011).

[34] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

[35] City of Burien v. Kiga, 144 Wn.2d 819, 824, 31 P.3d 659 (2001).

[36] Filo Foods, LLC v. City of SeaTac, 183 Wn.2d 770, 782, 357 P.3d 1040 (2015); Washington Ass'n of Neigh. Stores v. State, 149 Wn.2d 359, 368, 70 P.3d 920 (2003).

[37] City of Burien, 144 Wn.2d at 825.

[38] 1 SENATE JOURNAL, 62nd Leg., Reg. Sess., at 132 (Wash. 2012).

Where a general title is used, "[o]nly rational unity among the matters need exist."[39] "Rational unity exists when the matters within the body of the initiative are germane to the general title and to one another."[40] Here, Senate Bill 6493 addresses several subtopics, but they all relate to the subject of SVP civil commitment cases and to each other.

Herrick claims the amendment to RCW 71.09.050(1) granting discretion to trial courts to order evaluative procedures is unrelated to the other provisions of the bill. We disagree. Senate Bill 6493 transferred financial responsibility for SVP evaluations from the Department of Social and Health Sciences (DSHS) to the prosecuting agency and the Office of Public Defense (OPD), and, at the same time, removed DSHS's rule-making authority over evaluators and evaluation procedures.[41] Who decides to approve a PPG evaluation is part of that procedure. Because the provision Herrick challenges was rationally related to the transfer of authority from DSHS to OPD and the prosecuting agency, it has "rational unity" with the general subject of "sexually violent predator civil commitment cases."

Herrick relies on In re Detention of Hawkins.[42] Hawkins held that the legislature could not have intended to include polygraph examinations in the mandatory evaluation under former RCW 71.09.040(4) (2009) without explicitly saying so.[43] But Hawkins did

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[39] Filo Foods, 183 Wn.2d at 782 (citing City of Burien, 144 Wn.2d at 825-26).

[40] Id. at 782-83 (citing City of Burien, 144 Wn.2d at 826).

[41] Effective July 1, 2012.

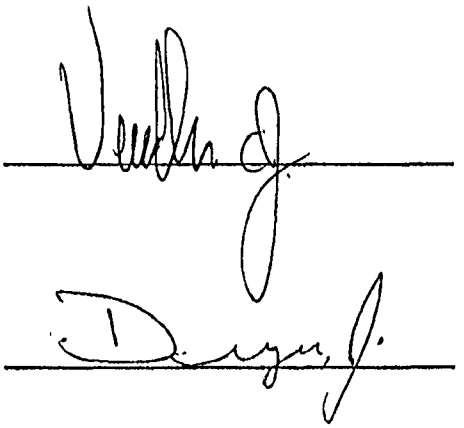
[42] 169 Wn.2d 796, 238 P.3d 1175 (2010).

[43] Hawkins, 169 Wn.2d at 803.

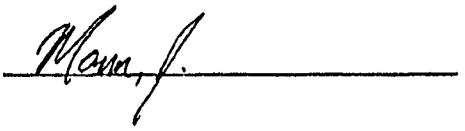
not address PPG testing and left the door open to other testing methods.[44] In any event, RCW 71.09.050(1) indisputably shows that the legislature intended to make polygraph and other types of testing available to evaluators.

We conclude that RCW 71.09.050(1) was not unconstitutionally amended in violation of article II, § 19.

Affirmed.



WE CONCUR:



[44] Id. at 803-04 ("This conclusion, as the foregoing analysis makes clear, applies only to polygraph examinations; the failure of the statute to enumerate other methods of conducting an examination does not necessarily preclude their use.").