

59808-2

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NO. 59808-2-I

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

In re Detention of Charles DeCuir,

STATE OF WASHINGTON,

Respondent

v.

CHARLES DECUIR,

Appellant.

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

The Honorable James H. Allendoerfer, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT¹

UNDER STRAND THE RCW 71.09 FINDINGS AGAINST
DE CUIR MUST BE REVERSED.

In In re Strand, the Supreme Court held Chapter 71.09 RCW (ch 71.09) does not require counsel at an RCW 71.09.025(1)(b)(v) mental health evaluation and affirmed the holding in State v. Kistenmacher, requiring counsel for psychological examinations conducted under RCW 71.09.040(4). Strand, 217 P.2d at 1163, 1165; In re Kistenmacher, 163 Wn.2d 166, 173, 178 P.3d 949 (2008). Because DeCuir was given a complete RCW 71.09.040(4) psychological examination without counsel, Strand requires DeCuir's case to be reversed.

In Strand, the State followed the procedures mandated in Ch. 71.09.(1) Strand received a pre-filing current mental health exam pursuant to RCW 71.09.025 on January 5, 2004. In re Strand, 217 P.3d at 1161. (2) A petition was filed alleging Strand met the criteria for ch 71.09 civil commitment. Id. (3) Counsel was appointed and a probable cause hearing was held on May 16, 2005. Id. at 1162. (4) A second, presumably more extensive evaluation was held pursuant to RCW 71.09.040(4) with counsel present on November 8, 2005. Id.

¹ On November 19, 2009, this Court directed the parties to file supplemental briefs addressing the recent decision in State v. Strand, __ Wn.2d __, 217 P.3d 1159 (Slip Op. filed October 8, 2009).

In DeCuir's case Ch. 71.09 procedures were ignored. (1) On May 25, 2004 the Department of Corrections referred DeCuir's case to the Attorney General's Office. CP 110. (2) On October 4-5, 2004, Dr. Robert Wheeler conducted the extensive forensic psychological evaluation which became DeCuir's RCW 71.09.040(4) evaluation. CP 209; 4RP 456. DeCuir was neither appointed counsel nor told he had a right to appointed counsel prior to this evaluation. CP 118. (3) A petition was filed by the Attorney General's Office on December 9, 2004. CP 218. (4) Counsel was appointed and a probable cause hearing held. 1RP 1-2. (5) The court found evaluation of DeCuir had already been conducted and ordered no post-finding psychological exam. CP 157. (6) The court ruled DeCuir could be required to submit to supplemental evaluation if needed, but no post-filing evaluation was done.² CP 309.

The requirements of Ch. 71.09 are settled and specific. In re Martin, 163 Wn.2d 501, 509, 182 P.3d 951 (2008). The extensive forensic psychological evaluation required by RCW 71.09.040(4) takes place after the probable cause hearing. RCW 71.09.040. Reversing these procedures deprived DeCuir of both statutory due process and his right to counsel.

DeCuir had a statutory right to consult appointed counsel prior to his precommitment psychological exam. RCW 71.09.040(2); Strand, 217

² The state claims DeCuir's counsel indicated DeCuir would not co-operate with a further interview. Brief of Respondent at 22. This claim does not match the record. 4RP 682.

P2d at 1165. Under statutory procedures counsel appointed for the probable cause hearing would consult with him prior to his exam. Id. Instead, DeCuir faced the exam without advice of counsel. CP 118-19. DeCuir also had the right to counsel present during his exam. In re Kistenmacher, 163 Wn.2d at 173. Under ch 71.09, counsel is provided when a petition is filed. Id. at 171. The State wrongfully deprived DeCuir of counsel by scheduling his RCW 74.09.040(4) evaluation prior to filing.

The State violated DeCuir's due process rights under the statute. RCW 71.09.040(4) requires the psychological examination to be conducted after the probable cause hearing and appointment of counsel. RCW 71.09.040(4); Kistenmacher, 163 Wn.2d at 173. The State's failure to conduct the examination at this time violated DeCuir's right to due process as well as his right to counsel. Strand, 217 P2d at 1163, citing Martin, 163 Wn.2d at 511. The State is bound by the words of the statute. Martin at 514. It may not change statutory procedure. Id.

Holding DeCuir's psychological evaluation prior to filing also deprived DeCuir of the court's protection. RCW 71.09.040(3) notes "this is a special proceeding" and prohibits discovery until after the probable cause hearing. RCW 71.09.040(3). DeCuir had a due process right to have his examination done under the court's jurisdiction and the protections of this section. Id.; Strand at 1163.

Additionally, the State had no right to subject DeCuir to this onerous and burdensome examination without a finding of probable cause. RCW 71.09.040 (4).

The State could claim DeCuir's examination was not the extensive RCW 71.09.040(4) forensic exam, but instead merely the RCW 71.09.025(1)(b)(v) "current mental health evaluation" and argue DeCuir had no right to counsel at the evaluation under Strand. This argument fails for two reasons: (1) the examination made was so extensive it left nothing to be done during a second exam, and (2) Wheeler examined DeCuir after the State's authority under RCW 71.09.025(1)(b)(v) ended.

An RCW 71.09.025(1)(b)(v) exam is a limited investigatory exam. This is demonstrated by the rules of statutory construction. Strand, 217 P2d at 1163; State v. Elmore, 143 Wn App. 185,188, 177 P.3d 172 (2008).

Under rules of statutory construction no part of a statute should be deemed inoperative or superfluous. Strand, 217 P2d at 1163 (No part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error). RCW 71.09.040 states:

(4) If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services.

RCW 71.09.040(4). DeCuir was evaluated by Dr. Robert Wheeler; a psychologist experienced in performing RCW 71.09.040(4) evaluations. 4RP 455. His stated purpose for the evaluation was to determine whether DeCuir met the criteria for indefinite civil commitment under RCW 71.09. CP 116; 4RP 456. The evaluation included review of 2695 pages of documents and nine hours and fifteen minutes of personal interview with DeCuir. 4RP 457-62, 466. The court found no further evaluation was necessary to fulfill the requirements of RCW 71.09.040(4). CP 157. This evaluation left nothing to be asked or investigated. Allowing a pre-filing mental health evaluation this extensive under RCW 71.09.025(1)(b)(v) would make RCW 71.09.040(4) superfluous.

The meaning of a statutory section is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Strand, 217 P.3d at 1163; State v. Elmore, 143 Wn App. 185,188, 177 P.3d 172 (2008). Ch 71.09 contemplates two phases prior to trial, a pre-filing investigatory phase and a post-filing a hearing phase. RCW 71.09.025; RCW 71.09.040. RCW 71.09.025 describes the pre-filing, investigatory phase. The RCW 71.09.025 (1)(b)(v) mental health evaluation is part of that phase. RCW 71.09.025(1)(b) describes the duties

of the agency with jurisdiction over the person being investigated. These duties involve collecting information. A "current mental health evaluation or a records review" is also authorized. Viewed in context, the allowed mental health evaluation is like the other records compiled by the agency; the kind of exam intended to update records. It is not an extensive, RCW 71.09.040(4)-type psychological exam.

Prior to the Court's 2002 decision in In re Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002), the Department of Corrections (DOC) followed this procedure. Evaluations were conducted by DOC psychologists. CP 293.

At this time, the Attorney General's Office also conducted its own exams. Id. It hired psychologists expert in the legal as well as mental health issues raised in ch 71.09. Id. If a petition was filed, Special Commitment Center (SCC) staff would conduct the evaluation required by RCW 71.09.040(4). Id. The Attorney General's Office found this procedure "inefficient." Id. It also became unavailable under Williams. Williams, 147 Wn.2d at, 491. As a result, the Joint Forensic Unit (JFU) was formed. Under this new procedure, the State hires the same pre-selected group of fourteen psychologists to do all the exams and each person's RCW 71.09.025(1)(b)(v) evaluation and RCW 71.09.040(4) exam are done by the same JFU evaluator. CP 289; 291. In DeCuir's case the

State merged the two exams, performing the whole RCW 71.09.040(4) psychological examination prior to filing. CP 309. This failure to follow statutory procedure deprived DeCuir of his right to counsel and his statutory right to due process.

The argument Wheeler acted under RCW 71.09.025(1)(b)(v) also fails because the State authority under RCW 71.09.025(1)(b)(v) was already exhausted. To begin with, RCW 71.09.025(1)(b)(v) authorizes "[a]current mental health evaluation or mental health records review. RCW 71.09.025(1)(b)(v) (emphasis added). Before he met Wheeler, however, DeCuir's records were reviewed by the End of Sentence Review Committee (ESRC); an entity consisting of representatives from nine state agencies, including the Mental Health Agency (Western/Eastern State Hospital). CP 288-89. The ESRC screened DeCuir to determine if he appeared to meet the statutory criteria for ch 71.09. Id. This screening constituted the "mental health records review" authorized by RCW 71.09.025(1)(b)(v). DeCuir's records review ended the State's authority under RCW 71.09.025(1)(b)(v). Wheeler examination of DeCuir, therefore, could only properly be conducted in compliance with RCW 71.09.040(4).

Secondly, RCW 71.09.025(1)(b)(v) authority ended when DeCuir's case was referred. RCW 71.09.025(1)(b)(v) authorizes a "current" mental

health evaluation. RCW 71.09.025(1)(b)(v). For purposes of RCW 71.09.025(1)(b)(v), "current" means "occurring in the present time." Strand, 217 P2d at 1163. Interpreting this provision the context of the whole section, "present time" as contemplated by RCW 71.09.025(1)(b)(v) is the time when the agency sends the required information. RCW 71.09.025(1)(b)(v). The Department of Corrections referred DeCuir to the prosecutor with documentation on May 25, 2004. CP 291. Wheeler evaluated him on October 4-5. This was not "the present" from the perspective of May 25.

The limited nature of the RCW 71.09.025(1)(b)(v) evaluation is supported by the role of that section in the context of the statute. Information collected under RCW 71.09.025 is used to determine whether probable cause exists to believe a person meets the criteria for ch 71.09. RCW 71.09.025; RCW 71.09.040(1), (2). Probable cause exists if a reasonable person would believe that a specific condition is more likely than not true. State v. Winterstein, _____ Wn. 2d ___, ___ P.3d ___, 2009 WL 4350257 (Wash.) (Slip Op. filed December. 3, 2009). The broad range of information provided by the DOC pursuant to RCW 71.09.025, including a departmental mental health evaluation and details of the past offense, is sufficient for this purpose. Id.

In DeCuir's case, the ESRB reviewed the information provided by the DOC under RCW 71.09.025(1)(b) and was sufficiently satisfied DeCuir met the criteria for ch 71.09 commitment. CP 291. This referral ended the State's authority under RCW 71.09.025(1)(b)(v). Wheeler's extensive psychological examination was therefore conducted under the auspices of RCW 71.09.040(4).

Civil statutes involving deprivation of liberty must be strictly construed. Martin, 163 Wn.2d at 508; In re Det. of Swanson, 115 Wn.2d 21, 31, 804 P.2d 1 (1990). Ch. 71.09 does not authorize the state to administer a full forensic psychiatric examination under the guise of RCW 71.09.025(1)(b)(v). Allowing such an examination would violate the right to statutory due process, deny the right to counsel and make the examination required by RCW 71.09.040(4) meaningless.

DeCuir was examined once. Wheeler described this examination as a forensic psychological examination done to determine whether he met 71.09 criteria. CP 116; 4RP 456. He interviewed DeCuir for over nine hours and reviewed 2695 pages of documents. 4RP 457-62, 466. This was not a "current mental health evaluation" done pursuant to RCW 71.09.025(1)(b)(v), it was DeCuir's RCW 71.09.040(4) psychological exam. This exam was done outside statutory procedure in violation of In

re Martin and without counsel in violation of In re Kistenmacher,
Kistenmacher, 163 Wn.2d at 173; Martin 163 Wn.2d at 508.

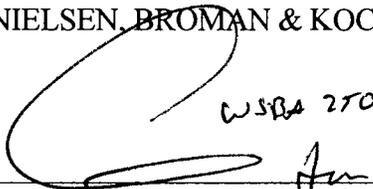
B. CONCLUSION

Strand allows a current mental health evaluation without counsel,
but DeCuir was deprived of counsel for his full psychological
examination. DeCuir's commitment must be reversed and remanded.

DATED this 15th day of December, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

In re the Detention of:)	
)	
CHARLES DeCUIR,)	
)	COA NO. 59808-2-1
<i>Appellant,</i>)	
)	
vs.)	
)	
STATE OF WASHINGTON,)	
)	
<i>Respondent.</i>)	

DECLARATION OF SERVICE

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

THAT ON THE 15TH DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*