

No. 34442-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF

John L. Strand,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
06 DEC 29 PM 1:34
STATE OF WASHINGTON
BY 

Clallam County Superior Court

Cause No. 05-2-00129-4

The Honorable Judge George L. Wood

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. The loss of the trial record requires reversal. 1

 A. Respondent failed to address Mr. Strand’s argument under Wash. Const. Article IV, Section 11..... 1

 B. Mr. Strand’s constitutional rights to due process and to appeal were violated. 1

II. The state circumvented RCW 71.09.040 and violated Mr. Strand’s constitutional right to due process..... 3

 A & B. RCW 71.09.025 does not authorize a full-blown SVP evaluation; instead, a full evaluation is permitted only after a petition has been filed, the right to counsel has attached, and a judge has determined the existence of probable cause. 6

 C. If Mr. Strand had been permitted to consult with counsel prior to or during his evaluation, he would have remained silent regarding uncharged criminal offenses. 9

III. Mr. Strand was entitled to a voluntariness hearing. 11

IV. Mr. Strand was denied the effective assistance of counsel..... 11

CONCLUSION 14

TABLE OF AUTHORITIES

STATE CASES

In re Greenwood, 130 Wn.App. 277, 122 P.3d 747 (2005)..... 13

Pulcino v. Federal Express, 141 Wn.2d 629, 9 P.3d 787 (2000) 5

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005)..... 5

State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005)..... 7

State v. Miller, Wn. App. 483, 698 P.2d 1123 (1985) 2

State v. Mills, 154 Wn.2d 1, 109 P.3d 787 (2005)..... 3

State v. Rainey, 107 Wn. App. 129, 28 P.3d 10 (2001) 12

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000)..... 3

CONSTITUTIONAL PROVISIONS

U.S. Const Amend V 4, 9

Wash. Const. Article IV, Section 11 1

STATUTES

RCW 71.09.025 6, 7, 8

RCW 71.09.040 3, 6, 7, 8, 9

OTHER AUTHORITIES

RAP 2.5..... 3, 5, 11

ARGUMENT

I. THE LOSS OF THE TRIAL RECORD REQUIRES REVERSAL.¹

- A. Respondent failed to address Mr. Strand's argument under Wash. Const. Article IV, Section 11.

Respondent has not addressed Mr. Strand's argument relating to Wash. Const. Article IV, Section 11. Accordingly, Mr. Strand stands on the Opening Brief.

- B. Mr. Strand's constitutional rights to due process and to appeal were violated.

Respondent asserts that "[t]he record in this case was painstakingly reconstructed..." and argues that the record is "sufficiently complete to allow appellate review in this case." Brief of Respondent, pp. 11, 12.

This is incorrect.

Respondent does not dispute that all of Mr. Strand's evidence was omitted from the Verbatim Report of Proceedings. Nor does Respondent dispute that trial counsel did not take notes and was unable to agree with or dispute opposing counsel's version of certain facts. Furthermore, trial counsel's so-called concession (that "nothing of significance was objected

¹ The Respondent has elected to number and organize its arguments so they do not correspond to the arguments raised in the opening brief. The original order is preserved here.

to” during the testimony. Brief of Respondent, p. 12) should not bind Mr. Strand’s appellate counsel, who is charged with independently reviewing the record and evaluating trial counsel’s performance.

Respondent also suggests that Mr. Strand’s failure to supplement the record amounts to a waiver of a complete record on appeal. Brief of Respondent, pp. 14-15. *citing State v. Miller*, Wn. App. 483, 698 P.2d 1123 (1985). This is incorrect. In *Miller*, no attempt was made to provide the Court of Appeals with information regarding the trial judge’s response to a jury question. In this case, by contrast, the missing testimony was addressed on the record. Trial counsel moved for a new trial when the problem was discovered, and objected to the court’s efforts to reconstruct the record. CP 39-88. Under these circumstances, no waiver can be presumed.

Finally, Respondent suggests that Mr. Strand has failed to prove specific prejudice resulting from the loss of the record. Brief of Respondent, pp. 15-16. But this circular argument, if accepted, would render the rule meaningless. The absence of a record prevents appellate counsel from asserting specific prejudice. The inability to review the record precludes an evaluation of trial errors and the performance of trial counsel, and is itself prejudicial.

Because the evidence presented by Mr. Strand was not preserved for appellate review, he was denied his constitutional rights to due process and to appeal. The order of commitment must be reversed and the case remanded to the trial court for a new trial.

II. THE STATE CIRCUMVENTED RCW 71.09.040 AND VIOLATED MR. STRAND'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Respondent asserts that Mr. Strand “has waived his right to bring” any issues relating to his SVP evaluation. Brief of Respondent, p. 16.² This is incorrect.

Under RAP 2.5(a)(3), an appellant may raise for the first time on review a manifest error affecting a constitutional right. An error is “manifest” for purposes of the rule when it has practical and identifiable consequences in the trial of the case. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 787 (2005); *State v. Roberts*, 142 Wn.2d 471 at 500, 14 P.3d 713 (2000). In his opening brief, Mr. Strand outlines manifest errors affecting his constitutional right to due process: initially, Mr. Strand asserts that the state intentionally circumvented his constitutional right to consult with counsel by subjecting him to a pre-filing SVP evaluation. *See* Appellant’s

² Respondent aggregates Mr. Strand’s arguments regarding the evaluation (set forth in Section II of the Opening Brief) with his ineffective assistance arguments (set forth in Section IV of the Opening Brief). Brief of Respondent, p. 17. The two sets of arguments are analytically distinct.

Opening Brief, Section IIA, p. 10. Next, Mr. Strand asserts that the state violated his due process right to have counsel present during the SVP evaluation. *See* Appellant's Opening Brief, Section IIB, p. 13. Finally, Mr. Strand demonstrates the "practical and identifiable consequences" of these violations on the outcome of his case: if he'd been allowed to consult with counsel, or to have counsel present during the SVP evaluation, he would have exercised his Fifth Amendment right to remain silent because of his potential exposure to additional criminal charges. The exercise of this right would have hindered the state's efforts to build a commitment case against him, and would have significantly changed the evidence introduced at trial. *See* Appellant's Opening Brief, Section IIC, p. 17. Accordingly, the errors are subject to review under RAP 2.5(a)(3).

Without citation to authority or the record, and without even referencing the Opening Brief, Respondent asserts that Mr. Strand (1) "fail[ed] to raise any issues of constitutional magnitude," (2) "had no right to counsel at the prefiling psychological evaluation," (3) "made no statements... that would expose him to criminal liability...," and (4) "cannot show any actual prejudice...." Brief of Respondent, p. 19. The first statement is incorrect, since Mr. Strand's arguments are based on the right to counsel secured by the due process clauses of the state and federal constitutions. The second statement is an attack on the merits of the

argument, and not a reason to refuse review. The third statement shows an apparent lack of understanding of criminal law, since any statement relevant to the uncharged allegations (such as an admission that he was present) could be used to prosecute Mr. Strand. The fourth statement is rebutted by Section IIC of the Opening Brief, which outlined the evidence that would have been unavailable had Mr. Strand's constitutional right to counsel been respected.

Under RAP 2.5(a), the appellate court has discretion to consider and rule on any nonconstitutional errors raised for the first time on review. *See, e.g., Roberson v. Perez*, 156 Wn.2d 33 at 39, 123 P.3d 844 (2005) (the rule is “discretionary, rather than mandatory”), and *Pulcino v. Federal Express*, 141 Wn.2d 629 at 649, 9 P.3d 787 (2000) (“RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level”). Mr. Strand does raise one nonconstitutional error in his Opening Brief. Specifically, he argues that the state violated his statutory right to have counsel present during his SVP evaluation. *See* Appellant's Opening Brief, Section IIB, p. 13. This issue is legal rather than factual, and does not depend on matters outside the record. It is an issue of statutory interpretation appropriate for resolution in the first instance by an appellate court.

For all these reasons, this court should reach the merits of Mr. Strand's claims.

A & B. RCW 71.09.025 does not authorize a full-blown SVP evaluation; instead, a full evaluation is permitted only after a petition has been filed, the right to counsel has attached, and a judge has determined the existence of probable cause.

Respondent asserts that Dr. Longwell's evaluation was not an SVP evaluation under RCW 71.09.040, but rather was (in Respondent's various formulations) a "pre-filing psychological evaluation," an "investigatory evaluation," or a "mental health evaluation" conducted pursuant to RCW 71.09.025. Brief of Respondent, p. 20, 21, 22, 25. According to Respondent, such evaluations are statutorily authorized and may be conducted without the opportunity for consultation with counsel. Brief of Respondent, pp. 20-26. This is incorrect.

RCW 71.09.025 is captioned "Notice to prosecuting attorney prior to release," and directs that the prosecutor shall be provided with

[A]ll relevant information including but not limited to the following information:

- (i) A complete copy of the institutional records compiled by the department of corrections relating to the person, and any such out-of-state department of corrections' records, if available;
- (ii) A complete copy, if applicable, of any file compiled by the indeterminate sentence review board relating to the person;
- (iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person;

- (iv) A current record of all prior arrests and convictions, and full police case reports relating to those arrests and convictions; and
- (v) A current mental health evaluation or mental health records review.

RCW 71.09.025(1)(b)

By contrast, RCW 71.09.040 does not refer to a “mental health evaluation.” Instead, RCW 71.09.040(4) provides for an evaluation that is geared toward determining whether or not someone qualifies as a sexually violent predator. Under the statute, such an evaluation can occur only after a judge has determined that probable cause exists:

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...
RCW 71.09.040(4).

The two sections use different language to describe the evaluations: RCW 71.09.025 refers to a “current mental health evaluation,” while RCW 71.09.040 refers to “an evaluation as to whether the person is a sexually violent predator[,] conducted by a person deemed to be professionally qualified to conduct such an examination...” Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. *State v. Jacobs*, 154 Wn.2d 596 at 603, 115 P.3d 281 (2005). Accordingly, the evaluation referred to in RCW 71.09.025 is not a

sexually violent predator evaluation. The latter is permitted only after a probable cause determination. RCW 71.09.040.

As a factual matter, the record does not support Respondent's contention that the initial evaluation was merely a "current mental health evaluation or mental health records review" under RCW 71.09.025. First, Dr. Longwell, a specialist on sex offender commitment evaluations, based in Oakland California, performed the 2004 evaluation. CP 99-139. The state employed Dr. Longwell (rather than a local professional) because she is "a person deemed to be professionally qualified to conduct such an examination" under RCW 71.09.040. Second, the 2004 evaluation is entitled "Sexually Violent Predator Evaluation," rather than "mental health evaluation." CP 104. Third, Dr. Longwell herself understood the 2004 evaluation to be "completed pursuant to RCW 71.09, the Sexually Violent Predator Act...." rather than simply a generic mental health evaluation. CP 104. Fourth, the 2004 evaluation addressed whether or not Mr. Strand had a mental abnormality (as defined by the statute) and whether such abnormality would make him likely to engage in predatory acts of sexual violence. CP 104-105. The evaluation was focused on these specific issues; it was not a general evaluation of Mr. Strand's mental health. Finally, the follow up evaluation (performed in 2005)-- which Respondent apparently claims was the main evaluation conducted

under RCW 71.09.040 (*see* Brief of Respondent, p. 2-3)-- was “merely... an update of” the 2004 evaluation. RP (1/31/06) 128. This bolsters the conclusion that the 2004 evaluation was the primary SVP evaluation, and not simply a “mental health” evaluation.

The SVP statute is structured so that an individual is not subjected to the intrusive process of a full-blown SVP evaluation until after a petition has been filed, the right to counsel has attached, and a judge has determined the existence of probable cause. *See* RCW 71.09 generally. The state intentionally circumvented the requirements of the statute and Mr. Strand’s constitutional rights by conducting a full SVP evaluation (rather than a general mental health evaluation) prior to filing a petition. Because of this, the commitment order must be reversed and the case remanded to the trial court.

- C. If Mr. Strand had been permitted to consult with counsel prior to or during his evaluation, he would have remained silent regarding uncharged criminal offenses.

Respondent misunderstands Mr. Strand’s argument regarding the Fifth Amendment. Contrary to Respondent’s assertions, Mr. Strand does not “[claim] that his Fifth Amendment rights were violated because he was denied counsel at the psychological evaluations.” Brief of Respondent, p. 26. Nor does Mr. Strand contend that the Fifth Amendment applies to SVP proceedings.

Instead, Section IIC of Appellant's Opening Brief outlines the practical and identifiable consequences that resulted from the denial of his constitutional right to counsel under the due process clause. If Mr. Strand had been permitted to consult with counsel (as he argues was required by the due process clause), a competent attorney would have advised him that he faced criminal exposure, and would have advised him to remain silent. His attorney's advice would have been based on his Fifth Amendment privilege against self-incrimination, but Mr. Strand does not argue that the privilege itself directly bars the use of his statements in the SVP proceeding.

In other words, Section IIC of the Opening Brief demonstrates that the error affecting Mr. Strand's constitutional right to due process was manifest: it had practical and identifiable consequences impacting the outcome of his SVP trial. Section IIC was intended to address the prejudice caused by the errors argued in Sections IIA and IIB; it was not intended to raise additional constitutional errors.

Respondent's argument regarding the "ripeness" of any claim under the Fifth Amendment privilege is likewise irrelevant to this appeal. Brief of Respondent p. 28.

III. MR. STRAND WAS ENTITLED TO A VOLUNTARINESS HEARING.

Respondent asserts that any right to a voluntariness hearing under the due process clause is waived by the failure of Mr. Strand's trial counsel to request such a hearing. Brief of Respondent, p. 36. This is incorrect. Under Mr. Strand's argument, proof of voluntariness is a component of due process, and the burden is on the state to establish voluntariness before the state may use those statements to involuntarily commit Mr. Strand. *See* Appellant's Opening Brief, Section III, p. 22. Accordingly, the claimed error raises an issue of constitutional dimension, which may be addressed for the first time on appeal. RAP 2.5(a)(3).

Respondent next argues that no hearing was required because there is no proof of involuntariness. Brief of Respondent, p. 37. But Mr. Strand's argument is that the burden rests with the state; the state's failure to introduce evidence of voluntariness should not be held against Mr. Strand. The remedy requested is an evidentiary hearing, at which the state can introduce any evidence establishing compliance with due process. *See* Appellant's Opening Brief, Section III, p. 22.

IV. MR. STRAND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent suggests that trial counsel's failure to object to Mr. Strand's evaluation was "in all likelihood a conscious choice relating to

trial strategy.” Brief of Respondent, p. 33. Respondent further suggests that Mr. Strand never made any statements that were incriminating. Brief of Respondent, p. 33. Respondent is incorrect on both counts.

First, there is no legitimate strategy that would involve forging a motion to suppress the evaluation. The evaluation was the primary evidence against Mr. Strand; without it, the state would not have been able to proceed. *See, e.g., State v. Rainey*, 107 Wn. App. 129, 28 P.3d 10 (2001). Furthermore, his statements were used to corroborate the accusations against him, and provided a foundation sufficient to convince the court that prior allegations should be admissible against him. RP(1/30/06) 14-30. Without his statements, the prior allegations would have been excluded, and the jury would not have considered damaging propensity evidence.

Second, although Mr. Strand never admitted guilt, his statements were nonetheless incriminating. For example, he admitted to being present and having contact with his alleged victims. RP(2/1/06) 127-138. Although insufficient by itself to sustain a conviction, such information could be used (and was used in this case) to confirm the identity of the perpetrator and/or his opportunity to commit each crime.

Respondent also suggests that trial counsel’s errors could not have affected the outcome of the trial. Brief of Respondent, p. 34. This is

incorrect. Exclusion of the evaluation would have prevented the state from proceeding. Furthermore, even if the evaluation were admitted, the excision of Mr. Strand's statements would have undermined Dr. Longwell's conclusions and would have resulted in exclusion of the prior allegations (since his statements were used to provide the foundation for admission of the testimony).

Finally, Respondent argues that the failure to request a voluntariness hearing was not ineffective. Brief of Respondent, p. 37. This argument is directed to the merits of Mr. Strand's claim, which will not be repeated here. If a voluntariness hearing was required by the due process clause, and if the issue is not preserved for review, then trial counsel's failure to request a voluntariness hearing was ineffective.

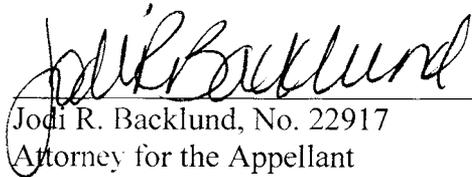
For all these reasons, Mr. Strand was denied the effective assistance of counsel. The commitment order must be reversed and the case remanded to the trial court. *In re Greenwood*, 130 Wn.App. 277 at 286-287, 122 P.3d 747 (2005).

CONCLUSION

For the foregoing reasons, the order of commitment must be reversed and the case remanded for a new trial.

Respectfully submitted on December 28, 2006.

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CERTIFICATE OF MAILING

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 28, 2006.



Jodi R. Backlund
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