

NO. 35399-7

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KEITH UTTER,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 MAR -6 PM 1:25
BY [Signature]

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The fundamental issue raised by this appeal is whether a criminal defendant's constitutional right not to be tried while incompetent gives rise to a corresponding constitutional right to receive mental health treatment at state expense.

In responding to the Department's opening brief, Respondent Keith Utter does not disagree with the Department's interpretation of the meaning or proper application of the relevant statutes, RCW 43.20B.330, RCW 10.77.090 and RCW 10.77.250. *See Resp't Br.* at 16-17. Instead, he argues that these statutes, and the administrative rules promulgated to implement them, violate an accused's constitutional right to "appear and defend" at the criminal trial, because he is being compelled to reimburse the Department for a portion of the cost of his hospitalization in order to "secure" this right. *Resp't Br.* at 34.

Mr. Utter's argument hinges on his erroneous assumption that the Department's sole purpose in treating a patient committed by the criminal court is to comply with the constitutional prohibition against proceeding to trial against an incompetent defendant. Like the trial court, Mr. Utter misunderstands the nature and purpose of mental health treatment

provided to patients at Western State Hospital and misconstrues Const. art. I, § 22.

II. ARGUMENT

A. A Party Challenging The Constitutionality Of A Statute Or Regulation Bears The Burden Of Proving Unconstitutionality Beyond A Reasonable Doubt

The Department agrees that this court's review of the constitutional challenge to RCW 10.77.250, RCW 43.20B.330 and WAC 388-855 is *de novo*. *Pierce County v. State*, 150 Wn.2d 422, 78 P.3d 640 (2003).

Mr. Utter claims the enhanced burden of proof in constitutional challenges to legislative enactments only applies where a statute or rule is challenged as being unconstitutionally vague. *Resp't Br.* 13-14. He is incorrect.

Statutes and agency regulations are presumed to be constitutional. *Born v. Thompson*, 154 Wn.2d 749, 764 n.15, 117 P.3d 1098 (2005); *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632, 949 P.2d 851 (1998). For this reason, all doubts are resolved in favor of constitutionality. *State ex rel. Washington State Public Disclosure Comm'n v. Washington Educ. Ass'n*, 156 Wn.2d 543, 556, 130 P.3d 352 (2006). Moreover, the party challenging the constitutionality of a statute or regulation bears the heavy burden of establishing its unconstitutionality

beyond a reasonable doubt. *State ex rel. Public Disclosure Comm'n*, 156 Wn.2d at 556 (challenge based on right to freedom of association); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 414, 120 P.3d 56 (2005) (challenge based on equal protection clause); *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999) (challenge based on constitutional restrictions on legislature's power to tax); *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998) (challenge based on constitutional prohibition against special legislation); *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996) (challenge based on constitution's single-subject requirement); *State v. Dixon*, 78 Wn.2d 796, 804, 479 P.2d 931 (1971) (challenged that statute was unconstitutionally vague); *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 339, 24 P.3d 424 (2001) (vagueness challenge); *Longview Fibre*, 89 Wn. App. at 632-33 (vagueness challenge).

Mr. Utter's conclusion that his burden of proof in this case is less than beyond a reasonable doubt is not supported by citation in his brief or by the law of this state. In reviewing the constitutionality of the legislative enactments and regulations challenged here, this court should require that Mr. Utter prove the statutes and rules unconstitutional beyond a reasonable doubt.

Mr. Utter is unable to meet that burden.

B. Western State Hospital's Focus In Providing For Patients Committed To The Hospital Is Treatment Of Mental Illness, Not Preparation For Criminal Proceedings

Respondent Utter claims a commitment to Western State Hospital (WSH) under RCW 10.77.090 is for the *sole* purpose of protecting the incompetent defendant from trial or of restoring the defendant's competency, so that he might exercise his right to appear and defend at trial. *Resp't Br.* at 19-20.

All patients involuntarily committed to a state hospital receive individualized treatment and adequate care. RCW 71.05.360 (civil commitment statute); RCW 10.77.210¹ (criminal commitment statute). All are expected to contribute to the cost of that treatment and care, to the extent they are able. RCW 43.20B.330; RCW 10.77.250.

The nature and purpose of the treatment of criminal defendants committed to WSH was recently described by this court in *Brame v. Western State Hosp.*, ___ Wn. App. ___, 150 P.3d 637 (2007), as follows:

Western State Hospital is a state-owned psychiatric hospital that evaluates and treats individuals with serious, long-term mental illnesses. RCW 72.23.020, .025. The Center for Forensic Services (the Center) is a locked, secure ward at the Hospital that houses patients committed to the Hospital

¹ See also RCW 10.77.120 (the Department "shall provide adequate care and treatment" to persons committed under RCW 10.77); RCW 10.77.2101 (memorializing the Legislature's intent that decisions regarding mental health treatment for persons committed under RCW 10.77 must be based on "a person's current conduct and mental condition rather than the classification of the [criminal] charges").

for an assessment of their competency to stand trial, those that have been found not guilty by reason of insanity, and a number of civilly committed patients. Although most of the Center's patients come to the Hospital through the criminal justice system, they have the right to "adequate care and individualized treatment." RCW 10.77.210(1). And hospital staff must make treatment decisions based on the patient's current conduct and mental condition rather than the charges that led to his or her commitment. RCW 10.77.2101.

All hospital patients participate in treatment plans administered by treatment teams, which may include psychiatrists, psychologists, licensed nurses, and social workers.

Brame, 150 P.3d at 639 (footnotes omitted).

WSH provides patients with mental health treatment designed to meet the individual needs of the patient. A need of every patient is restoration to a level of competency that will enable the patient to live as independently as possible and to adequately function in society. This may include the ability to appear and defend in a criminal proceeding.

C. Washington Const. Art. I, § 22 Prohibits Trying A Criminal Defendant While Incompetent; It Does Not Provide An Affirmative Right To Receive Mental Health Treatment That May Or May Not Restore Him To Competency At Taxpayer Expense

The constitutional provision involved here creates two relevant guarantees. The first is the right to personally appear and defend oneself in any criminal trial. The second is the right not to be compelled to advance money in order to secure the constitutional rights guaranteed a criminal defendant.

The pertinent language of Const. art. I, § 22 is:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ... *In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

(Emphasis added).

An accused's right to appear and defend in a criminal proceeding is guaranteed under both the federal and state constitutions. Const. amends. 5, 6; Const. art. I, § 22. This right includes the right not to be tried while incompetent. *Buchanan v. Kentucky*, 483 U.S. 402, 434 n.6, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987); *State ex rel. MacKintosh v. Superior Court*, 45 Wn. 248, 253-55, 88 P. 207 (1907).

It is only the second right – the emphasized language in the provision quoted above – that is critical to Mr. Utter's constitutional challenge.

1. A *Gunwall* Analysis is Not Required, As the Provisions of the State and Federal Constitutions Do Not Contain Parallel Language

Because the challenge here is based on a right guaranteed by the state constitution, it is appropriate for the court to determine whether the factors set out in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808(1986), must be considered before the court proceeds with the analysis. The *Gunwall* factors are applied to *parallel* provisions of the state and federal

constitutions to determine whether the Washington constitution provides greater protection than its federal counterpart. *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 931, 959 P.2d 1130, *review denied* 136 Wn.2d 1031 (1998).

The federal constitution does not have a parallel provision to the Const. art. I, § 22 language emphasized above. A *Gunwall* analysis is therefore not required in this case.

2. The Constitution Guarantees That An Accused Will Not Be Subjected To A Criminal Trial While Mentally Incompetent; It Does Not Guarantee A Right To Free Mental Health Treatment

Mr. Utter argues that this state's statutory scheme, requiring commitment of a criminal defendant to a state hospital for a competency evaluation and for competency restoration treatment, exists for the sole purpose of making the patient ready for trial or for protecting the incompetent patient from trial. *Resp't Br.* at 20.

He then concludes that because a criminal defendant may not be compelled to advance money in order to secure rights guaranteed under the Const. art. I, § 22 (such as the right not to be tried while incompetent), the effect of the commitment *statute* is to grant incompetent defendants a *constitutional* right to free mental health treatment. *Resp't Br.* at 19-20. This conclusion is not supported by any citation to authority, by law or by logic.

Mr. Utter notes that the state did not need to create a process for evaluation and treatment of allegedly incompetent criminal defendants,

but “wisely” chose that course. *Resp’t Br.* at 19-20. Once it chose that course, however, he contends that the Legislature created a statutory right to mental health treatment that enjoys constitutional protection.² *See Resp’t Br.* at 19-20.

It is this same statute, RCW chapter 10.77, that expressly permits the Department to seek reimbursement for the cost of the evaluation and treatment. RCW 10.77.250. This is the same statute that Mr. Utter argues violates Const. art. I, § 22.

As explained in the Department’s opening brief, there is nothing in Washington’s constitutional or common law history that suggests Const. art. I, § 22 was intended to give criminal defendants an affirmative right to receive mental health treatment at taxpayer expense. *See App. Br.* at 30-32. The statute also clearly is not intended to create a right to receive free mental health treatment. RCW 10.77.250.

² Mr. Utter also contends, without citation to authority, that the legislature enacted RCW 10.77.090 to “secure criminal defendants’ Art. I, Sec. 22 right not to be tried while incompetent.” *Resp’t Br.* at 19-20. It is RCW 10.77.050, not RCW 10.77.090, that provides “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” To the extent that the Legislature has codified a criminal defendant’s right to not be tried while incompetent, this is set forth in RCW 10.77.050, not RCW 10.77.090.

3. The Statutes And Regulations Authorizing The Department To Seek Reimbursement For The Cost Of Mental Health Treatment Provided To An Incompetent Criminal Defendant Who Is Not Restored To Competency Do Not Compel The Defendant To “Advance Money Or Fees To Secure” His Right Not To Be Tried While Incompetent

The thrust of Mr. Utter’s argument is that the statutes and regulations violate Const. art. I, § 22 by “compelling him to advance money or fees” in order to “secure” his right not to proceed to trial while incompetent. In Mr. Utter’s view, the “state’s chosen method to secure criminal defendants’ Art. I Sec. 22 right not to be tried while incompetent” is commitment to the state hospital for mental health treatment. *Resp’t Br.* at 20. If the Department seeks reimbursement for his treatment and care, Mr. Utter contends that it is compelling him to provide money in exchange for his constitutional right not to be tried while incompetent. *Resp’t Br.* at 20-34. Not surprisingly, Mr. Utter cites no authority for this contention.

Mr. Utter’s argument is flawed for at least two reasons. The first is that the focus of the Hospital’s care and treatment of a criminal defendant is not to assist him in appearing and defending at his criminal trial, nor to prevent his trial while he is incompetent. Instead, it is to provide mental health evaluation and treatment. The second is that a criminal defendant committed under RCW 10.77.090 is not compelled to pay money in exchange for his right not to proceed to trial while incompetent, as he has already been granted that right.

Moreover, as explained in the Department's opening brief, the facts of this case do not support the conclusion that Mr. Utter was compelled to reimburse the Department in order to "secure" his Const. art. I, § 22 right to "appear and defend"—to not proceed to trial while incompetent. *See App. Br.* at 32-34.

This court should reject Mr. Utter's claim that RCW 10.77.250, RCW 43.20B.330, and WAC chapter 388-855, the Department's rules enacted to implement these statutes, violate Const. art. I, § 22. The constitution does not prohibit the Department from seeking reimbursement for the cost of hospitalization from criminal defendants committed to a state hospital for mental health treatment to restore competency.

There is no dispute that criminal defendants do not have a constitutional right to receive such treatment, and there is no evidence that criminal defendants are required to reimburse the Department for such costs in order to "secure" their Const. art. I, § 22 rights.

Mr. Utter has failed to prove beyond a reasonable doubt that the statutes and rules violate Const. art. I, § 22. The superior court's decision to the contrary should be reversed.

D. The Superior Court Erred By Denying The Department's Motion To Supplement The Record With The Declaration Of Dr. Klein

Mr. Utter contends that the superior court properly denied the Department's motion to supplement the record because the Department

did not meet the standards for supplementation under RCW 34.05.562 and CR 59. *Resp't Br.* at 32-34.

Mr. Utter confuses the superior court's administrative review function with its authority to decide newly raised constitutional issues. Where, as here, a superior court sits in its appellate capacity and is addressing issues not raised during the proceedings below, and thus not developed in the record, the court abuses its discretion by refusing to consider undisputed evidence that goes to the core of the court's ruling. *See Okamoto v. Employment Security Dep't*, 107 Wn. App. 490, 494-95, 27 P.3d 1203 (2001).

In this case, Mr. Utter sought judicial review of an administrative decision upholding the Department's determination that he had an obligation to reimburse the Department for a portion of the cost of his hospitalization at Western State Hospital.³ However, Mr. Utter later requested that the superior court enter a declaratory judgment as to the constitutionality of the statutes and rules relied on by the Department in reaching this determination. CP 5. The superior court went beyond a mere review of the administrative decision below when it considered and

³ The sole request in Mr. Utter's petition for judicial review that the superior court "reverse the decision of the Administrative Law Judge and find that KEITH UTTER have no liability for cost of care at Western State Hospital while in a criminal competency proceeding." AR 128, ¶ 8.

ruled upon the constitutional validity of the Department's actions, as well as the relevant statutes and rules.

As such, the superior court abused its discretion by failing to admit and consider Dr. Klein's declaration. *See App. Br.* at 38-40. Because Mr. Utter's challenge to the constitutionality of RCW 10.77.250, RCW 43.20B.330 and WAC chapter 388-855 was raised for the first time on judicial review, the parties had no opportunity to fully develop the record during the administrative hearing.

The superior court abused its discretion when it refused to consider evidence related to Mr. Utter's constitutional claims and instead relied upon an incomplete record and its own misperceptions as to the nature and quality of treatment provided to persons committed to Western State Hospital for treatment under RCW 10.77.090.

III. CONCLUSION

For the reasons set forth above and in the Department's opening brief, the Court should reverse the decision of the superior court and uphold the Department's determination that Mr. Utter is financially responsible for a portion of the costs incurred in evaluating and treating his mental illness at Western State Hospital. In addition, the Court should reverse the superior court's conclusion that RCW 10.77.250, RCW

43.20B.330 and WAC chapter 388-855 are unconstitutional as applied to persons committed under RCW 10.77.090.

RESPECTFULLY SUBMITTED this 5th day of March 2007.

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CERTIFICATE OF SERVICE

I certify that I served a copy of Reply Brief of Appellant on all parties or their counsel of record on the date below as follows:

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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.

DATED this 5th day of March, 2007, at Tumwater, Washington.


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