

NO. 35927-8-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

CHRISTOPHER GAYLORD,

Respondent.

FILED
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STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

MALCOLM ROSS, WSBA # 22883
Assistant Attorney General
Attorney for Respondent
(206) 389-2011

ORIGINAL

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I. ASSIGNMENT OF ERROR

The trial court erred by entering an order appointing a second expert for Respondent Christopher Gaylord (Gaylord) in violation of RCW 71.09.050(2), and where no tenable reason existed for such appointment.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Whether the trial court committed an error of law by appointing Gaylord a second expert, where by law Gaylord is permitted a single expert absent a showing of “good cause.”

B. Whether the trial court abused its discretion by appointing Gaylord a second expert, where Gaylord was “expert shopping” because his first expert formed opinions unfavorable to Gaylord.

III. STANDARD OF REVIEW

A trial court’s error of law is reviewed de novo. *State v. Haney*, 125 Wn. App. 118, 123, 104 P.3d 36 (2005) (citing *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 525, 79 P.3d 1154 (2003)).

Alternatively, a trial court’s decision on appointment of an expert is subject to the “abuse of discretion” standard. *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001); *State v. Newcomer*, 48 Wn. App. 73, 94, 737 P.2d 1285 (1987). A court abuses its discretion

when its decision is based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

IV. STATEMENT OF THE CASE

On December 27, 2005, the State of Washington filed a petition seeking the civil commitment of Gaylord as a sexually violent predator (SVP). CP at 1-2. The State supported its allegations with a psychological evaluation of Gaylord that documented his extraordinary history of sexually deviant behaviors. CP at 17-22. On January 4, 2006, Gaylord stipulated that the State had established probable cause to believe that he met the criteria for civil commitment. CP at 42-44. The trial court ordered that Gaylord be detained and evaluated. CP at 44.

On November 22, 2006, Gaylord filed Respondent's Motion for Additional Expert (motion for second expert), with notice to the State. CP at 50. In its entirety, the motion for second expert read as follows:

Comes Now the Respondent, Christopher Gaylord, by and through his counsel of record, JOHN L. CROSS of the Law Office of Ronald D. Ness & Associates, and moves the Court for an order authorizing funds for a second psychiatric examination of Respondent.

This motion is based upon the files and records herein, CR 5 and RCW 71.09.050(2).

CP at 50. Gaylord did not provide any bases for granting his motion.

The State filed the Petitioner's Response to Respondent's Motion for Additional Expert. CP at 51-52. The State opposed Gaylord's motion, arguing that he had not presented good cause for appointment of a second expert. CP at 51-52.

Gaylord's Motion was heard on December 1, 2006. RP at 1. The trial court noted that the motion for second expert was "pretty short" and inquired, "How about the good cause?" RP at 2. Gaylord's counsel replied that the first expert had arrived at "findings that were not that different than the State's expert." RP at 2.

Counsel for the State opposed the motion, pointing out that RCW 71.09.050(2) provides for appointment of one expert with the language "an expert or professional person[.]" RP at 5. The State further argued that the Washington Administrative Code's (WAC) reimbursement rules require good cause for appointment of more than one expert for a respondent and that good cause had not been shown. RP at 4. Gaylord's counsel did not dispute this, stating, "I don't have any authority contrary to the WACs as stated." RP at 4.

The trial court nevertheless granted Gaylord's motion for second expert:

Court: I'll give you another expert, Mr., um, Cross. I'm going to do so out of abundance of caution for Mr. Gaylord. Like I say, he could be locked up the rest of

his life. And, while \$10,000 seems to me extreme, it's – when you're looking at somebody's life involved, I don't think that's . . .

Mr. Cross: May I, uh, send an order through the mail, your Honor?

Court: Yeah.

RP at 7. In its written order, the trial court appointed Dr. Richard Wollert, but made no additional findings to support the appointment of a second expert. CP at 63-78. Because a new evaluation by Dr. Wollert would take substantial time, the trial was continued to October 1, 2007. CP at 53.

V. ARGUMENT

A. **The Trial Court Committed an Error of Law by Appointing Gaylord a Second Expert in Violation of RCW 71.09.050(2) and WAC 388-885-010**

The Sexually Violent Predator Act at RCW 71.09.050(2) provides for the appointment of a single forensic expert for an SVP respondent. However, read together with WAC 388-885-010, the statute permits the trial court to appoint additional experts for “good cause.” In this case, however, Gaylord was expert shopping and the trial court appointed him a second expert without any showing of good cause. The trial court committed error by violating RCW 71.09.050(2) and WAC 388-885-010. Errors of law are not reviewed under the abuse of discretion standard; they are subject to de novo review. *Haney*, 125 Wn. App. at 123.

1. Washington law provides for the appointment of a single forensic expert for an indigent SVP respondent

As an indigent SVP respondent, Gaylord has a statutory right to a single expert for psychological evaluation services:

Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. . . . In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining **an expert or professional person** to perform an examination or participate in the trial on the person's behalf.

RCW 71.09.050(2) (in pertinent part; emphasis added). Under rules of statutory interpretation, the Legislature's choice of the singular article "an" indicates its intent that an indigent respondent be permitted a single expert at public expense. *State v. Leyda*, 157 Wn.2d 335, 346 n.9, 138 P.3d 610 (2006) (citing cases in which courts interpreted use of the singular article "a" in criminal statutes to authorize multiple units of punishment).

Gaylord's statutory right to choose his single expert goes beyond any due process right he might have. In criminal cases, where defendants raising a sanity issue have a due process right to expert assistance, that right does not include the privilege of choosing the expert. *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed.2d 53 (1985);

State v. Barnes, 58 Wn. App. 465, 472, 794 P.2d 52 (1990). *Ake* holds that:

[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. **This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.** Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

470 U.S. at 83 (emphasis added). Even a defendant in a capital murder case does not have a constitutional right to an evaluation by an expert of choice. *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990).

While Gaylord is limited by statute to a single forensic expert, this does not mean that he cannot obtain the services of other specialists, if he can establish that their assistance is required. If, for example, he had presented evidence that he suffers from organic brain damage and required an expert in that area, the trial court could have appointed him a neuropsychologist. Or, had he presented evidence of a debilitating medical condition that could lower his recidivism risk, the appointment of a medical expert could have been appropriate.

Thus, the Department of Social and Health Services has promulgated rules for reimbursing the fees of other experts, assuming that “good cause” is shown:

(3) “Evaluation by expert cost” means a county-incurred service fee directly resulting from the completion of a comprehensive examination and/or a records review, by a single examiner selected by the county, of a person:

....

(b) Alleged to be a “sexually violent predator” and who has had a petition filed; or

....

In the case where the person is indigent, “evaluation by expert cost” includes the fee for a comprehensive examination and/or records review **by a single examiner selected by the person examined. When additional examiners are approved by the trial judge for good cause, “evaluation by expert cost” includes the cost of additional examiners.**

WAC 388-885-010 (in pertinent part; emphasis added). When RCW 71.09.050(2) is read together with WAC 388-885-010, it is clear that any additional experts appointed by the trial court must be for “good cause.”

No law, however, permits an SVP respondent to engage in expert shopping. Gaylord was permitted a single forensic psychologist. The record is clear that he sought a second expert because his first had formed unfavorable opinions. Drs. Brown and Wollert are both forensic psychologists and both perform the same function. The trial court’s order permitted Gaylord to expert shop and was an error of law.

B. The Trial Court Abused Its Discretion by Appointing a Second Forensic Expert for Untenable Reasons

The trial court's order permitting Gaylord to engage in expert shopping, alternatively, constitutes an abuse of the trial court's discretion. The trial court erred by appointing Gaylord a second expert in the absence of "good cause," and where no tenable reason supported Gaylord's request. A trial court's ruling that is based on an error of law is an abuse of discretion. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 768, 82 P.3d 1223 (2004) (citing *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 355, 16 P.3d 45 (2000), *review denied*, 143 Wn.2d 1012, 21 P.3d 290 (2001)).

1. The trial court's reasons for appointing a second expert were untenable

Gaylord's sole basis for requesting a second expert was that his first expert's opinions "were not that different than the State's expert." RP at 2. Gaylord's right to a single expert at public expense does not include the right to a favorable opinion. *Ake*, 470 U.S. at 83; Harris, 949 F.2d at 1516 ("*Ake* does not guarantee access to a psychiatrist 'who will reach only biased or favorable conclusions.'") (quoting *Granviel v. Lynaugh*, 881 F.2d 185, 192 (5th Cir. 1989), *cert. denied*,

495 U.S. 963, 110 S.Ct. 2577, 109 L.Ed.2d 758 (1990)). This rule was recognized by the 9th Circuit even prior to *Ake*:

The fact that the first psychiatrist finds defendant to be legally sane does not create a necessity that a second psychiatrist be appointed. To hold otherwise could result in the defendant undergoing a series of psychiatric examinations until a favorable psychiatric report was filed with the court.

U.S. v. Valtierra, 467 F.2d 125, 126 (9th Cir. 1972) (citing *U.S. v. Maret*, 433 F.2d 1064, 1068 (8th Cir. 1970)). The rule is also universally recognized by persuasive authorities.¹

The trial court appointed a second expert for Gaylord in the mistaken belief that the possibility of indefinite confinement required an expert who could testify on Gaylord's behalf against civil commitment. Federal and state courts, however, have rejected the claim that there is a right to "effective assistance" from an expert, as there is from one's counsel. *See e.g., Harris*, 949 F.2d at 1517; *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir. 1989); *People v. Samayoa*, 15 Cal.4th 795, 837, 938 P.2d 2 (1997). The trial court erred.

¹ *Whittle v. State*, 518 So.2d 793, 794 (Al. App. 1987); *People v. Samayoa*, 15 Cal.4th 795, 837, 938 P.2d 2 (1997); *State v. Barker*, 564 N.W.2d 447 (Ia. App. 1997); *Crawford v. Com.*, 824 S.W.2d 847, 850 (Ky. 1992); *Com. v. DeWolfe*, 449 N.E.2d 344, 349 (Mass. 1983); *Com. v. Bridges*, 757 A.2d 859, 867 (Pa. 2000); *State v. Barnett*, 909 S.W.2d 423, 431 (Tn. 1995); *Funk v. Com.*, 379 S.E.2d 371, 373 (Va. App. 1989); *Pruett v. Thompson*, 771 F.Supp. 1428, 1441-42 (E.D.Va 1991), *aff'd* 996 F.2d 1560 (4th Cir. 1993).

The trial court's decision is subject to the "abuse of discretion" standard. *Fleming*, 142 Wn.2d at 863; *Newcomer*, 48 Wn. App. at 94. A court abuses its discretion when its decision is based on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258. Here, the trial court's decision was based on untenable grounds or reasons: Gaylord's dissatisfaction with his first expert's opinions and the possible consequences for Gaylord if he was committed as an SVP. Under these circumstances, the trial court clearly abused its discretion.

Asked by the trial court to articulate good cause for appointment of a second expert, Gaylord's counsel could only point to the first expert's unfavorable opinions. RP at 2. The trial court, in its written order, provided no basis whatsoever for its decision. CP at 63-78. The trial court's only reason for granting Gaylord's motion was stated in its oral decision:

I'll give you another expert, Mr., um, Cross. I'm going to do so out of abundance of, uh, caution for Mr. Gaylord. Like I say, he could be locked up the rest of his life. And, while \$10,000 seems to me extreme, its – when you're looking at somebody's life involved, I don't think that's. . .

RP at 7. Thus, the only reasons in the record for granting Gaylord's motion were his dissatisfaction with his first expert and the possibility of indefinite confinement. These were "untenable grounds or reasons." *Powell*, 126 Wn.2d at 258.

The possibility of being confined indefinitely cannot constitute a tenable reason for appointment of a second expert. Every SVP respondent faces that possibility. If affirmed, the trial court's decision effectively creates a *per se* rule granting an additional expert to any indigent SVP respondent who dislikes his first expert's opinions.

Even in cases where a defendant faces the possibility of the death penalty, he does not have a constitutional right to choose his sole expert. *Harris*, 949 F.2d at 1516. Where a death penalty defendant does not have such a right, an SVP respondent cannot be granted a second expert simply because he dislikes his first and he faces the possibility of indefinite confinement.

C. The Trial Court's Error Prejudices the State

The State has been prejudiced by the trial court's abuse of discretion. The trial court's order greatly changed the status quo and will markedly increase the time and expense of the litigation. This case was on the eve of trial or resolution and now will be delayed indefinitely. Gaylord's expenses for expert services will more than double, will perhaps triple or quadruple. The State will have to prepare for, depose and cross-examine an expert who should never have been appointed.

The trial court's appointment of Dr. Wollert virtually guarantees that trial now will be a lengthy and costly affair. That this is so is evident

from the several previous cases where this Court and others have reviewed Dr. Wollert's unique practices and opinions.

For example, where Dr. Wollert's testimony was presented to support a request for a new commitment hearing, this Court rejected his opinions that an SVP: (1) had finished treatment, where he had completed only three of six treatment phases; (2) did not suffer from the diagnoses he had been adjudicated as suffering from; and (3) was no longer dangerous because he was two years older than when he was committed. *In re Detention of Elmore*, 134 Wn. App. 402, 415-20, 139 P.3d 1140 (2006), *review granted*, 158 Wn.2d 1025, 152 P.3d 347 (2007).

In another case where an SVP respondent sought a less restrictive alternative, the housing he proposed for himself would not accept him because the Department of Corrections End of Sentence Review Committee and local law enforcement had determined that he was a level III sex offender. *In re Detention of Enright*, 131 Wn. App. 706, 712-13, 128 P.3d 1266 (2006). Dr. Wollert, however, opined that the SVP was actually a level II offender because "out-of-date risk assessment principles" had been used to designate him a level III. *Id.* at 712. Division III rejected that argument. *Id.* at 715-16.

Recently, this Court rejected more of Dr. Wollert's unique opinions, relied upon by respondents seeking new commitment hearings.

In one case, Dr. Wollert opined that an SVP had a recidivism risk of 10 percent, based on a single Wisconsin study, and that the SVP had never met the statutory requirements for commitment. *In re Detention of Fox*, 138 Wn. App. 374, 383-84, 158 P.3d 69 (2007). He also opined that a 61-year-old SVP was no longer dangerous because he was two years older than when he was committed, though he had last offended at age 56. *Id.* at 399-400. This Court rejected both opinions as a basis for a new trial. As even the dissenting Judge in that case noted, “The legislature is clearly concerned about Dr. Wollert’s proposed testimony.” *Id.* at 408 n.21 (Armstrong, J., dissenting).

It is therefore clear that the status quo has markedly changed and the trial in this matter will likely be a highly contested, long-drawn-out affair. Appointment of Dr. Wollert for untenable reasons has prejudiced the State. The trial court’s order should be reversed and the case remanded with instructions that Gaylord must proceed with the one expert to whom he is statutorily entitled.

VI. CONCLUSION

Gaylord exercised his statutory right to choose his own expert. When that expert formed opinions unfavorable to him, he sought a second expert. The trial court granted his request based on untenable grounds.

The trial court abused its discretion and the order appointing Dr. Wollert as Gaylord's second expert should be reversed.

RESPECTFULLY SUBMITTED this 27th day of August, 2007.

ROBERT M. MCKENNA
Attorney General


MALCOLM ROSS, WSPA #22883
Assistant Attorney General
Attorneys for Petitioner

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CHRISTOPHER GAYLORD,

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DECLARATION OF
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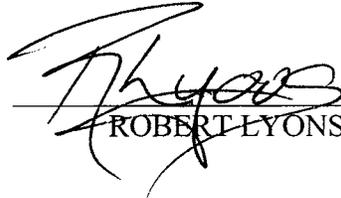
I, Robert Lyons, declare as follows:

On August 27, 2007, I deposited in the United States mail true and correct cop(ies) of Appellant's Opening Brief, postage affixed, addressed as follows:

John Cross
559 Bay Street
Port Orchard, WA 98366

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 27, 2007, at Seattle, Washington.


ROBERT LYONS

ORIGINAL