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STATE OF WASHINGTON
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DEPUTY

No. 37359-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

John Coppin,

Appellant.

Lewis County Superior Court

Cause No. 05-2-01742-1

The Honorable Judge Richard Brosey

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

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ARGUMENT

I. THE COMMITMENT ORDER VIOLATED MR. COPPIN'S STATUTORY AND CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

The interpretation of a statute is an issue of law, reviewed *de novo*.

In re Detention of Strand, ___ Wn.App. ___, ___, 217 P.3d 1159, 1162 (2009). Procedural statutes are liberally construed to preserve a party's right to a fair trial. *State v. Boiko*, 138 Wn. App. 256, 156 P.3d 934 (2007). RCW 71.09 must be strictly construed because it curtails civil liberties. *In re Detention of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008).

The application of a court rule is an issue of law, reviewed *de novo*. *Niccum v. Enquist*, ___ Wn.App. ___, ___, 215 P.3d 987, 989 (2009). Questions involving allegations of constitutional violations are also reviewed *de novo*. *Strand*, at 1162.

Respondent erroneously argues for an "abuse of discretion" standard. Brief of Respondent, p. 10, citing *Balise v. Underwood*, 71 Wn.2d 331, 428 P.2d 573 (1967). According to Respondent, a trial court

has discretion to grant or deny a jury demand “after a previous waiver...”¹
Brief of Respondent, p. 10.

Underwood does not apply to this case. In *Underwood*, the Supreme Court examined a party’s late demand for a jury under *former* RCW 4.44.100 (1967). The case did not address the constitutional right to a jury trial secured by Wash. Const. Article I, Section 21; nor did it address jury demands under RCW 71.09.050.

Instead of addressing Mr. Coppin’s argument—that a trial judge lacks discretion to reject a jury demand made under RCW 71.09.050(3)—Respondent assumes that a trial judge has such discretion. Brief of Respondent, p. 10. If one assumes that the trial court has discretion (as Respondent does here), it is no great feat to argue in favor of upholding the exercise of discretion. But Respondent’s assumption—that a trial judge has discretion to reject a late jury demand—is the subject of Mr. Coppin’s argument. *See* Appellant’s Opening Brief, pp. 9-13. Instead of ignoring the issue, Respondent would have been better served by addressing it directly.

¹ In fact, *Underwood* did not involve an explicit waiver, and did not address a jury demand made following an explicit waiver. *See Underwood*, at 340.

Because this case involves (1) the interpretation of a statute, (2) the applicability of a court rule, and (3) the violation of a constitutional right, the correct standard of review is *de novo*. *Strand*, at 1162; *Enquist*, at 989.

B. RCW 71.09.050 permits a person facing civil commitment to orally demand a jury at any time prior to trial, even after entering a jury waiver.

RCW 71.09.050 provides (in part) that a detainee facing civil commitment “shall have the right to demand” a jury trial; a bench trial is authorized only “[i]f no demand is made...” RCW 71.09.050(3). As a procedural statute, RCW 71.09.050 must be interpreted liberally to preserve Mr. Coppin’s right to a fair trial. *Boiko, supra*. Furthermore, because RCW 71.09 curtails civil liberties, it must be strictly construed in favor of Mr. Coppin. *Martin, supra*. Finally, civil incarceration achieved by means other than strict compliance with the procedures set forth in RCW 71.09 deprives a person of liberty without due process of law. *Martin*, at 511; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3.

Applying these rules, and giving the words in the statute their plain and ordinary meaning, RCW 71.09.050(3) must be read to require a jury trial whenever a detainee makes a demand—regardless of the timing of the demand, regardless of whether the demand is oral or in writing, and

regardless of whether or not the detainee has previously waived jury.

Boiko, supra; Martin, supra; see also State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008) (words in a statute should be given their plain and ordinary meaning, unless a contrary intent is evident).

Mr. Coppin demanded a jury trial on the morning of trial. RP (1/22/08) 4, 12. Under RCW 71.09.050, this was his right. The lateness of the demand, the absence of a written demand, and the prior waiver are irrelevant; the demand was authorized under the plain language of the statute. RCW 71.09.050(3). By failing to convene a jury, the trial court violated RCW 71.09.050, infringed Mr. Coppin's "inviolable" right to a jury trial under Wash. Const. Article I, Section 21, and denied him due process of law. *Martin, supra*.

Respondent does not dispute Mr. Coppin's interpretation of RCW 71.09.050. Nor does Respondent attempt to argue that the statute provides the trial court discretion to deny a detainee's request for a jury. Brief of Respondent, pp. 10-11. Instead, as previously noted, Respondent simply assumes the trial court has such discretion, and argues that such discretion was not abused. Brief of Respondent, pp. 10-11.

Given the Court's duty to interpret the statute in Mr. Coppin's favor—because it is a procedural statute, and because RCW 71.09 curtails civil rights—Respondent's assumption is unwarranted. RCW 71.09.050

does not grant a trial judge discretion to deny a detainee's demand for a jury trial.

The trial court should have convened a jury, as required under RCW 71.09.050. Because the trial judge failed to comply with that provision, Mr. Coppin's commitment violated his statutory right to a jury trial, infringed his state constitutional right to a jury trial, and denied him due process of law. The commitment order must be vacated and the case remanded to the trial court for a new trial. *Martin, supra*.

C. Civil Rule 38 does not apply to SVP proceedings because the rule is in conflict with RCW 71.09.050(3).

The Rules of Civil Procedure do not apply where they are "inconsistent with rules or statutes applicable to special proceedings..." such as cases brought under RCW 71.09. CR 81(a); *In re Detention of Young*, 163 Wn.2d 684, 693, 185 P.3d 1180 (2008). CR 38, which governs jury demands in most civil cases, is inconsistent with RCW 71.09.050 for three reasons. Accordingly, CR 38 does not govern proceedings under RCW 71.09.

First, RCW 71.09.050 does not require a written demand, does not set a deadline for the demand, does not require filing and service of the demand, does not require payment of a jury fee, and does not explicitly mention waiver of the right (although failure to make the demand will

result in a bench trial.) By contrast, CR 38 requires a written jury demand that must be filed and served at the trial setting and accompanied by payment of a fee. Under CR 38, waiver is presumed from failure to timely file and serve a demand or failure to pay the fee.

Second, RCW 71.09.050 grants the right to demand a twelve-person jury. RCW 71.09.050 (3). By contrast, CR 38 allows for juries of six or twelve.

Third, under RCW 71.09.050, a party may demand that “the trial” be in front of a jury. RCW 71.09.050(3). CR 38, on the other hand, permits a party to demand that a jury to hear “any issue triable of right by a jury,” thus allowing for bifurcated trials heard by judge and jury.

For all these reasons, CR 38 is inconsistent with RCW 71.09.050. Because of these inconsistencies, CR 38 does not apply to proceedings brought under RCW 71.09. CR 81(a). Respondent’s argument to the contrary relies on a misunderstanding of the plain language of RCW 71.09.050. Brief of Respondent, pp. 11-13. According to Respondent, the statute is “silent regarding the procedures for making such a demand.” Brief of Respondent, p. 11. This is incorrect.

As noted previously, the statute must be construed in favor of the detainee. *Martin, supra*; *Boiko, supra*. Absent a contrary intent, the words in the statute must be given their plain and ordinary meaning.

Lilyblad, supra. By its plain, direct, and mandatory language, the statute grants the right to a jury trial without qualification: a detainee “shall have the right to demand that the trial be before a twelve-person jury...” RCW 71.09.050(3).

The statute is not “silent” with regard to the procedure to be used: instead, a detainee need only make a demand, and a jury shall be provided. RCW 71.09.050. Nor is the statute “consistent” with CR 38; the civil rule has very specific terms, limitations, and qualifications not required under the statute. The statute’s simplicity is its virtue: it provides strong protection to the parties’ interest in having a jury hear civil commitment cases. Respondent’s argument rests on ignoring this core value.

CR 38 does not apply to proceedings under RCW 71.09, and cannot limit a detainee’s right to demand a jury trial. Mr. Coppin’s demand for a jury should have been honored, and the trial judge’s failure to convene a jury requires reversal. The commitment order must be reversed, and the case remanded for a jury trial. RCW 71.09.050(3).

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. COPPIN HAD BEEN CONVICTED OF A “CRIME OF SEXUAL VIOLENCE.”

A. Standard of Review

The interpretation of a statute is an issue of law, reviewed *de novo*. *Strand, at* _____. RCW 71.09 must be strictly construed because it curtails

civil liberties. *Martin*, at 508. A court construing RCW 71.09 must choose a “narrow, restrictive construction” over a “broad, more liberal interpretation.” *Martin*, at 510.

Evidence is insufficient to support civil commitment unless, when viewed in a light most favorable to the state, it would persuade a fair-minded rational person that the requirements for commitment had been established beyond a reasonable doubt. *In re Detention of Sease*, 149 Wn.App. 66, 79, 201 P.3d 1078 (2009).

B. RCW 71.09 differentiates between “sexually violent offenses” and “crimes of sexual violence.”

The primary objective of statutory construction is to ascertain and carry out the intent of the legislature. *Strand*, at _____. Principles of statutory interpretation require a “comprehensive reading” of RCW 71.09, deriving legislative intent from “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.” *Id.*, at _____ (internal quotation marks and citations omitted). This requires that RCW 71.09 provisions be read in context, with individual words understood in conjunction with other words with which they are associated, rather than in isolation. *Strand*, at _____ (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)).

Where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004) . RCW 71.09 uses two different phrases to describe a predicate offense under RCW 71.09: “sexually violent offense” and “crime of sexual violence.” See RCW 71.09.020(17) and RCW 71.09.020(18). The former (“sexually violent offense”) is used repeatedly throughout the statute; the latter (“crime of sexual violence”) occurs only in the definition of “sexually violent predator.” RCW 71.09.020(18); see also RCW 71.09.020(17), RCW 71.09.025; RCW 71.09.030; RCW 71.09.060; RCW 71.09.140. Since the legislature has used different language in RCW 71.09, different meanings are intended. *Costich*.

The phrase “sexually violent offense” has a specific definition:

“Sexually violent offense” means ... rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; [an equivalent offense under a prior statute, federal law, or from another jurisdiction]; an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act [was done with sexual motivation]; or... an attempt, criminal solicitation, or criminal conspiracy to commit [one of the listed offenses].

RCW 71.09.020(17). By contrast, RCW 71.09 does not define the phrase “crime of sexual violence.” Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006). Applying this rule and the requirement that RCW 71.09 be strictly construed, the phrase “crime of sexual violence” must be given the most restrictive meaning derived from the ordinary definition of each word. Assuming a detainee’s predicate offenses qualify as sexual crimes, only the meaning of the word “violence” must be examined. The dictionary definition of violence is “swift and intense force,” or “rough or injurious physical force.” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. 2006.

Examining these phrases in context (as required by the Supreme Court in *Strand*), the reason for the difference becomes apparent. Initial screening-type questions are made with reference to the list contained in RCW 71.09.020(17) (the definition for “sexually violent offense.”) Thus, the prosecuting attorney must be notified prior to release of an inmate who has been convicted of a sexually violent offense and who appears to qualify for commitment under RCW 71.09. *See* RCW 71.09.025. Similarly, the prosecuting attorney may file a petition prior to release of

any inmate who has been convicted of a sexually violent offense. *See* RCW 71.09.030; RCW 71.09.060. Finally, notice must be provided whenever a person committed under RCW 71.09 escapes or is conditionally released; such notice must be provided to the victims of the sexually violent offense and/or the sheriff of the county where the offense was committed. RCW 71.09.140.

These provisions, which use the phrase “sexually violent offense,” do not require a factual determination as to whether or not actual violence was used in the commission in the offense. Instead, any decisions can be made simply by referring to the list of offenses contained in the definition of “sexually violent offense.” RCW 71.09.020(17).

By contrast, the jury must determine whether the predicate offense qualifies as a “crime of sexual violence.” RCW 71.09.020(18); RCW 71.09.060(1). The fact-finder must decide whether the predicate offense was in fact accomplished by “swift and intense force,” or “rough or injurious physical force.” RCW 71.09.020(18); *Dictionary.com*. The jury may not rely on a list of offenses, but must examine the underlying facts and determine whether actual violence was employed in the predicate offense under consideration.² This is consistent with the statute’s purpose:

² Some sexually violent offenses—such as those involving forcible compulsion—will by definition involve actual violence. Others, however—such as Child Molestation or

to address the risks posed by the “small but extremely dangerous group of sexually violent predators”—those who are likely to engage in “repeat acts of predatory sexual violence”—and not the larger pool of nonviolent sexual predators. *See* RCW 71.09.010.

Thus the legislature has provided an objective (list-based) standard for certain determinations, and a case-specific, factual, and judgment-based standard for the jury’s determination of whether civil commitment is appropriate. Respondent does not address the two standards, and does not examine the legislature’s choice of different phrases. Brief of Respondent, pp. 13-16. Instead, Respondent assumes that the phrase “sexually violent offense” and the phrase “crime of sexual violence” mean the same thing. *See* Brief of Respondent, pp. 15-16 (“Under the plain language... a conviction for statutory rape in the first degree meets the definition of a ‘crime of sexual violence’ and qualifies as a predicate offense...”). Respondent does not explain why the legislature would use different language to mean the same thing; nor does Respondent explain how its interpretation of the statute is consistent with the basic rule that the

Residential Burglary with Sexual Motivation—might be accomplished without actual violence.

legislature intends different meanings when it uses different language within the same statute. *Costich, at 475-476.*

C. Although the state proved that Mr. Coppin had been convicted of a sexually violent offense, it did not prove that he had been convicted of a “crime of sexual violence.”

The state proved that Mr. Coppin had been convicted of statutory rape in the first degree. RP (1/23/08) 49-50; Exhibits 2 and 3, Supp. CP.; *see also* Finding No. 3, CP 6; Conclusion No. 3, CP 8. The offense qualifies as a “sexually violent offense” under the statute. RCW 71.09.020. However, statutory rape is not necessarily a “crime of sexual violence.” To establish that Mr. Coppin had been convicted of a “crime of sexual violence,” the state was required to produce some evidence that the statutory rape was accomplished by “swift and intense force,” or “rough or injurious physical force.” In other words, the state was required to produce facts supporting its allegation that Mr. Coppin’s prior sexually violent offense qualified as a “crime of sexual violence.”

In the absence of proof that Mr. Coppin had been convicted of a “crime of sexual violence,” the evidence was insufficient to establish beyond a reasonable doubt that he was a sexually violent predator. RCW 71.00.060; RCW 71.09.020. The commitment order must be reversed and the Petition dismissed.

III. BECAUSE MR. COPPIN WAS ILLEGALLY DETAINED AT THE TIME THE PETITION WAS FILED, THE STATE SHOULD HAVE BEEN REQUIRED TO PLEAD AND PROVE A RECENT OVERT ACT; ITS FAILURE TO DO SO REQUIRES DISMISSAL.

Mr. Coppin rests on the argument set forth in his Opening Brief.

IV. THE ADMISSION OF UNLAWFULLY OBTAINED EVIDENCE VIOLATED MR. COPPIN'S CONSTITUTIONAL RIGHTS UNDER WASH. CONST. ARTICLE I, SECTION 7.

Mr. Coppin rests on the argument set forth in his Opening Brief.

V. THE SUPREME COURT'S DECISION IN *STRAND* CONTROLS MR. COPPIN'S CLAIM THAT HIS EVALUATION VIOLATED RCW 71.09.

In light of the Supreme Court's decision in *Strand, supra*, Mr.

Coppin concedes the issue.

VI. IF MR. COPPIN'S CLAIM REGARDING THE VIOLATION OF HIS CONSTITUTIONAL RIGHT TO PRIVACY IS NOT PRESERVED FOR REVIEW, THEN MR. COPPIN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Coppin rests on the argument set forth in his Opening Brief as it pertains to the violation of his constitutional right to privacy.

In light of *Strand*, he concedes that his attorney was not required to challenge his prefiling interview.

VII. THE SUPREME COURT'S DECISION IN *STRAND* CONTROLS MR. COPPIN'S CLAIM THAT HE IS ENTITLED TO A VOLUNTARINESS HEARING.

In light of the Supreme Court's decision in *Strand, supra*, Mr. Coppin concedes the issue.

CONCLUSION

For the foregoing reasons, the commitment order must be reversed and the Petition dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on December 8, 2009.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Marek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

John Coppin
McNeil Island Corrections Center
P. O. Box 88600
Steilacoom, WA 98388

and to:

Attorney General's Office
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188

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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 8, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant