

No. 39954-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

DAVID MOSTELLER,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE COURT'S DISREGARD FOR ITS OBLIGATIONS WHEN ORDERING FORCIBLY ADMINISTERED MEDICATIONS DENIED MOSTELLER DUE PROCESS

a. The State claims the court has no independent obligation to follow constitutionally mandated procedures for an incompetent person accused of a crime. The prosecution correctly sets forth a portion of the law when the State seeks to forcibly medicate a person so that the person may become competent to stand trial. Response Brief, at 8-9.

As the State concedes, involuntarily administered medications may be ordered by a court only in limited circumstances, after the State proves (1) “that important government interests are at stake”; (2) “that involuntary medication will significantly further those concomitant state interests”; (3) “that involuntary medication is necessary to further those interests”; and (4) “that administration of the drugs is medically appropriate.” Sell v. United States, 539 U.S. 166, 180-83, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) (emphases in original). And the State agrees that its burden of proof for each element justifying involuntary

medication is clear, cogent, and convincing evidence. Response Brief, at 9.

These mandatory procedures exist because an individual has a significant liberty interest inherent in the due process clause in avoiding the forced administration of psychotropic medication. Sell, 539 U.S. at 180; Riggins v. Nevada, 504 U.S. 127, 134, 112 S.Ct. 810, 118 L.Ed.2d 479 (1992). A judicial order, standing alone, does not negate a person's due process rights.

The court ignored its obligations under Sell and the State made no effort to meet its burden of proof. Mosteller did not agree to the forced medications. First, the psychologist noted Mosteller was adamant about not taking medications voluntarily. CP 70, 83. Second, his attorney did not agree that the State should force him to take medications against his will. The attorney appears to have noted the entry of the court order without comment, but also without joining in the request.

The obligation to conduct a Sell hearing falls on the court and prosecution. Mosteller is not required to request such a hearing.

The State insists that Mosteller, having been found incompetent and resisting the State's efforts at forcible medication,

waived his right to have the court determine whether there was a sufficient basis for involuntary medications by failing to object to the court's procedure. Yet the State cites no case law placing the burden on the incompetent defendant to request a Sell hearing. Rather, case law places the onus of following the mandated Sell procedure squarely on the court, and the burden of proof clearly on the prosecution.

“Under Harper,<sup>1</sup> forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness.” Riggins, 504 U.S. at 135. In Riggins, because the trial court had permitted forced medication of a person in the course of criminal proceedings, without taking account of his “liberty interest,” and with a consequent possibility of trial prejudice, the Supreme Court reversed his conviction and remanded for further proceedings.

The constitution permits involuntarily administered antipsychotic drugs “only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive

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<sup>1</sup> Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

alternatives, is necessary significantly to further important governmental trial-related interests.” Sell, 539 U.S. at 179. The failure to follow these mandatory procedures denied Mosteller his due process right to refuse the forced administration of medications.

b. The State’s mootness argument ignores the fundamental unfairness of being tried after the court improperly orders involuntary administration of medication. The prosecution claims Mosteller cannot complain of having been forced to take antipsychotic medications because his trial is over. This argument simply ignores the due process rights at stake. In Riggins, the Supreme Court agreed with the accused person that the involuntary administration of medications denied him a full and fair trial. 504 U.S. at 133. The error here is the same. Mosteller was denied his right to a fair trial by virtue of having been forced to take medications he adamantly did not wish to take, and in doses larger than he desired. CP 83, 107. The relief that is available to him is a new trial conducted in accordance with his right to due process, and thus, the case is not moot.

c. The State's harmless error analysis is directly contrary to *Riggins*. In *Riggins*, the Supreme Court held, "Efforts to prove or disprove actual prejudice from the record before us would be futile," and it would be "purely speculative" to guess the outcome of the trial had the court not ordered involuntarily administered medications. 504 U.S. at 137. Thus, "[w]e accordingly reject the dissent's suggestion that *Riggins* should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril." Id.

Here, the reason the State requested involuntary medications was because Mosteller did not wish to take them. The court's improper order that the State involuntarily medicate him to restore his competency to stand trial, entered without the mandatory process he was due before the unwarranted intrusion into his liberty, requires reversal. *Riggins*, 504 U.S. at 137-38. Even though the Supreme Court has spelled out the criteria for forcibly medicating an individual facing trial, the court's failure to engage in any analysis whatsoever denied Mosteller his right to due process of law.

2. THE PROSECUTION PROPERLY CONCEDES SENTENCING ERRORS BUT INSISTS ON FORCIBLY MEDICATING MOSTELLER

a. The State correctly concedes that the court imposed an incorrect term of community custody. The prosecution properly agrees that the community custody range for third degree assault at the time of the offense was 9 to 18 months. Response Brief at 25; WAC 437-20-010. The 27 month term of community custody imposed by the trial court must be corrected on remand.

b. The State misunderstands the offender score error. The judgment and sentence lists the criminal history used to calculate Mosteller's offender score. It lists six prior adult felony convictions, but finds Mosteller has an offender score of "7." CP 12-13. The court did not check any box indicating there is a basis to add an additional point.

The prosecution defends the sentence imposed on the ground that it had also alleged Mosteller should receive an additional point for being on community custody. But the judgment and sentence does not find Mosteller was on community custody.

The judgment and sentence is the final sentencing order establishing the terms of the sentence. In re Restraint of West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005). It is invalid on its face

if the four corners of the document do not justify the sentence imposed. West, 154 Wn.2d at 207; In re Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). The court's sentencing order is invalid on its face, because it uses a "7" as Mosteller's offender score but only lists "6" possible points that could count in his criminal history.

Where the judgment and sentence does not authorize any additional criminal history or reason to elevate Mosteller's sentence, the judgment and sentence is invalid on its face and Mosteller's sentence exceeds the standard range. See State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). The necessary remedy is to remand the case for a standard range sentence. Id.

c. The court's overly broad treatment order as a community custody condition, including involuntary medications, exceeded the court's authority. The prosecution repeatedly asserts that Mosteller acknowledged his mental health problems at the sentencing proceeding, which is true. But Mosteller never asked the court to order him to take medications as a condition of community custody.

The State essentially claims that this order of requiring Mosteller to take medications is different than the pretrial order,

and may be imposed after finding Mosteller to be dangerous and in need of medications under Harper. This argument fails for several reasons.

First, a community custody condition contains many punitive consequences and is not a civil order entered for purposes of prison discipline as in Harper. 494 U.S. at 225. Under RCW 9.94A.631(1), "If an offender violates any condition or requirement of a sentence," offender may be arrested without a warrant; if arrested, the offender must be jailed. Under RCW 9.94A.714(1), any offender who is found to have violated conditions of community custody on three occasions must be remanded to full custody and must serve the remainder of the sentence in total confinement. See State v. Madsen, 153 Wn.App. 471, 475, 228 P.3d 24 (2009), review denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010) (discussing mandatory nature of this community custody provision). Thus, any violation of the court's order causes mandatory and significant penal sanctions.

Second, Harper also requires specific findings as to the need for forced medications. 494 U.S. at 232. The person must have serious mental illness and be dangerous to himself or others so that forced medications is in the person's medical interest.

Here, the court made no findings and did not instruct the treatment providers to ensure Mosteller was not incarcerated for refusing medications that were not strictly necessary to insure he was not dangerous.

The court's overly broad ruling with significant penal consequences must be stricken and narrowly tailored to the circumstances of the case.

d. The remaining errors should be evaluated at a new sentencing hearing. The State cryptically concedes that there were "typographical" errors in the sentencing documents that may be corrected on remand. Response Brief at 36. Mosteller asserts that the errors identified in the Opening Brief must be corrected to the extent the court has authority to do so, including the apparent "wash out" of one of Mosteller's prior convictions.

3. THE PROSECUTION'S FAILURE TO FILE  
MANDATORY WRITTEN FINDINGS  
SUBSTANTIALLY DELAYS APPELLATE REVIEW  
AND SHOULD NOT BE TOLERATED.

The prosecution agrees that CrR 6.1(d) requires written findings of fact but faults Mosteller for failing to remind the State of this unambiguous post-trial obligation under the court rule.

Response Brief at 42.

The State's approach to written findings confuses the role of the appellate court. Mosteller has the constitutional right to a meaningful appeal. Wash. Const. art. I, § 22 (guaranteeing "right to appeal in all cases"); See Seattle v. Klein, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007). The prosecution flaunts that right by refusing to comply with the mandatory rule requiring written findings, failing to obtain those findings even during the appeal, and seeking to have all the evidence reviewed *de novo* but in the light most favorable to the State. Since the trial court never explained the factual basis for its ruling and the prosecution refuses to submit written findings, the convictions should be reversed and dismissed.

Not only is delay itself a component of the prejudice that may attach due to the late filing of findings of fact, the prosecution's failure to comply with mandatory court rules smacks of the appearance of unfairness and merits reversal. See e.g., State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (delay due to prosecutorial mismanagement may cause sufficient prejudice to merit dismissal under CrR 8.3); State v. Witherspoon, 60 Wn.App. 569, 572, 805 P.2d 248 (1991) (late findings violate appearance of fairness and require reversal where remand is inadequate remedy based on lengthy delay and defendant's continued custody). In

Washington, the right to a fair trial requires not only the due process requirements such as the right to counsel and “the right to appeal in all cases,” but also the right to justice that is “administered openly and without unnecessary delay.” Wash. Const. art. I, §§ 10<sup>2</sup> and 22.<sup>3</sup>

Since the prosecution refuses to comply with the requirements of CrR 6.1(d), even when alerted to the absence of findings on appeal, this Court should reverse the conviction and dismiss the charge against Mosteller, based on the denial of his right to a meaningful appeal. The delay caused by remand for entry of findings of fact, followed by the likelihood of further appeal, is simply unfair when the prosecution had ample opportunity to avoid this delay.

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<sup>2</sup> Article I, section 10 provides, “Justice in all cases shall be administered openly, and without unnecessary delay.”

<sup>3</sup> Article 22 provides in pertinent part, “In criminal prosecutions the accused shall have . . . the right to appeal in all cases.”

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Mosteller respectfully requests this Court remand his case for further proceedings.

DATED this 21st day of July 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 39954-7-II
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	)	
DAVID MOSTELLER,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF JULY, 2010.

X \_\_\_\_\_ *gral*

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