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No. 50077-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Ausagetaitama Faga,

Appellant.

Pierce County Superior Court Cause No. 12-2-08307-5

The Honorable Judge Jerry T. Costello

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to allow Mr. Faga to purge his contempt.

ISSUE 1: A contemnor must be allowed to purge a finding of civil contempt. Did the trial court err by refusing to lift Mr. Faga's contempt sanction after he unequivocally agreed to comply with the court's order?

2. The trial court erred by conditioning Mr. Faga's ability to purge his contempt on the actions of third parties.

ISSUE 2: A court may not impose purge conditions that are dependent on the actions of third parties. Did the trial court err by conditioning Mr. Faga's ability to purge his contempt on the actions of third parties who are beyond his control?

3. The trial court improperly modified Mr. Faga's purge conditions to make them more onerous.

ISSUE 3: A purge condition is not subject to ongoing modification and increasing onerousness. Did the trial court err by adding requirements to Mr. Faga's purge conditions, making them more onerous?

4. The trial court violated Mr. Faga's First Amendment protection against compelled speech.

ISSUE 4: The First Amendment protects against compelled speech. Did the trial court violate Mr. Faga's First Amendment rights by attempting to coerce him into falsely stating that he submitted voluntarily to evaluation and testing?

5. The trial court improperly sought to coerce Mr. Faga into disclosing information protected by the attorney-client privilege.
6. The trial court improperly sought to coerce Mr. Faga into surrendering his right to complete discovery.
7. The trial court improperly sought to coerce Mr. Faga into waiving his right to sue for negligence or intentional misconduct.
8. The trial court improperly sought to coerce Mr. Faga into waiving his right to limit the dissemination of private information.

ISSUE 5: A court abuses its contempt powers by unlawfully seeking to compel a litigant to waive rights to which he is

legally entitled. Did the trial court err by conditioning Mr. Faga's ability to purge his contempt on disclosure of information protected by the attorney-client privilege, and on waiver of his right to complete discovery, waiver of his right to sue for negligence or intentional misconduct, and waiver of his right to limit the distribution of private information?

9. The trial court's refusal to lift the contempt sanction violates Mr. Faga's Fourteenth Amendment right to due process.

ISSUE 6: Indefinite civil commitment may not be based on a finding of probable cause. Does the trial court's contempt order indefinitely prolong Mr. Faga's civil commitment based on the initial probable cause finding?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Ausagetaitama Faga, a 41-year-old Samoan-American, has been held without trial at the Special Commitment Center since 2012. CP 4, 184. He has been convicted of a single sex offense, committed when he was twenty-two. CP 3, 65.¹

In February of 2014, Mr. Faga was found in contempt for his failure to “submit to such supplemental evaluation procedures as may be required by the [State’s] evaluator,” Dr. Harry Hoberman. CP 157, 185.² The court directed that he purge his contempt by complying with the prior order.³ CP 172, 185.

In 2016, Mr. Faga agreed to comply. He completed a 22-page disclosure form in anticipation of a sexual history polygraph. CP 186, 209. However, the release form was overbroad, and Mr. Faga’s attorney alerted the State to the problem a week prior to the scheduled polygraph appointment. Mr. Faga would not sign. CP 186, 192-200.

¹ He has additional juvenile history, including allegations of sexual offending; however, his sole conviction for a sex crime was entered in 1998. CP 65.

² The court also required Mr. Faga to submit to a deposition and a penile plethysmograph (PPG). He has complied with those portions of the order. CP 185, 213, 297.

³ Later orders clarified that the evaluator could require Mr. Faga to submit to physiological testing such as a penile plethysmograph (PPG) and a sexual history polygraph. CP 174-176, 182-183, 185.

The waiver required Mr. Faga to state that he participated in the polygraph “freely, voluntarily and without threats or promises of any kind.” CP 206. This was not true, given that his participation was coerced by court order and he’d been detained indefinitely without trial on a contempt finding based on not having taken the polygraph. CP 209.

The waiver also required Mr. Faga to give up any right “to access any written or recorded report of this polygraph examination, including the opinion of examiner, whether by request or subpoena, now and at any time in the future.” CP 206. Mr. Faga’s attorney pointed out that this meant abandoning his ability to obtain reports or opinions other than those received by Petitioner. CP 262-263 (citing CR 34 and CR 45).

The waiver also permitted the polygrapher to discuss the results and to release a written report not just to Dr. Hoberman, but to anyone, without limitation. CP 206. It required Mr. Faga to waive his right to sue the polygrapher for negligence or intentional misconduct. CP 206.

Dr. Hoberman’s consent form for the evaluation posed additional problems. First, the form required Mr. Faga to disclose if he’d received “any information” about the evaluation, even if it came from his lawyer during privileged attorney-client communication.⁴ CP 203.

⁴ Dr. Hoberman clarified that he only wanted to find out if such information had been provided (whether by counsel or not); he did not need to know the specifics. CP 256-257.

Second, the consent form required Mr. Faga to “agree to participate in [the] evaluation.” CP 203. The form made no reference to the court-ordered nature of the evaluation or the coercive contempt sanction that motivated Mr. Faga’s participation. CP 203.

Dr. Hoberman also sought Mr. Faga’s consent in writing to a test he planned to administer. CP 205. Like the polygrapher’s waiver, this consent form required Mr. Faga to “indemnify and hold harmless” Dr. Hoberman and the test’s publisher (who would score it upon completion), without any limitations for negligence or intentional misconduct. CP 203. The document further required Mr. Faga to “agree to all terms and conditions” but made no reference to the court order or the coercive contempt sanction.⁵ CP 203.

Mr. Faga signed altered versions of the forms and provided them to Petitioner’s attorney. CP 186-187, 203-206. He and his attorney redacted the objectionable language and changed each document from an expression of his (fictitious) consent to an acknowledgement of notice. CP 203-206.

⁵ The publishing firm provided a policy paper “containing our concerns about using the MSI II Consent Form with clients who do not agree to signing [it].” CP 294-295. Despite the publisher’s expressed hopes, the policy paper does not “clarif[y] the issue” of using the consent form with clients who do not agree to sign it. CP 294-295.

The State's experts refused to meet with Mr. Faga without his signatures on the original, unaltered forms. CP 187, 194, 202, 209, 214. The sexual history polygraph and Dr. Hoberman's supplemental evaluation were canceled. CP 186-187, 214.

Mr. Faga brought a motion to lift the contempt sanctions and set a trial. CP 184. He filed a declaration reiterating his willingness to submit to the sexual history polygraph and further evaluation by Dr. Hoberman. CP 208. He explained that he'd completed the sexual history questionnaire and was waiting for the polygrapher and Dr. Hoberman to come meet with him. CP 208-209.

He emphasized that he would submit to the polygraph and evaluation, but that his cooperation was coerced by the contempt order rather than voluntary. CP 209. He also explained that he did not wish to limit his right to discovery or to release the State's experts from liability relating to their work on his case. CP 209.

Mr. Faga retained a psychologist named Dr. Joe Scropo to provide information regarding the need for waivers such as the one Dr. Hoberman insisted Mr. Faga sign. CP 282. In addition to his forensic practice, Dr. Scropo works as a risk-management consultant for the country's largest professional liability insurer for psychologists. CP 282.

In that capacity, he presents workshops and seminars about ethics and risk management in psychology. CP 282.

Dr. Scropo pointed out that the American Psychological Association's (APA) binding ethics code expressly permits a psychologist to conduct a court-ordered evaluation or testing without the examinee's informed consent. CP 284-285.⁶ He also noted that the APA's Specialty Guidelines for Forensic Psychology permit the practitioner to conduct an evaluation over objection and without the examinee's consent. CP 286. Although not binding, these guidelines "represent the consensus in the field of forensic psychology about what constitutes a high level of professional quality in the delivery of forensic services." CP 286.

Consistent with the ethics code and the forensic guidelines, Dr. Scropo consistently advises forensic evaluators that an examinee's consent is not necessary when conducting a court-ordered evaluation. CP 286.

Dr. Scropo also addressed Dr. Hoberman's requirement that examinees sign a consent form prior to administration of psychological testing. Dr. Scropo described the SEPT⁷ manual as the "definitive textbook on the standards that govern test construction, evaluation,

⁶ Dr. Hoberman acknowledged this in his declaration. CP 256.

⁷ Standards for Educational and Psychological Testing.

documentation and testing applications.” CP 287. The SEPT manual allows for testing without consent when “mandated by law or governmental regulation.” CP 287. A comment explains that “Consent is not required when testing is legally mandated, such as a court-ordered psychological assessment.” CP 287.

Dr. Scropo went on to opine that the liability waivers Dr. Hoberman requires are unenforceable and contrary to public policy. CP 288-289. He noted that in his role as risk-management consultant and forensic evaluator, he had “never encountered a forensic evaluator who has demanded that a court-ordered examinee indemnify and hold harmless the forensic evaluator for the evaluator’s errors and/or omissions in the performance of the evaluation.” CP 289.

Mr. Faga provided the court with a declaration showing that Dr. Hoberman has evaluated at least one other detainee who refused to sign his two consent forms.⁸ CP 269-271. Another exhibit shows one court’s approach to cases where the detainee refuses to sign: entry of an order specifically authorizing the polygrapher to conduct an examination and release the results to appropriate parties without fear of liability. CP 273-274.

⁸ Dr. Hoberman had previously declared under oath that he has “always required that participants sign an Informed Consent” as part of his “post-probable cause evaluation process.” CP 256.

Following a hearing, the court denied Mr. Faga's request to lift the sanctions and schedule a trial. CP 296-299. The court found that Mr. Faga had not shown he was unable to comply with the court's earlier order. CP 299.

This court granted discretionary review.

ARGUMENT

THE COURT OF APPEALS SHOULD LIFT THE CONTEMPT SANCTION AND REMAND MR. FAGA'S CASE FOR TRIAL.

Mr. Faga has unequivocally agreed to submit to the trial court's order. Despite this, he cannot purge his contempt without the cooperation of Dr. Hoberman and the polygrapher. Both refuse to see him unless he waives important legal rights. This is improper. The trial judge should have lifted the contempt sanction and set Mr. Faga's case for trial.

A. This court should review Mr. Faga's case *de novo*.

Appellate courts review *de novo* a trial court decision that relies exclusively on affidavits, declarations, and other documents. *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, 300 P.3d 799 (2013).⁹ Here, the court's refusal to lift the remedial

⁹ See also, e.g., *Smith v. Skagit Cy.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *Carlson v. City of Bellevue*, 73 Wn.2d 40, 435 P.2d 957 (1968); *Bishop v. Town of Houghton*, 69 Wn.2d 786, 420 P.2d 368 (1966). Whether addressing zoning issues or public records requests, appellate courts reviewing a documentary record stand "in the same position as the trial

(Continued)

sanctions rests entirely on documentary evidence. Accordingly, the appellate court stands in the same position as the trial court. *Id.* Review is *de novo. Id.*

In addition, Mr. Faga's case presents a question of law: whether a court may force a contemnor to waive statutory and constitutional rights to satisfy the demands of a nonparty as a precondition to purging contempt. Such issues of law are reviewed *de novo. Tabingo v. Am. Triumph LLC*, 188 Wn.2d 41, 46, 391 P.3d 434 (2017), *as amended* (May 2, 2017), *reconsideration denied* (May 10, 2017).

No special rules apply to contempt cases. *See, e.g., In re Silva*, 166 Wn.2d 133, 140, 206 P.3d 1240, 1244 (2009) (applying *de novo* review to determine questions of law in a contempt case); *In re of Rapid Settlements, Ltd's*, 189 Wn. App. 584, 614, 359 P.3d 823, 839 (2015), *as amended on denial of reh'g* (Oct. 29, 2015), *review denied sub nom. In re Rapid Settlements, Ltd.*, 185 Wn.2d 1020, 369 P.3d 500 (2016) (same).

B. The trial court improperly conditioned Mr. Faga's ability to purge his contempt on the actions of third parties.

Mr. Faga is court-ordered to complete a sexual history polygraph and to cooperate with Dr. Hoberman's supplemental evaluation. CP 21-

court." *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994).

22, 156-157, 170-176, 182-183. He is not court ordered to waive any legal rights. CP 21-22, 156-157, 170-176, 182-183.

Dr. Hoberman and his chosen polygrapher refuse to visit Mr. Faga. CP 187, 194, 202, 209, 214. Without a visit from Dr. Hoberman and the polygrapher, Mr. Faga cannot purge the contempt finding; he is not free to leave the McNeil Island facility where he has resided since 2012. CP 21.

Where a contemnor's ability to purge contempt is "dependent upon the actions of a third party, the purpose of civil contempt is defeated." *In re M.B.*, 101 Wn.App. 425, 460, 3 P.3d 780 (2000). Thus, for example, a purge condition may require the contemnor to seek treatment but may not require the person to gain acceptance into a residential treatment program to satisfy the purge condition. *Id.* Similarly, the court may require a contemnor to write a letter promising to behave in foster care but may not make release from detention contingent on DSHS's ability to find a long-term foster care placement. *Id.*, at 466.

Similarly, here, Mr. Faga does not have the power to compel Dr. Hoberman or his polygraph examiner to visit him. They refuse to do so unless he meets their conditions by signing away some of his rights. CP 187, 194, 202, 209, 214. Thus, Mr. Faga's ability to purge his contempt is "dependent upon the actions of a third party," and the purpose of the order is defeated. *Id.*, at 460, 466. Once Dr. Hoberman and his polygrapher

announced they would not evaluate Mr. Faga, the trial court should have lifted the remedial sanctions and scheduled the case for trial. *Id.*

Mr. Faga cannot leave McNeil Island, and cannot force Dr. Hoberman and his polygrapher to visit him. CP 21. He cannot satisfy the court's purge condition without their cooperation. Because of this, the contempt sanctions have become punitive. *Id.* The sanctions must be lifted and the case remanded for trial. *Id.*

C. The court improperly modified Mr. Faga's purge condition to impose additional requirements.

A purge condition "is not subject to ongoing modification and increasing onerousness." *In re M.B.*, 101 Wn. App. at 462. The imposition of additional requirements not included as part of the original purge clause may transform a legitimate remedial condition into an unlawful punitive sanction. *Id.*

The original contempt order in this case did not require Mr. Faga to sign any waivers or consent forms. He was not directed to waive his right to discovery from third parties, his right to sue for negligence or intentional misconduct, his right to keep private whether he received certain information or advice from his attorney, or his right to prevent the unlimited dissemination of private information. CP 172.

Obligating him to waive these rights now amounts to “ongoing modification and increasing onerousness.” *Id.* By continuing to hold him without trial based on the experts’ demands for his signatures on their waiver and consent forms, the court has improperly added to Mr. Faga’s purge conditions. *Id.* The court has improperly moved the goal posts. *Id.*

Through its refusal to lift remedial sanctions until Mr. Faga satisfies the State’s experts preconditions, the lower court has stepped partway down a slippery slope. There is no limitation on the kind of waivers an evaluator could extract from a detainee seeking to purge his contempt.

For example, an evaluator in Dr. Hoberman’s position could demand that Mr. Faga waive his right to cross-examination, his right to subpoena the expert as a defense witness, his right to call his own expert, or even his right to trial on the State’s petition.

Remedial contempt sanctions are intended to coerce performance of an act that is within the person’s power to perform. *Id.*, at 438. They should not be used to improve the State’s position or to shield professionals from potential liability.

The trial court should not have used the contempt power to force Mr. Faga to waive his rights. The court’s order must be reversed, the remedial sanctions lifted, and the case remanded for trial.

D. The contempt order violates Mr. Faga's First Amendment protection against compelled speech.

The First Amendment's free speech clause "'prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213, 133 S. Ct. 2321, 2327, 186 L. Ed. 2d 398 (2013) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)). The State "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573, 115 S. Ct. 2338, 2347, 132 L. Ed. 2d 487 (1995). A speaker "has the right to tailor [his or her] speech;" this right applies "not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.*

The court's order compels Mr. Faga to falsely state that his participation in the evaluation and testing is voluntary. This violates his First Amendment protection against compelled speech. *Id.*

Dr. Hoberman's release indicates that Mr. Faga "agree[s] to participate in [the] evaluation." CP 203. It makes no mention of the court's order or the contempt sanction. Similarly, the "Informed Consent for Psychosocial Testing" indicates that Mr. Faga "agree[s] to all terms and

conditions contained herein.” CP 205. It, too, makes no mention of the court’s order or contempt sanction.

The polygrapher’s form likewise indicates that Mr. Faga “authorize[s]” the examiner to disseminate information, and that his consent to record is given “freely, voluntarily and without threats or promises of any kind.” CP 206. No mention is made of the court’s order or the contempt sanction.

In short, each form incorrectly suggests that Mr. Faga consents; in fact, he objects. CP 203-206, 209. The court’s orders compel his participation; he should not be coerced into expressing an Orwellian acknowledgement that his coerced participation is voluntary. *Id.*

E. Mr. Faga cannot be coerced into waive the attorney-client privilege, to waive his right to full discovery, to waive his right to seek redress for negligence or malfeasance, and to waive his right to limit the distribution of private information.

As matters stand, Mr. Faga cannot purge his contempt without waiving important legal rights. This is improper.

Dr. Hoberman’s form requires Mr. Faga to disclose if he received “any information” about the evaluation, even if the information came from counsel. CP 203. This amounts to a waiver of attorney-client privilege and should not be the subject of a contempt sanction. RCW 5.60.060(2)(a).

The attorney-client privilege “is imperative to preserve the sanctity of communications between clients and attorneys.” *Dietz v. Doe*, 131 Wn.2d 835, 851, 935 P.2d 611 (1997). Courts interpret the privilege “as applying to all communications and advice between an attorney and client, including from the attorney to the client.” *Zink v. City of Mesa*, 162 Wn.App. 688, 724, 256 P.3d 384 (2011). The privilege protects from disclosure “[t]he substance of the consultations.” *State v. Sheppard*, 52 Wn. App. 707, 711, 763 P.2d 1232 (1988).¹⁰

Mr. Faga cannot be forced to reveal the topics he discussed with his attorney. *Id.* Dr. Hoberman’s form does just that: it requires Mr. Faga to disclose if counsel provided “any information” about the evaluation. CP 203. Compelling Mr. Faga to sign the waiver violates his right to confidential communication with his attorney. *Id.*

In addition, both Dr. Hoberman and the polygrapher require Mr. Faga to waive his right to sue for negligence or intentional misconduct. CP 203, 206. This means Mr. Faga will have no remedy even if Dr. Hoberman and the polygrapher conspire to fabricate evidence.

¹⁰ Thus, even a client’s identity is protected if “there is a strong probability that disclosure would convey the substance of confidential communications.” *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 45, 14 P.3d 879 (2000), *as amended* (Jan. 11, 2001); *see also Dietz*, 131 Wn.2d at 849, 851 (noting that the privilege “protects the identity of the client where the revelation of the client’s identity would necessarily reveal the essence of the attorney-client communications.”)

It is undisputed that Dr. Hoberman is not ethically obligated to obtain consent prior to evaluating someone. CP 256, 284-286. Indeed, Dr. Hoberman himself acknowledged that the APA's ethics code allows for evaluations without consent when "mandated by law." CP 256. Furthermore, he has evaluated at least one other Washington detainee without that person's consent. CP 269-271. And there is at least one local polygrapher whose concerns about liability appear to have been addressed by court order rather than a coerced waiver. CP 273-274.

Mr. Faga should not be compelled to give up his right to sue for negligence or intentional misconduct. There is no basis for a contempt order based on his refusal to waive this right.

The polygrapher's release form also requires Mr. Faga to "waive [his] right to access any written or recorded report of [the] polygraph examination, including the opinion of examiner, whether by request or subpoena, now and at any time in the future." CP 206. This limits Mr. Faga's right to full discovery.

If he signs this waiver, Mr. Faga may never see anything other than the final report.¹¹ Unless the polygrapher provides all his materials to the

¹¹ Mr. Faga will likely receive the final report provided to Petitioner through normal discovery. However, he will not be able to obtain anything the polygrapher chooses to hold back.

State, Mr. Faga will be unable to obtain (for example) a transcript of the session or a report outlining the raw data. CP 206. Ordinarily, Mr. Faga would be entitled to subpoena those materials under CR 45; however, the waiver form explicitly covers subpoenas. CP 206. He cannot be compelled to waive his right to discovery as a precondition to purging his contempt.

The polygrapher's waiver allows the polygrapher to "discuss" or "release a report of" the evaluation, interview, and examination. CP 206. This provision places no limits on how widely the information can be disseminated. CP 206. Under the waiver's terms, the polygrapher can discuss otherwise private information with the press or other parties unconnected to the case. Mr. Faga should not be compelled to give up his right to limit dissemination of the information.

F. The trial court's order infringes Mr. Faga's right to due process.

A finding of probable cause is constitutionally insufficient to justify indefinite civil commitment. U.S. Const. Amend. XIV; *Addington v. Texas*, 441 U.S. 418, 433, 99 S. Ct. 1804, 1813, 60 L. Ed. 2d 323 (1979). In this case, Mr. Faga is being held based on a judicial finding of probable cause.

Under the contempt sanction, he has been detained for several years without trial, based on this finding of probable cause. Unless the

contempt order is lifted, confinement will continue indefinitely, subject to the cooperation of third parties over whom Mr. Faga has no control.

The court's order subjects Mr. Faga to a "massive curtailment of liberty"¹² without the procedural protections guaranteed by the due process clause. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 494-95, 100 S. Ct. 1254, 1265, 63 L. Ed. 2d 552 (1980). The contempt sanction must be lifted, and the case remanded for trial.

CONCLUSION

The trial court erred by refusing to lift contempt sanctions after Mr. Faga unequivocally agreed to submit to the court's order. His trial should not be further delayed. The contempt sanctions must be lifted and the case remanded for trial.

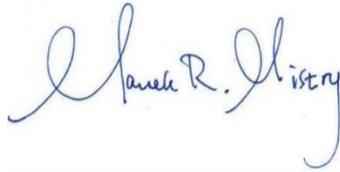
¹² *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012).

Respectfully submitted on April 23, 2018,

BACKLUND AND MISTRY

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Ausagetalitama Faga
McNeil Island Special Commitment Center
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Office of the Attorney General
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 April 23, 2018.



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