

FILED
Court of Appeals
Division II
State of Washington
10/2/2020 3:57 PM

NO. 54392-3

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

In re the Detention of P.R.,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

P.R. was originally civilly committed to Western State Hospital for threatening to kill and trying to run over a man who was walking his son to school. In January 2020, doctors at Western State Hospital filed a petition to recommit P.R. On January 13, 2020, P.R.'s counsel informed the trial court that P.R. had indicated he wanted to proceed pro se, but also that he did not want attend court. The court recessed the hearing until the next day so P.R.'s counsel could confirm how P.R. would like to proceed. On January 14, 2020, P.R.'s counsel confirmed that she had discussed P.R.'s rights with him, and that P.R. wanted the hearing to proceed and did not want to be present. The court waived his presence, proceeded with the hearing, and found that there was sufficient evidence to recommit P.R. for up to 180 days of treatment at Western State Hospital.

P.R. now asks that the order of commitment be reversed and he be retried on the basis that he has a constitutional right to a jury trial and there is no record of his being advised by the trial court of his right to a jury trial, or that he knowingly, intelligently, and voluntarily waived of that right. But P.R. is precluded from raising this argument on appeal because he did not raise it below and he cannot show that this was manifest constitutional error under RAP 2.5(a)(3). No Washington court has held that persons facing up to 180 days of involuntary civil commitment have a constitutional right to

a jury trial, nor that they have a constitutional right to be advised in open court of their statutory jury trial right, nor that they must knowingly, intelligently, and voluntarily waive that right. Indeed, our courts of appeal have rejected all of those arguments.

Likewise, no error is manifest in the record. P.R. directed his attorney to proceed with the bench hearing without him present after his attorney advised him of his rights, and there is no indication that the alleged underlying error resulted in the deprivation of any constitutional right, or that there were practical and identifiable consequences at trial of which the trial court should have been aware and could have corrected. Finally, while a person in P.R.'s position has a *statutory* right to a jury trial, our courts have ruled that the civil rules for jury waiver control in involuntary treatment cases. Under those rules, the person implicitly waives their right to a jury trial if they do not demand it. P.R. affirmatively directed his attorney to proceed with a bench trial, implicitly waiving his right to a jury trial. In short, no error occurred here, let alone any manifest constitutional error. The trial court's order of commitment should be affirmed.

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II. COUNTERSTATEMENT OF THE ISSUES

- A. Is P.R. precluded from claiming that the trial court erred by not advising him of his statutory right to a jury trial or requiring that he affirmatively waive that right when he claimed no such error at trial and cannot demonstrate that the failure to do so was a manifest constitutional error?
- B. Must a person facing up to 180 days of involuntary treatment knowingly, intelligently, and voluntarily waive their right to a jury trial?

III. COUNTERSTATEMENT OF THE FACTS

In February 2018, P.R. threatened to kill and tried to run over a man who was walking his son to school. Clerk's Papers (CP) 36. He was charged with two counts of Assault in the Second Degree and one count of Felony Harassment, but those charges were dismissed when he was found incompetent to stand trial. CP 32-33. He was eventually civilly committed on January 10, 2019, after a superior court commissioner found that he had committed acts constituting a violent felony and was substantially likely to commit similar acts due to a mental disorder, in addition to being gravely disabled as a result of a mental disorder. CP 37. He continued to be detained on that basis through the hearing that is the subject of this appeal. CP 57-58.

Dr. Bradley Antonides and Dr. Nandan Kumar petitioned for P.R.'s recommitment on the basis of the violent offense and grave disability on January 7, 2020. CP 54-55. The hearing on that petition was initially calendared for January 13, 2020. Verbatim Report of Proceedings (VRP) 3.

On that date, P.R. refused to come to court, according to a report from hospital security staff who had gone to transport him from his ward. VRP 3-4. P.R.'s attorney offered to go to the ward to determine P.R.'s wishes about the hearing, as he had earlier intimated that he wished to proceed pro se. VRP 3-4. After further discussion with P.R.'s attorney, the court recessed the hearing until later in the day. VRP 4-6.

Reconvening later in the day, the court was again informed that P.R. had told security staff that he did not want to come to court. VRP 7. P.R.'s attorney reported that she had gone to the ward to speak personally with P.R. VRP 7. He told his attorney unequivocally that he did not want to come to court, but did not provide clear guidance on how to proceed. VRP 8. The parties agreed that the court could rule on the violent offense, as doing so was based on the pleadings and did not require testimony or argument. VRP 8-9. P.R.'s attorney proposed bringing the court's ruling on the violent offense to P.R., informing him of his options, and seeing how he would like to proceed. VRP 10-11. The court found that the petitioners had made a prima facie case that P.R. continued to meet civil commitment criteria on the basis of the violent offense. VRP 12.

The court reconvened P.R.'s hearing the next day in front of a different commissioner. VRP 13. P.R.'s attorney informed the court that she had spoken with P.R. again that morning, and that he had declined to attend

court and asked to have his presence waived. VRP 13. P.R.'s attorney then summarized the case as follows:

This is a Petition for up to an additional 180 days of involuntary treatment on two bases, one being grave disability, the second being a recommit on a violent offense. Yesterday, I did not have clear instruction from my client as to how he wished to proceed, and so the court did review the Petition, made a *prima facie* finding with regard to the violent offense recommit, and we recessed the case at that point.

I can inform the court that I did meet with my client since that time. I informed him of the court's finding with regard to the violent offense recommit, and I informed him of his rights and asked him how he wished to proceed with the case at this point. [P.R.] was very clear that at this time he does not wish to retain an independent expert as to the recommit on violent offense, and so we are not offering any independent expert testimony on that basis.

He did instruct me to move forward with the hearing today, so I am prepared to do so, and I'll leave it at that, Your Honor.

VRP 14. After testimony from Dr. Antonides – no other witnesses were called by either party – the court found that P.R. was gravely disabled in addition to meeting recommitment criteria under the violent offense.

VRP 30-31.

P.R. timely appeals.

IV. ARGUMENT

A. P.R. Cannot Challenge the Alleged Failure to Inform Him of His Right to a Jury Trial, or the Alleged Invalidity of His Waiver of it, for the First Time on Appeal

1. P.R.'s counsel did not raise the alleged error below, so review is not appropriate because it is not a manifest error affecting a constitutional right

This Court may refuse to review any claim of error P.R. did not raise in the trial court. RAP 2.5(a). The record establishes that P.R. did not file a demand for a jury trial with the trial court, nor did his attorney object to proceeding with a bench hearing in front of the commissioner. P.R. also does not argue that he raised the issue with the trial court, but instead claims that the alleged error is reviewable because it implicates a constitutional right. Opening Br. at 7-8. Because P.R. failed to preserve this issue for appeal and cannot show that it is a manifest error affecting a constitutional right, this Court should decline to review it.

Courts of appeal do not ordinarily review unpreserved errors except under specific circumstances, such as when the alleged error is manifest and affects a constitutional right. *State v. A.M.*, 194 Wn.2d 33, 38, 448 P.3d 35 (2019); RAP 2.5(a)(3). To determine whether an error rises to the level of a manifest constitutional error requires a two-step analysis: first, whether the error is of constitutional magnitude, and second, whether the error is manifest. *State v. Mosteller*, 162 Wn. App. 418, 425-26, 254 P.3d 201

(2011). The Court’s inquiry into whether this is a manifest constitutional error serves a “gatekeeping function,” which is a distinct question from whether a person’s constitutional rights were actually violated, or whether the person was actually prejudiced under harmless error analysis. *A.M.*, 194 Wn.2d at 38-39 (citations omitted).

Courts do not assume errors are of constitutional magnitude; they analyze the alleged error and “assess whether it implicates a constitutional interest as compared to another form of trial error.” *State v. Guzman Nunez*, 160 Wn. App. 150, 158, 248 P.3d 103 (2011), *aff’d and remanded sub nom. State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012) (citing *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Constitutional errors include, for example, infringing on a criminal defendant’s constitutional right against self-incrimination, *A.M.*, 194 Wn.2d at 39, or a person’s constitutional right to bear arms, *Matter of Det. of T.C.*, 11 Wn. App. 2d 51, 61-62, 450 P.3d 1230 (2019).

If the claimed error is of constitutional magnitude, this Court must then ask if the error is manifest. *O’Hara*, 167 Wn.2d at 99. To establish manifest error, P.R. must show actual prejudice: that is, that there were “practical and identifiable consequences at trial” that affected his constitutional rights. *See A.M.*, 194 Wn.2d at 39. “[T]o determine whether an error is practical and identifiable, the appellate court must place itself in

the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100.

Even constitutional errors, if they do not result in practical and identifiable consequences at trial, are waived if they are not raised at the trial court level. *State v. Campos-Cerna*, 154 Wn. App. 702, 708, 226 P.3d 185 (2010). If this Court cannot identify any practical and identifiable consequences on P.R.’s constitutional rights from the record, the error is not manifest. *See O’Hara*, 167 Wn.2d at 99.

a. Because P.R. has no constitutional right to a jury trial in these circumstances, the alleged error is not of constitutional magnitude

No court has ruled that persons facing up to 180 days of involuntary treatment have a constitutional right to a jury trial, including for the violent offense commitment that formed part of the trial court’s order for commitment here. *Matter of Det. of M.W. v. Dep’t of Soc. & Health Servs.*, 185 Wn.2d 633, 663, 374 P.3d 1123 (2016). Meanwhile, courts have ruled that persons facing 14- or 90-day commitment periods do *not* have a constitutional right to a jury trial. *Matter of Det. of C.B.*, 9 Wn. App. 2d 179, 184, 443 P.3d 811 (2019), *review denied sub nom. In re Det. of C.B.*, 194 Wn.2d 1005, 451 P.3d 333 (2019) (90-day commitments, analogizing to recent holding that found no constitutional right to jury trial for 14-day

commitments); *In re Det. of S.E.*, 199 Wn. App. 609, 617, 400 P.3d 1271 (2017) (14-day commitments).

In order to determine whether a person has a constitutional right to a jury trial in Washington State, the Court must engage in a two-part inquiry: first, the Court must identify the scope of the jury trial right when the State was founded in 1889, and second, it must determine whether “the type of action at issue is similar to one that would include the right to a jury trial at that time.” *Det. of M.W.*, 185 Wn.2d at 662. Persons facing involuntary commitment in 1889 had a right to a jury trial “in a case to decide whether [they] could be committed *indefinitely* to a ‘hospital for the insane.’” *Det. of C.B.*, 9 Wn. App. 2d at 183-84 (internal quotation marks omitted) (emphasis added). Our courts have repeatedly distinguished this constitutional right to a jury trial when facing *indefinite* commitment from modern involuntary commitment procedures, where the State faces a comparatively high burden of proof for shorter terms of commitment. *Det. of M.W.*, 185 Wn.2d at 663; *Det. of S.E.*, 199 Wn. App. at 617; *Det. of C.B.*, 9 Wn. App. 2d at 184.

P.R. had no constitutional right to a jury trial here. He had a *statutory* right to a jury trial for commitment periods of 90 and 180 days. RCW 71.05.300, .310; MPR 3.3(a) (“A jury is available only in a hearing for 90- or 180-day commitment proceedings pursuant to RCW 71.05.300

and RCW 71.05.320”). Notably, the Court of Appeals in *Det. of C.B.* wrote that 90-day commitment periods “cannot be distinguished” from 14-day commitments for purposes of determining whether a person has a constitutional right to a jury trial. 9 Wn. App. 2d at 184. 90-day and 180-day commitments are subject to essentially the same procedural and constitutional requirements. *Cf. Matter of Det. of Dydasco*, 135 Wn.2d 943, 952, 959 P.2d 1111 (1998) (equal protection requires applying same notice requirements to persons facing 14-, 90-, and 180-day commitments).

Since P.R. had no constitutional right to a jury trial, the facts in this case sharply contrast with *Det. of T.C.* and *A.M.*, where the error directly impacted the person’s constitutional rights to bear arms and against self-incrimination, respectively. *Det. of T.C.*, 11 Wn. App. 2d at 61-62; *A.M.*, 194 Wn.2d at 39. Where no constitutional right is implicated, there is no constitutional error. This Court should decline to review this claim on that basis.

b. P.R. likewise had no constitutional right to be informed of his jury trial right by the trial court in his evidentiary hearing, so any alleged error there is not of constitutional magnitude

When the State seeks to involuntarily commit a person for up to 180 days, the person whom the State seeks to detain has a statutory right to a jury trial. RCW 71.05.300(2), .310. At the time of the hearing that is the

subject of this appeal, the statute directed the trial court to hold a first appearance on the petition for civil commitment, separate from the evidentiary hearing on the merits, at which the court was to inform the person of their right to an attorney, their right to a jury trial, and that their involuntary commitment would result in their loss of their firearms rights. Former RCW 71.05.300(2),¹ MPR 3.3(b).² This first appearance could be waived by the person's attorney. Former RCW 71.05.300(1).

The person is then required to file their demand for a jury trial within two judicial days of that first appearance, or the matter will be heard without a jury. MPR 3.3(b).³ No part of the statute requires that the person be advised of their jury trial right at their *evidentiary* hearing on a petition for up to 180 days of involuntary treatment. *See Det. of C.B.*, 9 Wn. App. 2d at 188 (ruling that MPR 3.3(b) does not require that the person be advised of their jury trial right at their evidentiary hearing on the petition, only at the

¹ “At the time set for appearance the detained person shall be brought before the court, *unless such appearance has been waived* and the court shall advise him or her of his or her right to be represented by an attorney, his or her right to a jury trial, and, if the petition is for commitment for mental health treatment, his or her loss of firearm rights if involuntarily committed.” Former RCW 71.05.300(2).

² The legislature amended RCW 71.05.300(2) in 2020 to require only that the person's *attorney* “advise him or her of his or her right to be represented by an attorney, his or her right to a jury trial, and, if the petition is for commitment for mental health treatment, his or her loss of firearm rights if involuntarily committed.” Current RCW 71.05.300(2).

³ MPR 3.3(b) does not appear to have been updated to track the change to the statute requiring the person's attorney, not the trial court, to inform them of their rights. The MPRs were adopted effective January 1, 1974, and have not been amended since.

first appearance). P.R. does not appear to differentiate between the first appearance and evidentiary hearing, nor does he acknowledge that MPR 3.3(b) refers to former RCW 71.05.300, which allowed his attorney to waive his presence at the first appearance.

Nor does the law require anything outside of these statutes and court rules to effectuate the rights of the detained person. Division One of the Court of Appeals has considered and rejected an argument identical to P.R.'s, ruling that the procedural protections of former RCW 71.05.300(2) and MPR 3.3(b) are adequate and that there is no extra-statutory requirement that a person in P.R.'s position be informed of their right to a jury trial in open court at their evidentiary hearing. *Id.* This is distinguishable from other cases where the Court of Appeals has interpreted statutory requirements that require the trial court, and no other entity, to inform the person of the possible loss of constitutional rights as a result of their commitment. *Det. of T.C.*, 11 Wn. App. 2d at 61-62 (analyzing as a threshold matter whether trial court's failure to advise person of possible loss of firearm rights was manifest constitutional error).

P.R.'s argument is further undercut by the plain language of former RCW 71.05.300(1). Under that section, P.R.'s attorney could waive P.R.'s presence at the first appearance, meaning that there would be no mandatory in-court notifications if his presence were waived. To credit P.R.'s

argument would be to *require* that a person be present for the first appearance under former RCW 71.05.300, regardless of whether they desired to waive their presence, rendering former RCW 71.05.300(1)'s waiver of presence clause superfluous and cause “unreasonable and unnecessarily burdensome result[s].” *Det. of C.B.*, 9 Wn. App. 2d at 188.

Finally, P.R. argues that because the issues he raises affect his “due process right to notice and his liberty interests” they are reviewable under RAP 2.5(a)(3). Opening Br. at 8. But this vague and underdeveloped argument would constitutionalize any mere allegation that the State or trial court failed to follow a statutory procedure, no matter how minor. And even if this Court were to interpret the first appearance rules to create a due process right to in-court, on-the-record notice of the person’s jury trial, this case dealt with an evidentiary hearing. So even if this Court interprets the statute or MPR 3.3(b) as creating a constitutional entitlement to due process in some circumstances, *see* Opening Br. at 8, there is not even any *statutory* violation to review here. Any hypothetical constitutional right to notice would not even attach. *See Det. of C.B.*, 9 Wn. App. 2d at 188.

Because P.R. articulates no legal reason for this Court to *both* constitutionalize the requirement that a person be advised of their statutory jury trial right at their first appearance *and* to extend that requirement to the person’s evidentiary hearing, he has claimed no constitutional error on this

basis. Because he did not raise the alleged error below, this Court should decline to review it.

- c. **P.R. has failed to articulate any practical and identifiable consequences that affected his constitutional rights that flowed from the alleged error, so the error is not manifest.**

P.R. must make a “plausible showing that the [alleged] error had practical and identifiable consequences at trial” in order for that error to be manifest. *A.M.*, 194 Wn.2d at 40. “[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100. Examples of manifest error include admitting unconstitutional evidence, *A.M.*, 194 Wn.2d at 40, or where noncompliance with an in-court statutory warning “directly impacts” a person’s constitutional right to bear arms, *Det. of T.C.*, 11 Wn. App. 2d at 61. Put another way, the reviewing court must be able to plausibly connect the alleged constitutional error to the harmful consequences on the person’s rights at trial. *See O’Hara*, 167 Wn.2d at 98.

The consequences of the error that P.R. claims here are neither practical nor identifiable, and thus not manifest. The purpose of the Court’s “gatekeeping function” under RAP 2.5(a)(3) is to reject claims on appeal

“where the trial court could not have foreseen the potential error.” *O'Hara*, 167 Wn.2d at 100. Here, the trial court knew that P.R. had waived his presence through counsel and directed her to proceed with his evidentiary hearing before the commissioner. VRP 14. The trial court presumably knew that former RCW 71.05.300(1) and MPR 3.3(b) required only that the person be advised of their jury trial right at their first appearance, unless their appearance was waived.

The trial court could not have reasonably foreseen and corrected the error that P.R. claims here. *O'Hara*, 167 Wn.2d at 100. The trial court could not have been aware of a statutory warning that it was not required to give. Nor could it have known that it should have stopped the proceedings to ensure that P.R. was aware of his statutory right to a jury trial when his counsel reported that P.R. wanted to proceed with the evidentiary hearing before the commissioner and had implicitly waived his statutory right to a jury trial. *See id.*; VRP 14.⁴

P.R. chose for his hearing to proceed without his presence and without a jury. The trial court could not have foreseen the error that P.R. alleges and corrected it, as there was no legal requirement to give the in-court warning to which P.R. claims he was entitled. Nor could the trial

⁴ P.R. does not claim that his attorney at trial misrepresented this exchange with him.

court have foreseen the “error” that he affirmatively chose to proceed with a bench trial and implicitly waived his statutory right to a jury trial. No practical or identifiable consequences flowed from the alleged error, and therefore no manifest error occurred. This Court should decline to review his claim on that basis, as well.

B. There Is No Legal Requirement That Persons Subject to Involuntary Commitment Knowingly, Intelligently, and Voluntarily Waive Their Right to a Jury Trial

As an ancillary matter, P.R. claims that he was required to have knowingly, intelligently, and voluntarily waived his statutory right to a jury trial, regardless of whether this Court finds that he has a constitutional right to a jury trial. Opening Br. at 17-23. But that is the standard for waiver of a defendant’s right to a jury trial in a criminal case. *Det. of C.B.*, 9 Wn. App. 2d at 190. Involuntary treatment hearings are civil cases and “not analogous to a criminal proceeding.” *State v. M.R.C.*, 98 Wn. App. 52, 57, 989 P.2d 93 (1999). P.R. cites only a criminal case, *State v. Hos*, 154 Wn. App. 238, 225 P.3d 389 (2010), for the proposition that the Court should hold that a knowing, intelligent, and voluntary waiver is required here. Opening Br. at 18.

P.R. has articulated no persuasive legal basis for this Court to depart from the requirements in MPR 3.3(b) that require him to demand a jury trial within a certain time, or else waive that right. *Det. of C.B.*, 9 Wn. App. 2d

at 185. Our courts have repeatedly held that the civil rules control in involuntary treatment cases, where a person implicitly waives their jury trial right if they do not demand it, and where there is no constitutional requirement that a person facing civil commitment knowingly, intelligently, and voluntarily waive their statutory right to a jury trial. *Id.* at 189-90.

P.R. attempts to distinguish his circumstances from *Det. of C.B.* and *Det. of S.E.*, but offers no compelling rationale for abandoning those cases' analysis about application of the civil rules regarding jury trial waiver. He offers citations to cases that the *C.B.* and *S.E.* Courts have already distinguished from these circumstances, such as *Quesnell v. State*, 83 Wn.2d 224, 517 P.2d 568 (1973), which the *C.B.* Court said "provides no guidance where the defendant does not demand a jury trial." *Det. of C.B.*, 9 Wn. App. 2d at 189. And he offers no compelling rationale why 180-day commitments should require a knowing, intelligent, and voluntary waiver of the jury trial right, where 90-day commitments do not. *See id.* at 190.

Finally, P.R. fails to fully acknowledge that he chose, through his attorney, to proceed with a bench hearing before the commissioner. VRP 14. He did not demand a jury trial. To credit P.R.'s argument would require finding that P.R. could not, even if he wanted to, waive his own presence at the civil commitment hearing or affirmatively choose to proceed with a hearing in front of a commissioner without first having a pro forma

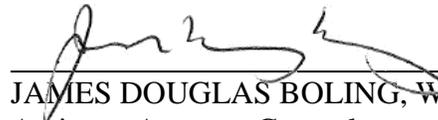
appearance or other formality (such as a written waiver) during which a court ensured that he actually knew that he wanted what he said he wanted through counsel. *See Det. of C.B.*, 9 Wn. App. 2d at 188. No court in Washington has so held in the civil commitment context, where the civil rules for implicit waiver of the statutory jury trial right control. *Id.* at 190. This Court should follow *C.B.* and decline to find that a knowing, intelligent, and voluntary waiver was required before P.R.'s hearing could proceed as he wished.

V. CONCLUSION

P.R. failed to raise in the trial court the issue of whether he either appropriately waived or was appropriately informed of his statutory jury trial right. He had no constitutional right to a jury trial, nor a constitutional right (indeed, not even a statutory right) to be informed of his jury trial right on the record in his evidentiary hearing. And there were no practical and identifiable consequences as result of the alleged error because the trial court could not have foreseen a notice requirement that did not exist and need not have informed him of his statutory jury trial right when he implicitly waived it and affirmatively chose to proceed by bench trial. Finally, there is no constitutional or statutory requirement that P.R. knowingly, intelligently, and voluntarily waive his jury trial right, as the civil rules for implicit waiver of the jury trial right control in involuntary

treatment cases. Because the error that P.R. alleges here was not a manifest constitutional error, this Court should decline to review it.

RESPECTFULLY SUBMITTED this 2nd day of October 2020.



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CERTIFICATE OF SERVICE

I, *Holly McClure*, state and declare as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On October 2nd, 2020, I served a true and correct copy of this **BRIEF OF RESPONDENT** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

Counsel for Appellant

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Via COA E-Filing Portal at: katebenward@washapp.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of October 2020, at Lacey, Washington.



HOLLY MCCLURE
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October 02, 2020 - 3:57 PM

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