NO. 29920-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re Detention of Jason Muns,

STATE OF WASHINGTON,

Respondent,

v.

JASON MUNS

Appellant.

FILED
AUG 22, 2012
Court of Appeals
Division III
State of Washington

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

The Honorable Cameron Mitchell, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MUNS HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF RCW 71.09.060.

a. He Was Harmed Because Critical Evidence Was Excluded Based on the Statute.

Muns' theory at trial was that he does not have a personality disorder or a mental abnormality under the statute, but instead is a developmentally disabled person who can be safely treated and cared for in the community. 3RP 38-39, 47-48, 1274. Evidence that he was eligible for the Community Protection Program (CPP) was crucial to that theory. The State does not dispute that standing to raise a constitutional challenge to the statute exists when a party is adversely affected by its application. Respondent's Opening Brief (hereinafter "ROB") at 10 (citing In re Detention of McClatchey, 133 Wn.2d 1, 7-8, 940 P.2d 646 (1997)). In this case, Muns was adversely affected when the trial court relied on the statute to reject evidence crucial to his theory of the case.

b. Muns Made a Sufficient Offer of Proof That the CPP Was Available to Him.

The crux of the State's argument is that Muns was not harmed because the CPP was not an option that would exist for him upon release. ROB at 10-11. This argument should be rejected because Muns presented substantial evidence that the CPP was a real option that would exist for him if released.

The State seems to think the "option" means an option for the State to involuntarily force a person to submit to "voluntary treatment." It argues the CPP is not a voluntary treatment option that would exist for Muns because he has not yet agreed to attend. ROB at 13. The State is correct that Muns had not yet gone through the application process. But that type of certainty is not required as a threshold to presenting relevant evidence. The statute refers to voluntary treatment "options" that would exist. Given his eligibility, Muns would likely have the option of the CPP.

The State also appears to argue that the mere filing of a civil commitment petition under chapter 71.09 RCW makes Muns ineligible for the CPP. ROB at 23-24. This is simply untrue. RCW 71.09.060 governs admissibility of evidence at commitment trials. It does not govern eligibility for the CPP. The State has shown nothing that would preclude Muns from participating in the CPP.

The State argues Muns does not have standing and relies on In re Detention of Mulkins, 157 Wn. App. 400, 237 P.3d 342 (2010). But that reliance is misplaced for two reasons. First, Muns proffered much greater evidence of his eligibility for the CPP than Mulkins. Mulkins had only a letter saying that he was a potential candidate. Id. at 402. He did not present evidence that he had been found eligible for services by the Division of Developmental Disabilities or that any professional had found him suitable

for the CPP. Muns, by contrast, did both. CP 147, 282; Ex. 9. Mulkins discussed the application process as possible evidence that the option would exist, but it does not stand for the hyper technical proposition that other evidence cannot suffice. Mulkins, 157 Wn. App. at 406-07.

Second, the Mulkins court's reasoning is no longer valid in light of subsequent precedent. The court in Mulkins relied on the interpretation of RCW 71.09.060 from State v. Harris. Mulkins, 157 Wn. App. at 406 n.6 (citing State v. Harris, 141 Wn. App. 673, 680, 174 P.3d 1171 (2007)). But Harris was disapproved by Washington's Supreme Court in In re Detention of Post, 170 Wn.2d 302, 316, 241 P.3d 1234 (2010). Post rejected the Harris court's reasoning that the possibility of a new commitment petition was irrelevant because it was speculative, stating, "That the filing of a new petition is not certain to occur does not make the possibility irrelevant." Post, 170 Wn.2d at 317. The same is true of voluntary treatment options. The fact that they are "voluntary" and "options" rather than certain to occur does not make them irrelevant.

The proper way to deal with uncertainty about the CPP is cross-examination, not exclusion of relevant evidence. The commitment statutes focus the jury's attention on "what would happen if the respondent were living freely in the community." In re Detention of West, 171 Wn.2d 383, 399, 256 P.3d 302 (2011) (emphasis added). Thus, the consideration of

voluntary treatment options such as the CPP does not require proof that Muns would be certainly (rather than optionally) and involuntarily (rather than voluntarily) required to participate. If the State believes the CPP is insufficient to safeguard the community, it is free to present the jury with evidence and argument to that effect: "To be sure, the State may offer evidence of the treatment and placement conditions that are necessary to mitigate the respondent's dangerousness, and the State may offer evidence that these components are lacking in the respondent's proposed arrangements for unconditional release." West, 171 Wn.2d at 399. What it may not do is, via statute, exclude evidence that directly relates to the voluntary treatment options the jury may consider.

"Voluntary treatment options" will always, by definition, be both voluntary and optional. Muns should not be required to prove the treatment is certain and inescapable before admitting it as evidence or permitting him to challenge the statute excluding it.

2. RCW 71.09.060 ARBITRARILY DENIES ONLY TO THE DEVELOPMENTALLY DISABLED THE ABILITY TO PRESENT EVIDENCE OF VOLUNTARY TREATMENT OPTIONS IN CIVIL COMMITMENT TRIALS.

The State claims RCW 71.09.060 treats all respondents under chapter 71.09 RCW alike because all are precluded from presenting evidence of less restrictive alternatives (LRA). ROB at 15-21. This argument is

nothing more than an attempt to sidestep the issue. Muns does not challenge the prohibition on evidence of LRAs at commitment trials. He challenges the provision of RCW 71.09.060 that permits evidence of voluntary treatment options while simultaneously excluding one voluntary treatment option open only to the developmentally disabled who may have difficulty finding other treatment.

a. The CPP Is a Voluntary Treatment Option, Not an LRA.

The State tries to make it appear Muns or Novick Brown proposed the CPP as an LRA. ROB at 19-20. This is false. Novick Brown's report did not discuss statutory LRAs, which are, by definition, programs the court can order as an alternative to complete confinement once a person is found to meet commitment criteria. CP 280-337; RCW 71.09.020(6). Nor did she state in her deposition that the CPP should be an LRA for Muns. CP 521-622. She stated she was retained for a risk assessment and determination regarding Muns' suitability for community based placement and whether he was eligible for Division of Developmental Disabilities (DDD) services. CP 282, 527. Only one time, in her report spanning 57 pages, does she refer to the CPP as the "least restrictive alternative" for Muns. CP 282. In her deposition, she never used that phrase. CP 521-622. She explained her report is a risk assessment to determine if Muns could be appropriately

managed in the CPP setting or in other DDD programs, analogous to the risk assessment the CPP would do. CP 558-62. She stated she is more familiar with the CPP than with chapter 71.09. CP 578. She was most likely speaking in the framework of the CPP, which aims to provide community protection services "in the least restrictive manner and environment." WAC 388-831-0120; see also RCW 71A.12.250. Nothing about her report or her deposition indicates that she or Muns was intending to propose the CPP as an LRA.

Moreover, the State clearly understood it to be proposed as evidence of voluntary treatment, since it brought up the provision of RCW 71.09.060 discussing voluntary treatment options. 2RP 128; CP 44-45. Muns argued the CPP could be considered as "how those [DDD] services could be provided were he not in involuntary custody." 2RP 134. That can only be interpreted as referring to voluntary treatment options because LRAs are still "involuntary custody." The court's oral and written rulings are unclear on the basis for the denial, but the argument made here on appeal was before the court. 2RP 137-38; CP 137.

Muns did not seek to propose the CPP evidence as an LRA. "Voluntary treatment options," are admissible. RCW 71.09.060. The CPP is a "voluntary treatment option" because participants are free to leave,

unlike an LRA which is court-ordered confinement, albeit of a less restrictive variety. WAC 388-831-0020; RCW 71.09.020(6).

b. There Is No Rational Basis For Treating the CPP Differently From Other Voluntary Treatment Programs.

The State also argues it has a legitimate interest in keeping mentally ill and dangerous people out of the CPP. ROB at 15. This argument should be rejected. First, as discussed above, neither RCW 71.09.060 nor any other statute keeps Muns out of the CPP if he is unconditionally released. The statute excludes evidence; it does not preclude participation. RCW 71.09.060. Second, the CPP is designed for those who are developmentally disabled and present a risk to the community. RCW 71A.12.210; WAC 388.831-0030. The State is arguing that precisely the people the program was designed for should be kept out of it.

The State may be correct that the CPP may not be sufficiently secure for those found to meet chapter 71.09 RCW's commitment criteria. ROB at 15. But at the commitment trial, the Court should not presume a respondent is committable when assessing evidence. Moreover, the only time a voluntary treatment option comes into play is upon unconditional release because the respondent does not meet commitment criteria. RCW 71.09.015; RCW 71.09.060. It is irrational to assume that that anyone even

alleged to meet chapter 71.09 criteria is automatically and forever too dangerous for the CPP but not for other voluntary treatment.

The State appears to argue that any treatment that is not court-ordered is insufficient to protect the community. ROB at 23. Since court-ordered treatment is already excluded from consideration as an LRA, this argument would exclude the entire universe of treatment (voluntary and involuntary) options. This argument should be rejected because it renders meaningless the statutory provision that "voluntary treatment options" may be considered. See, e.g., In re Detention of Stout, 159 Wn.2d 357, 367 n.6, 150 P.3d 86 (2007) (court does not construe statutes so as to render language meaningless).

The issue raised in this appeal is the exclusion of evidence. The State has identified no rational basis for excluding evidence of one voluntary treatment option open only to developmentally disabled respondents. This exclusive classification is arbitrary and violates Muns' right to equal protection of the laws.

3. PROCEDURAL DUE PROCESS IS VIOLATED WHEN THE STATE DEFINES COMMITMENT CRITERIA AND THEN PROHIBITS MUNS FROM PRESENTING EVIDENCE THE CRITERIA ARE NOT MET.

The very essence of due process is, "'the right to a fair opportunity to defend against the State's accusations.'" State v. Jones, 168 Wn.2d 713,

720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Due process requires that before the State can deprive a person of liberty, that person must, at a minimum, be afforded a meaningful opportunity to be heard. King v. King, 162 Wn.2d 378, 413, 174 P.3d 659 (2007).

Even in prison disciplinary proceedings, where inmates have substantially limited liberty interests, due process guarantees the right to present relevant evidence on one's behalf and not to have that evidence arbitrarily excluded from consideration. See In re Malik, 152 Wn. App. 213, 220, 215 P.3d 209 (2009) (In prison disciplinary hearing, "Minimum due process includes the right to present witnesses and documentary evidence . . . . While a hearing officer has discretion to limit evidence presented at an infraction hearing, he or she must generally state proper reasons for doing so."). It should go without saying that, when a statute defines commitment criteria but prohibits evidence showing the criteria are not met, there is no meaningful opportunity to defend or be heard.

Yet the State argues due process is not violated because Muns had no liberty or property right to participate in CPP. ROB at 25-30. This statement is a red herring that serves only to distract from the real issue, namely, the process that is due before the State may commit a person, potentially for life, under RCW 71.09. After spending several pages

valiantly knocking down this straw man, the State ultimately concedes Muns has a "substantial liberty interest" in not being indefinitely confined. ROB at 25-31.[1] The only question is whether he received the process that is due. He did not.

a. Admitting Evidence of Muns' Eligibility for the CPP Would Reduce the Risk of Error in the Commitment Trial.

The CPP program is directly relevant to the commitment criteria under Chapter 71.09 RCW. "[A] sexually violent predator is someone who, by definition, is 'likely to engage in predatory acts of sexual violence if not confined in a secure facility' and is not amenable to voluntary treatment on unconditional release." In re Detention of Thorell, 149 Wn.2d 724, 751, 72 P.3d 708 (2003) (quoting RCW 71.09.020(16)). Therefore, the question of whether voluntary treatment in the community would be appropriate "goes to whether the definition of SVP is met." Id. "[A] fact finder may consider evidence that voluntary treatment on unconditional release is appropriate." Id.

The State argues evidence of the CPP would not be probative or reduce the risk of error in commitment proceedings because the program is

[1] See also Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)).

voluntary and Muns could refuse services. ROB at 31. This argument fails because it is precisely "voluntary treatment" options that are relevant under the statute. RCW 71.09.060; Thorell, 149 Wn.2d at 751. It defies logic to declare that a voluntary program cannot be considered a "voluntary treatment option" under the statute because it is voluntary.

The State next appears to conflate two concepts that are, in fact, distinct: whether the CPP is an option that "would exist," for Muns if he were unconditionally released and whether he has already been accepted to and agreed to participate in that program. ROB at 28, 30, 31. The State has cited no authority that, before evidence of a voluntary treatment option may be admitted, a respondent must prove he has already been accepted into the program and will be obliged to participate. Novick Brown would have testified that Muns is appropriate and eligible for the CPP. CP 282. This evidence shows that program "would exist" for Muns if he were unconditionally released.

The State would be free to argue that it is not certain Muns would participate if released. This would be true of all "voluntary treatment options." Similarly, evidence that a new commitment petition may be filed upon commission of a "recent overt act" is relevant in the commitment proceedings. Post, 170 Wn.2d at 317. In Post, the court declared, "That the filing of a new petition is not certain to occur does not make the possibility

irrelevant." Id. The same is true of the CPP. The mere fact that it is not certain to occur does not make it irrelevant.

The State also argues evidence of the CPP would not show Muns is safe to be in the community. ROB at 32. But Novick Brown's report is to the contrary. She opines Muns is appropriate and eligible for the CPP because his needs can be met there "while simultaneously protecting the community." CP 282. This evidence is relevant because it tends to show Muns can be safely treated in the community and undermines the State's case. See Post, 170 Wn.2d at 316-17 (potential consequences of committing a recent overt act have "some tendency to diminish the likelihood" of reoffense and are therefore relevant). Banning evidence of the CPP unfairly deprives Muns of relevant evidence and renders his trial unfair. See Post, 170 Wn.2d at 317; Malik, 152 Wn. App. 213, 220.

Finally, the State argues Muns is not entitled to participate in the CPP. ROB at 32. The State relies not on a rejection by the appropriate agency or any statutory authority, but on a statement of legislative intent. ROB at 24 (citing Second Substitute Senate Bill Report, E2SSB 6630, 59th Leg. 2006 Reg. Sess. (2006). But the plain language of the statute governs evidence that may be considered at trial, not eligibility for the CPP:

> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. In determining whether or not the person would be likely to

> engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition. The community protection program under RCW 71A.12.230 may not be considered as a placement condition or treatment option available to the person if unconditionally released from detention on a sexually violent predator petition.

RCW 71.09.060. The statement of the legislature's understanding of an amendment cannot contradict the plain language of RCW 71.09.060, which governs evidence at the commitment trial, not participation in the CPP. See, e.g., State v. Landseidel, 165 Wn. App. 886, 269 P.3d 347 (2012) ("Statutory interpretation begins with the statute's plain meaning. When the plain language is unambiguous, the legislative intent is apparent and we will not construe the statute otherwise.").

No statute makes the CPP off-limits to anyone who has ever been even alleged to be a sexually violent predator. The CPP may not be open to those committed under chapter 71.09 RCW or those awaiting trial. But once it has been determined that a person does not meet commitment criteria, there is no reason why programs such as the CPP should not be available. The CPP may reject a person if they he cannot be safely managed in that program. RCW 71A.12.230. But this does not mean that that will be the case with Muns. The State has presented no evidence to rebut Muns' offer of proof that he meets the CPP criteria. This relevant evidence would reduce

the risk that a person who can be safely managed in the community will be instead wrongly committed under chapter 71.09 RCW.

b. Reducing the Risk of Erroneous Commitment Outweighs Any Possible State Interest in Controlling Persons Who Are Unconditionally Released.

If a person is determined at trial not to meet commitment criteria, he must be unconditionally released. RCW 71.09.060. Thus, the State can no longer have any interest in keeping him confined. The State's interest in confining those found to meet the criteria or those awaiting trial does not extend to those who are unconditionally released and, therefore, does not weigh in favor of excluding evidence of the CPP at trial. The State essentially argues that sexually violent predators are too dangerous for the CPP. ROB at 32. The fatal flaw in this argument is that, if unconditionally released, a person is not a sexually violent predator and the State may not confine him. The State has no interest to counterbalance Muns' interest in being able to present relevant evidence and prevent error at his commitment trial.

RCW 71.09.060 expressly states the jury may consider voluntary treatment options. But it then prohibits evidence of the treatment Muns is eligible for, thereby denying Muns the ability to defend himself. This places Muns in an impossible predicament and violates procedural due process.

4. MUNS HAS A SUBSTANTIVE DUE PROCESS RIGHT NOT TO BE CONFINED AS AN SVP IF HE IS NOT ONE.

The State has entirely misconstrued Muns' substantive due process argument in this case. The crux of it is simple. Civil commitment violates the fundamental substantive due process right to freedom from bodily unless the person is proved to be both mentally ill and dangerous. Foucha Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). RCW 71.09.060(1) violates substantive due process because it is not narrowly tailored to confine only those who cannot be safely managed in the community.

Some persons, like Muns, may be safe to be treated in the community via the CPP. But because they cannot present this evidence and the factfinder may not consider it, they may nonetheless be committed. To the extent it prohibits consideration of voluntary treatment options that mitigate risk to the community, Washington's civil commitment scheme under chapter 71.09 RCW violates substantive due process because it deprives Muns of the fundamental interest in physical liberty and is not narrowly tailored to achieve the State's interest in confining those who are both mentally ill and dangerous.

The State cites the need for long-term treatment of SVPs in total confinement facilities. ROB at 34. But the State again conflates those who are found to meet commitment criteria (and have, therefore, been found to be both mentally ill and dangerous) with those who have not. If Muns can show via the CPP that he is not a danger to the community, then he does not meet commitment criteria and must be unconditionally released.

B. CONCLUSION

Muns is a developmentally delayed person who was denied the ability to present relevant evidence at his commitment trial in violation of equal protection and due process. For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, this Court should reverse Muns' commitment.

DATED this 22nd day of August, 2012.

Respectfully submitted,

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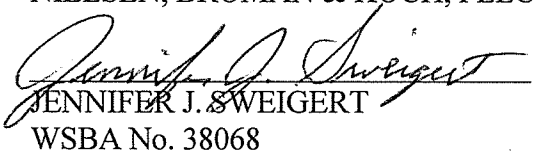

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In re Detention of Jason Muns

No. 29920-1-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 22nd day of August, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 22nd day of August, 2012.

x Patrick Mayovsky