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No. 37140-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN LEWIS FARR,

Appellant.

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

The Honorable Judge M. Scott Wolfram

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing.
2. The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where there was no statutory authority for the order and the order was based on inadmissible hearsay.
3. The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr's right to procedural due process was violated.
4. The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr's rights under article 1, section 7 of the Washington State Constitution, and the Fourth Amendment to the United States Constitution were violated.
5. The trial court erred in entering the following findings of fact:
 2. The defendant has tested positive for controlled substances that are not normally prescribed for patients at Eastern State Hospital, including but not limited to certain benzodiazepines, methamphetamine, and marijuana.
 3. The defendant has since refused drug screens as well refused less intrusive methods such as hair or fingernail samples.
 4. The defendant's fragile liver and overall hepatic health continue to be in danger without the ability to perform drug screens.

(CP 157-158).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing.

- a. Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where there was no statutory authority for the order and the order was based on inadmissible hearsay.
- b. Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr's right to procedural due process was violated.
- c. Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr's rights under article 1, section 7 of the Washington State Constitution, and the Fourth Amendment to the United States Constitution were violated.

C. STATEMENT OF THE CASE

In 2012, the State charged Ryan Lewis Farr with two counts of first degree assault, one count of first degree robbery, and one count of first degree arson. (CP 15-17). Following competency and sanity evaluations, Mr. Farr moved the trial court for a judgment of acquittal by reason of insanity, pursuant to RCW 10.77.080. (CP 33-37, 54-58, 60). Mr. Farr then entered a plea of not guilty by reason of insanity, to one count of first degree assault. (CP 61-62). The trial court accepted the plea and entered findings of fact and conclusions of law, including finding Mr. Farr "was legally insane at the time of the commission of the act alleged in the information and is not legally responsible for said acts[.]" (CP 63-64). The trial court ordered Mr. Farr committed to a State Hospital as

being criminally insane, pursuant to RCW Chapter 10.77. (CP 65-66). Mr. Farr was committed to Eastern State Hospital. (CP 178-267).

Subsequently, Mr. Farr filed both an appeal and a personal restraint petition, the latter of which was transferred back to the trial court as a CrR 7.8 motion. (CP 80-86, 88-91, 97-98). Following these challenges, his plea of not guilty by reason of insanity was upheld. (CP 130-132, 142-143).

In September 2019, the State filed a motion for an order permitting Eastern State Hospital to conduct drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing. (CP 145-147). The motion stated it was based on “the files and records herein, the declaration of counsel, RCW 10.77.094 and RCW 71.05.217.” (CP 145). Attached to the motion was a declaration of the Walla Walla County Prosecuting Attorney. (CP 146-147). The declaration stated the prosecutor was contacted by Dr. Gregory J. Bahder, Psychiatrist, and Chris B. Phillips, MSW and Psychiatric Social Worker, at Eastern State Hospital, and then set forth facts relayed to him by these two individuals. (RP 146-147). Declarations or reports by Dr. Bahder and Mr. Phillips themselves were not included with the motion. (CP 145-147).

The trial court appointed counsel to represent Mr. Farr in response to the motion. (CP 148; RP 1-3). Defense counsel filed a response to the State’s motion, requesting the motion be denied. (CP 152-153). Defense counsel argued the statutes cited by the State do not provide authority for the requested order, and

the requested order would violate article 1, section 7 of the Washington Constitution, and the Fourth Amendment to the United States Constitution. (CP 152-153).

On October 14, 2019, the trial court held a hearing on the motion. (RP 6-11). The State did not call any witnesses or provide any information in addition to the written motion it had filed. (CP 145-147; RP 6-11). Defense counsel objected to the entry of an order as requested, arguing:

The State is relying on 10.77.094, which has nothing to do with it. There is no specific authorization. Therefore, this must fall. His right to due process under the 4th Amendment, his right under Article 1, Section 7 are being asked to be curtailed. He does find that this is a significant fundamental right. The nature of this hearing does not comport with the formality required with regard to any sort of constitutional right being abridged. The State should be disqualified under RPC 3.7. The affidavit that was submitted by the State should not be heard as there was no attempt of a finding of good cause for hearsay. We do need to have testimony if the State wants to bring this back with appropriately filed witnesses that can attest to anything that was said in the affidavit submitted by the State. I'm sure the State will do so. Your Honor, this is something that we do need to take seriously. It is a fundamental right to his liberty. He wants you to be aware that as innocuous as this motion was, it is very insidious, your Honor. The State is asking to be able to hold him down and pull hair out of his head. I don't think that this is something that we should take lightly with a two page affidavit that's comprised solely of hearsay.

(RP 7-8).

Mr. Farr also addressed the trial court and objected to the entry of an order. (RP 9-11).

At the time of the hearing, the trial court file included progress reports for Mr. Farr from Eastern State Hospital, through May 1, 2019. (CP 178-253). The trial court file did not yet include a progress report for Mr. Farr from Eastern State Hospital for May 1, 2019 through November 1, 2019. (CP 256-259).

The trial court granted an order authorizing Eastern State Hospital to conduct drug testing. (CP 157-158; RP 8-11). The trial court stated “I have had an opportunity to review the file, the Eastern State Hospital matters and everything that’s in the file and it seems to me the drug testing is based on what has been happening at Eastern State Hospital and is proper and I will grant that request.” (RP 8).

The trial court entered a written order including findings of fact. (CP 157-158; RP 10). The trial court ordered “that Eastern State Hospital be, and is hereby authorized to conduct drug testing of the defendant including urinalysis, nail sample testing, and hair sample testing.” (CP 158). The trial court entered the following written findings of fact:

1. The defendant was found not guilty of reason of insanity [sic] of Assault in the First Degree and committed to Eastern State Hospital on November 1, 2013.
2. The defendant has tested positive for controlled substances that are not normally prescribed for patients at Eastern State Hospital, including but not limited to certain benzodiazepines, methamphetamine, and marijuana.
3. The defendant has since refused drug screens as well refused less intrusive methods such as hair or fingernail samples.
4. The defendant’s fragile liver and overall hepatic health

continue to be in danger without the ability to perform drug screens.

(CP 157-158).

Mr. Farr appealed. (CP 160-162).

D. ARGUMENT

Issue 1: Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing.

The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing. The order should be reversed.

“The Washington State Legislature has seen fit to provide criminal defendants with a mechanism for obtaining an acquittal by reason of insanity.” *State v. Reid*, 144 Wn.2d 621, 627, 30 P.3d 465 (2001); *see also* RCW 10.77.080 (motion for acquittal on grounds of insanity). If a criminal defendant proves, by a preponderance of the evidence, that he was insane at the time of the offense charged, an acquittal may be entered. *See id.*; *see also* RCW 10.77.080. An insanity acquittee is “wholly incapable of forming the requisite intent to commit a crime” and “does not *escape* punishment because he has committed no act deserving of punishment.” *Id.* at 627 n.2.

“The statute further provides for the civil commitment of insanity acquittees who present a substantial danger to others or a substantial likelihood of

committing future criminal acts which would jeopardize public safety.” *Id.* at 627 (citing RCW 10.77.110).

This case involves an issue of first impression. There is no Washington case law addressing involuntary drug testing for insanity acquittees committed to a state hospital. Chapter 10.77 RCW, setting forth procedures for the criminally insane, does not contain a provision addressing involuntary drug testing for insanity acquittees committed to a state hospital.

The chapter does contain a statute setting forth the criteria for when a state hospital may administer antipsychotic medication without consent to an insanity acquittee. *See* RCW 10.77.094. This statute provides:

A state hospital may administer antipsychotic medication without consent to an individual who is committed under this chapter as criminally insane by following the same procedures applicable to the administration of antipsychotic medication without consent to a civilly committed patient under RCW 71.05.217, except for the following [three enumerated criteria].

RCW 10.77.094(1).

Chapter 71.05 RCW sets forth procedures for civil commitment of the mentally ill.

The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing, for several separate reasons, set forth below. The order should be reversed based on one or more of the following reasons.

a. Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where there was no statutory authority for the order and the order was based on inadmissible hearsay.

The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing on Mr. Farr, where there was no statutory authority for the order and the order was based on inadmissible hearsay. The order should be reversed.

Defense counsel objected below to the entry of the order because it lacked statutory authority, was based solely on hearsay, and there was not a finding of good cause for hearsay. (CP 152-153; RP 7-8). Therefore, these issues are properly raised on appeal.

As acknowledged above, Chapter 10.77 RCW, setting forth procedures for the criminally insane, does not contain a provision addressing involuntary drug testing for insanity acquittees committed to a state hospital. Therefore, there was no statutory authority for the drug testing order entered by the trial court. The statutes relied upon by the State, RCW 10.77.094 and RCW 71.05.217, set forth the criteria for when a state hospital may administer antipsychotic medication without consent to an insanity acquittee. *See* RCW 10.77.094; RCW 71.05.217. Therefore, these statutes do not grant the trial court authority order to drug testing of Mr. Farr.

In addition, the trial court's order authorizing drug testing of Mr. Farr was based solely upon inadmissible hearsay.

The rules of evidence applied to the hearing on the motion held here. *See* ER 1101(a) (stating that “[e]xcept as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington.”). The motion does not fall under one of the enumerated categories under which the rules of evidence need not be applied. *See* ER 1101(a), (c).

“This court reviews whether a statement was hearsay de novo.” *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 688–89, 370 P.3d 989 (2016).

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). “Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.” ER 802.

The State’s motion for drug testing stated it was based on “the files and records herein, the declaration of counsel, RCW 10.77.094 and RCW 71.05.217.” (CP 145). Attached to the motion was a declaration of the Walla Walla County Prosecuting Attorney. (CP 146-147). The declaration stated the prosecutor was contacted by Dr. Bahder and Mr. Phillips, from Eastern State Hospital, and then set forth facts relayed to him by these two individuals. (RP 146-147). This declaration was the only facts offered in support of the State’s motion. (CP 145-147; RP 6-11).

Dr. Bahder’s and Mr. Phillips’ statements set forth in the prosecutor’s declaration were hearsay; the statements were from someone other than the

declarant prosecutor, and they were offered in evidence to prove the truth of the matter asserted. *See* ER 801(c). Because there is not an exception under the rules of evidence allowing admission of this hearsay, it was not admissible, and the trial court erred in admitting it. *See* ER 802.

At a minimum, given Mr. Farr’s liberty and privacy interests at stake, the trial court erred in admitting the hearsay evidence without good cause. *See State v. Bao Dinh Dang*, 178 Wn.2d 868, 883-889, 312 P.3d 30 (2013); *State v. Derenoff*, 182 Wn. App. 458, 332 P.3d 1001 (2014)¹; *see also Youngberg v. Romeo*, 457 U.S. 307, 319-23, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (an involuntarily committed individual retains liberty interests); *Washington v. Olsen*, 194 Wn. App. 264, 272, 374 P.3d 1209 (2016), *aff’d*, 189 Wn.2d 118, 399 P.3d 1141 (2017) (stating “[a] person generally has a privacy interest in his or her bodily functions, including control of urine.”) (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 307, 178 P.3d 995 (2008)).

In the context of revocation of the conditional release of an insanity acquittee, because a conditional liberty is at stake, our Supreme Court applies limited due process rights. *See Bao Dinh Dang*, 178 Wn.2d at 883-889; *see also Derenoff*, 182 Wn. App. 458.² The Court stated that “[u]nder limited due process

¹ The application portion of *State v. Derenoff*, 182 Wn. App. 458, 332 P.3d 1001 (2014) cited here is the unpublished portion of the opinion. Therefore, it does not contain page numbers to reference. In addition, GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

² GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

analysis, we have held that ‘hearsay evidence should be considered only if there is good cause to forgo live testimony.’” *Id.* at 884 (quoting *State v. Dahl*, 139 Wn.2d 678, 686, 990 P.2d 396 (1999)). The Court stated that “[g]ood cause is defined in terms of difficulty and expense of procuring witnesses in combination with demonstrably reliable or clearly reliable evidence.” *Id.* (quoting *Dahl*, 139 Wn.2d at 686) (internal quotation marks omitted). The Court held “trial courts must articulate a good faith basis for introducing hearsay evidence – whether written or spoken – in a revocation hearing of this nature.” *Id.* at 885.

Given Mr. Farr’s liberty and privacy interests at stake, the trial court erred in admitting the hearsay evidence without good cause for doing so, articulated on the record below. *See Bao Dinh Dang*, 178 Wn.2d at 883-889; *Derenoff*, 182 Wn. App. at 458³; *Youngberg* 457 U.S. at 319-23; *Olsen*, 194 Wn. App. at 272 (citing *York*, 163 Wn.2d at 307).

Further, the trial court erred in entering findings of fact numbers 2, 3, and 4 entered in its drug testing order, where the only basis for these three findings of fact was the inadmissible hearsay. (CP 157-158).

In general, when reviewing findings of fact, the appellate court determines “whether substantial evidence supports the challenged findings of fact and, in turn, if the supported findings and unchallenged findings support the court’s

³ GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

conclusions of law.” *State v. Coleman*, 6 Wn. App. 2d 507, 514, 431 P.3d 514 (2018); *see also, e.g., State v. Sommerville*, 111 Wn.2d 524, 533-34, 760 P.2d 932 (1988). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Sommerville*, 111 Wn.2d at 534.

Here, where the only basis for challenged findings of fact numbers 2, 3, and 4 was inadmissible hearsay from the prosecutor’s declaration, they were not supported by substantial evidence. There was no other admissible evidence in the record to support these challenged findings of fact. The remaining unchallenged finding (finding of fact number 1) does not support the trial court’s conclusion of law authorizing drug testing of Mr. Farr.

“[A]n erroneous evidentiary ruling does not result in reversal unless the defendant was prejudiced.” *Gonzalez-Gonzalez*, 193 Wn. App. at 689 (*citing State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004)); *see also Bao Dinh Dang*, 178 Wn.2d at 885 (where the trial court erred in admitting hearsay without good cause, harmless error analysis applied). Mr. Farr was prejudiced by the trial court’s admission and reliance on the inadmissible hearsay from the prosecutor. (CP 146-147). This was the only evidence offered by the State in support of its motion. (CP 145-147; RP 6-11). At the hearing held on the motion, the State did not call any witnesses or provide any information in addition to the written motion it had filed. (CP 145-147; RP 6-11). In addition, the admission of the

inadmissible hearsay without good cause was not harmless, because there was no non-hearsay evidence presented to support the drug testing order. *See Bao Ding Dang*, 178 Wn.2d at 885.

Because there was no statutory authority authorizing Eastern State Hospital to conduct drug testing on Mr. Farr, and the order was based solely on inadmissible hearsay, the order should be reversed.

b. Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr's right to procedural due process was violated.

The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr's right to procedural due process was violated. The order should be reversed.

Defense counsel objected below to the entry of the order based upon the denial of Mr. Farr's due process rights, due to the nature of the hearing. (RP 7). Nonetheless, "[i]t is consistent with RAP 2.5(a) for a party to raise the issue of denial of procedural due process in a civil case at the appellate level for the first time." *Conner v. Universal Utilities*, 105 Wn.2d 168, 171, 712 P.2d 849 (1986); *see also* RAP 2.5(a)(3) (a party may raise a manifest error affecting a constitutional right for the first time on appeal).

"The applicability of the constitutional due process guaranty is a question of law subject to de novo review." *In re Detention of Fair*, 167 Wn.2d 357, 362, 219 P.3d 89 (2009).

Under the Fourteenth Amendment, a state may not deprive persons of “life, liberty, or property” without providing them “due process of law.” U.S. Const. amend. XIV, § 1. “Procedural due process prohibits the State from depriving an individual of protected liberty interests without appropriate procedural safeguards.” *Derenoff*, 182 Wn. App. at 466 (citing *In re Pers. Restraint of Bush*, 164 Wn.2d 697, 704, 193 P.3d 103 (2008)).

“When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.” *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 704, 257 P.3d 570 (2011) (citation omitted) (internal quotation marks omitted). “The opportunity to be heard must be at a meaningful time and in a meaningful manner, appropriate to the case.” *Id.* at 704-705 (citation omitted) (internal quotation marks omitted). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 705 (alteration in original) (citation omitted) (internal quotation marks omitted).

In order to determine what procedural due process demands in a particular situation, appellate courts consider the test set forth in *Mathews v. Eldridge*, balancing three factors:

- (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any of additional procedural safeguards, and (3)

the government interest, including costs and administrative burdens of additional procedures.

Derenoff, 182 Wn. App. at 466 (citing *In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007); see also *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

Our Supreme Court stated “[t]his court repeatedly has recognized that due process guaranties must accompany involuntary commitment for mental disorders.” *In re Detention of Schuoler*, 106 Wn.2d 500, 509, 723 P.2d 1103 (1986).

Here, procedural due process required greater procedural protections than were provided to Mr. Farr before the trial court entered an order for involuntary drug testing for an unlimited time period. (RP 6-11). The order was entered based solely upon a declaration from the prosecutor, containing inadmissible hearsay. (CP 145-147). Although the trial court held a hearing, the State did not call any witnesses or provide any information in addition to the written motion it had filed. (CP 145-147; RP 6-11). A balancing of the *Mathews v. Eldridge* factors establishes that due process requires, at a minimum, a meaningful hearing, with the right to present evidence, cross-examine witnesses, and have the rules of evidence enforced, before the trial court can order involuntary drug testing of an insanity acquittee. See *Mathews*, 424 U.S. at 335.

First, considering the private interest affected, Mr. Farr has a privacy interest in his bodily functions, including control of his urine, and his hair and

nails. *See Olsen*, 194 Wn. App. at 272 (stating “[a] person generally has a privacy interest in his or her bodily functions, including control of urine.”) (citing *York*, 163 Wn.2d at 307); *see also State v. Olsen*, 189 Wn.2d 118, 124, 399 P.3d 1141 (2017) (stating “[w]e have consistently held that the nonconsensual removal of bodily fluids implicates privacy interests.”); *York*, 163 Wn.2d at 307-308 (recognizing that obtaining body fluids via urinalysis “is a significant intrusion on a student’s fundamental right of privacy.”). In addition, despite being civilly committed to a state hospital, Mr. Farr retains his liberty interests. *See Youngberg*, 457 U.S. at 319-23. Mr. Farr is not a convicted criminal, but rather, was acquitted of his crimes. *See Reid*, 144 Wn.2d at 627; RCW 10.77.080. This factor weighs in Mr. Farr’s favor.

Second, the risk of erroneous deprivation of Mr. Farr private interest is great, given the lack of existing procedures for involuntary drug testing for insanity acquittees committed to a state hospital. Chapter 10.77 RCW does not contain a provision addressing involuntary drug testing for insanity acquittees committed to a state hospital. Because of the lack of existing procedures, this factor also weighs in Mr. Farr’s favor. *Cf. Derenoff*, 182 Wn. App. at 466-67 (where the second factor does not weigh in the individual’s favor, because the current procedure provided sufficient procedural safeguards).

Third, considering the State’s interest, in the general context of civil commitment, the State has an interest in protecting public safety and ensuring

appropriate treatment for mentally ill individuals. *In re Detention of M.W.*, 185 Wn.2d 633, 652, 374 P.3d 1123 (2016).

A weighing of the three *Mathews v. Eldridge* factors set forth shows due process requires greater procedural protections than were provided to Mr. Farr before the trial court entered an order for involuntary drug testing for an unlimited time period. *See Mathews*, 424 U.S. at 335. Although the state does have interests at stake, there is currently no procedures in place to protect Mr. Farr's privacy interest in his bodily functions while civilly committed to a state hospital.

At a minimum, given the interests at stake for Mr. Farr, due process requires he receive a meaningful hearing, with the right to present evidence, cross-examine witnesses, and have the rules of evidence enforced, before the trial court can order involuntary drug testing of him for an unlimited time period. *See Mathews*, 424 U.S. at 335; *see also, e.g.*, RCW 10.77.094(1) and RCW 71.05.217(7)(c) (statutes setting forth the procedures for when a state hospital may administer antipsychotic medication without consent to an insanity acquittee; although the statute does not apply to Mr. Farr, the statutes are cited as an example of procedural protections that should be in place before depriving Mr. Farr of his privacy interests).

The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing on Mr. Farr, where Mr. Farr's right to procedural due process was violated. The order should be reversed.

c. Whether the trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr’s rights under article 1, section 7 of the Washington State Constitution, and the Fourth Amendment to the United States Constitution were violated.

The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, where Mr. Farr’s rights under article 1, section 7 of the Washington State Constitution, and the Fourth Amendment to the United States Constitution were violated. The order should be reversed.

Mr. Farr raised both constitutional challenges below, preserving these issues for appeal. (CP 152-153, RP 7-8).

“Whereas the Fourth Amendment prohibits ‘unreasonable searches and seizures,’ article I, section 7 of our State constitution prohibits any invasion of an individual’s right to privacy without ‘authority of law.’” *State v. Betancourth*, 190 Wn.2d 357, 366, 413 P.3d 566 (2018).

The nonconsensual removal of bodily fluids implicates privacy interests. *Olsen*, 189 Wn.2d at 124; *York*, 163 Wn.2d at 307-308; *see also Robinson v. City of Seattle*, 102 Wn. App. 795, 812, 10 P.3d 452 (2000) (finding “[t]he collection and testing of urine by the City no doubt constitutes a search and therefore implicates article I, section 7.”); *Blomstrom v. Tripp*, 189 Wn.2d 379, 403, 402 P.3d 831 (2017) (acknowledging “[i]n the context of a state-ordered search, urine testing “is ‘particularly destructive of privacy and offensive to personal dignity.’”).

“It is well-established that in some areas, article I, section 7 provides greater protection than its federal counterpart – the Fourth Amendment.” *York*, 163 Wn.2d at 306. Our appellate courts have not yet determined if Washington’s Constitution provides broader protection in the specific context of bodily functions and civil commitment of an insanity acquittee.

Our Supreme Court, in *State v. Gunwall*, established a non-exclusive set of six factors to determine “whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution.” *Blomstrom*, 189 Wn.2d at 400 (quoting *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986)). The six *Gunwall* factors are: “(1) the textual language; (2) difference in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.” *Id.* at 401 (quoting *Gunwall*, 106 Wn.2d at 58).

The first, second, third, and fifth factors of the *Gunwall* test generally support analyzing article 1, section 7 independently from the Fourth Amendment. *Id.*; see also *Robinson*, 102 Wn. App. at 809 (recognizing “[a]nalysis of these factors generally remains the same each time a constitutional provision is examined.”).

The fourth *Gunwall* factor “requires an examination of preexisting state law to determine what protection this state has historically afforded the subject at issue.” *Robinson*, 102 Wn. App. at 810; see also *Blomstrom*, 189 Wn.2d at 401-

02. Our Supreme Court has established that bodily functions are entitled to heightened protection under article 1, section 7. *Blomstrom*, 189 Wn.2d at 401 (citing *York*, 163 Wn.2d at 307); *see also Robinson*, 102 Wn. App. at 810-11. Because of the heightened protection given to bodily functions under article I, section 7, this factor supports independent state constitutional analysis.

The sixth *Gunwall* factor asks whether the issue is of particular state interest. *See Blomstrom*, 189 Wn.2d at 402; *Robinson*, 102 Wn. App. at 811-12. Acquittal of a criminal charge by insanity, and civil commitment of insanity acquittees, is governed by State law. *See Reid*, 144 Wn.2d at 627; RCW 10.77.080; RCW 10.77.110. Thus, the appropriateness of searches of insanity acquittees is a matter of particular state and local concern. *See Blomstrom*, 189 Wn.2d at 402. The sixth *Gunwall* factor also supports an independent state constitutional analysis.

Under article 1, section 7 of the Washington Constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. 1, § 7. A claimed article 1, section 7 violation is reviewed in two steps:

First, we determine whether the action complained of constitutes a disturbance of one’s private affairs. If there is no private affair being disturbed, no article 1, section 7 violation exists. Second, we consider whether authority of law justifies the intrusion.

Blomstrom, 189 Wn.2d at 402-03 (internal quotation marks omitted) (citations omitted).

Here, the action complained of disturbs Mr. Farr’s private affairs. “[C]ourt-ordered urinalysis constitutes an acute privacy invasion by the State.” *Blomstrom*, 189 Wn.2d at 404. Mr. Farr has a privacy interest in his bodily functions, including control of his urine, and his hair and nails. *See Olsen*, 194 Wn. App. at 272; *Olsen*, 189 Wn.2d at 124; *York*, 163 Wn.2d at 307-308; *Robinson* 102 Wn. App. at 812; *Blomstrom*, 189 Wn.2d at 403.

Turning to the second part of the article 1, section 7 analysis, “[a]uthority of law’ may be satisfied by a valid warrant, a recognized exception to the warrant requirement, a constitutional statute, or a court rule.” *Blomstrom*, 189 Wn.2d at 404; *see also Robinson*, 102 Wn. App. at 813. A court order does not meet the authority of law requirement. *See State v. Phillip*, 452 P.3d 553, 561-62 (Wash. Ct. App. 2019), *review denied*, 194 Wn.2d 1017, 455 P.3d 140 (2020).

Further, for article 1, section 7 analysis of government searches outside the context of law enforcement, the following analysis applies:

We have recognized two types of privacy: the right to non-disclosure of intimate personal information or confidentiality, and the right to autonomous decisionmaking. The former may be compromised when the State has a rational basis for doing so, while the latter may only be infringed when the State acts with a narrowly tailored compelling state interest.

See Robinson, 102 Wn. App. at 817 (quoting *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 96-97, 847 P.2d 455 (1993)); *see also Olsen*, 189 Wn.2d at 127-134 (applying this analysis).

A drug test implicates both the confidentiality and the personal autonomy branches of privacy under article 1, section 7. *Robinson*, 102 Wn. App. at 817-18. Therefore, the autonomy test applies, and the search “must be justified by compelling government interests and must be narrowly tailored to meet those interests.” *Id.* at 818; *see also Olsen*, 189 Wn.2d at 127-134.

Here, the order authorizing Eastern State Hospital to conduct involuntary drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing, for an unlimited time period, is not narrowly tailored to achieve compelling state interests. *See Robinson*, 102 Wn. App. at 818; *Olsen*, 189 Wn.2d at 127-134. The order authorizes continuous drug testing of Mr. Farr for as long as he is committed to Eastern State Hospital. (CP 157-158). It contains no limitations on testing Mr. Farr; it does not require hospital personnel to have any level of suspicion before testing him. (CP 157-158). Even assuming, without conceding, that compelling state interests for drug testing Mr. Farr exist, the trial court’s order is not narrowly tailored. The trial court’s order instead gives Eastern State Hospital unfettered discretion to drug test Mr. Farr, and could even be construed to authorize invasive techniques such as involuntary bladder catheterization or restraining Mr. Farr in order to obtain hair and nail samples. The trial court’s order violates Mr. Farr’s rights under article 1, section 7 of the Washington State Constitution.

The trial court's order also violates Mr. Farr's rights under the Fourth Amendment.

"Court generally agree that collection and analysis of biological samples, including urine, constitute a search for Fourth Amendment purposes." *State v. Rose*, 146 Wn. App. 439, 455, 191 P.3d 83 (2008) (citing *State v. Surge*, 122 Wn. App. 448, 452, 94 P.3d 345 (2004), *aff'd*, 160 Wn.2d 65, 156 P.3d 208 (2007)).

"The Supreme Court has not established a standard for assessing whether a particular search violated the Fourth Amendment rights of an involuntary committed person." Alexis Alvarez, *A Reasonable Search for Constitutional Protection in Serna v. Goodno: Involuntary Civil Commitment and the Fourth Amendment*, 44 U.C. Davis L. Rev. 363, 374 (2010).

To determine whether a search is reasonable under the Fourth Amendment, courts apply a balancing test, "balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

"Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

Because Mr. Farr is not a convicted criminal nor a pretrial detainee, because there was a verdict (acquittal) in his case, he must receive more Fourth Amendment protection than given in a criminal setting. *See, e.g.*, Carol Trevey,

Prisoners of the Mind?: The Inappropriateness of Comparing the Involuntarily Committed Mentally Ill to Pretrial Detainees in Fourth Amendment Analyses, 13 U. Pa. Const. L. 1435 (2011); cf. *State v. Puapuaga*, 164 Wn.2d 515, 192 P.3d 360 (2008) (upholding the seizure of property from a pretrial detainee, recognizing that “an inmate’s expectation of privacy is necessarily lowered while in custody.”).

Here, the order authorizing Eastern State Hospital to conduct involuntary drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing, for an unlimited time period, is not a reasonable search under the Fourth Amendment. The proffered need for the search (drug testing) of Mr. Farr, balanced against the invasion of his privacy rights, demonstrates that the ongoing, unfettered search is not reasonable. *See Bell*, 441 U.S. at 599 (setting forth the balancing test). The scope of the search is too broad, authorizing continuous drug testing of Mr. Farr for as long as he is committed to Eastern State Hospital. (CP 157-158). The trial court’s order gives Eastern State Hospital unfettered discretion to drug test Mr. Farr, which is an unreasonable search. The trial court’s order violates Mr. Farr’s rights under the Fourth Amendment.

Because the order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr violates his rights under article 1, section 7 of the Washington State Constitution, and the Fourth Amendment to the United States Constitution, the order should be reversed.

E. CONCLUSION

The trial court erred in entering an order authorizing Eastern State Hospital to conduct drug testing of Mr. Farr, including urinalysis, nail sample testing, and hair sample testing. There was no statutory authority for the order and the order was based on inadmissible hearsay; and it violated Mr. Farr's rights to procedural due process, and his rights under article 1, section 7 of the Washington State Constitution, and the Fourth Amendment to the United States Constitution. For one or more of these reasons, the order should be reversed.

Respectfully submitted this 2nd day of April, 2020.


Jill S. Reuter, WSBA #38374

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OF THE STATE OF WASHINGTON

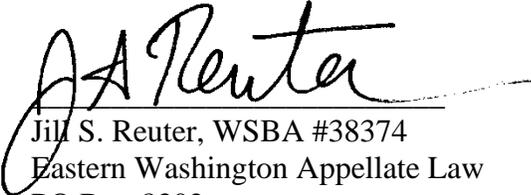
STATE OF WASHINGTON) COA No. 37140-9-III
Plaintiff/Respondent)
vs.) Walla Walla Co. No. 12-1-00328-6
)
RYAN LEWIS FARR) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 2, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served a copy on the Respondent at jnagle@co.walla-walla.wa.us using the Washington State Appellate Courts' Portal.

Dated this 2nd day of April, 2020.


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