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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

ALFRED KISTENMACHER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

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JUL 11 1990

**ANSWER OF THE STATE OF WASHINGTON TO THE
APPELLANT'S PETITION FOR REVIEW**

ROB MCKENNA
Attorney General

MELANIE TRATNIK
Assistant Attorney General
WSBA #25576
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98604
(206) 389-2005

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I. INTRODUCTION

The court of appeals affirmed the civil commitment of Mr. Kistenmacher as a sexually violent predator. *In re Detention of Kistenmacher*, ___ Wn. App. ___, 138 P.3d 648 (2006). The Respondent, State of Washington, opposes further review of the decision.

II. ISSUE FOR REVIEW

This case is a direct appeal of a trial court order committing Mr. Kistenmacher as a sexually violent predator. For the reasons stated below, the issue presented by the petition is not appropriate for review under the considerations of RAP 13.4(b). If review were accepted, the issues would be:

1. Whether RCW 79.01.050 creates a right to counsel at a forensic evaluation conducted to determine if someone meets the criteria for being committed as a sexually violent predator.
2. If no statutory right exists, then can a right be created if an employee of the Special Commitment Center erroneously advised an individual once that he could have counsel present, but the individual in no way acted in reliance on that erroneous representation.¹

¹ As argued in Part IV C below, the court of appeals recognized that Mr. Kistenmacher's arguments failed to demonstrate that there would have been any different result had counsel been provided. Accordingly, if review were accepted, the issues presented also ask whether he can show any harm from the absence of counsel at the forensic evaluation.

III. STATEMENT OF THE CASE

The State expands upon the facts set forth by Mr. Kistenmacher because the following additional facts are relevant to why this case is not appropriate for review under RAP 13.4(b).

On July 19, 2004, Mr. Kistenmacher received a form from John Rockwell, an intake worker at the Special Commitment Center, entitled Notice of Evaluation as a Sexually Violent Predator. RP 3/21/05, p. 5. Among other things, this form included the following two statements: "I agree to participate in an assessment for the purpose of evaluation as a Sexually Violent Predator," and "I have been advised by John Rockwell that I may have my attorney present during the clinical interview portion of the evaluation for the purpose of commitment as a Sexually Violent Predator." CP 123. Mr. Kistenmacher put a check on the line next to these two statements, indicating he would participate in the evaluation and that he wished to have an attorney present. RP 3/21/05, p. 5; CP 123.

Fourteen days later, on August 2, 2004, Mr. Kistenmacher met with Dr. Goldberg. RP 3/21/05, p. 5. Dr. Goldberg presented Mr. Kistenmacher with another form entitled Notice of Evaluation as a Sexually Violent Predator, informing him of the purpose of the evaluation.

RP 3/21/05, p. 5; RP 3/22/05, p. 11; CP 124. This form was substantially the same as the form provided by John Rockwell on July 19, 2004, except that it did not contain any language regarding the presence of an attorney. RP 3/21/05, p. 6. Mr. Kistenmacher checked the line indicating that he would participate in Dr. Goldberg's interview. RP 3/21/05, p. 6; CP 124.

Mr. Kistenmacher later testified that he understood that the purpose of Dr. Goldberg's evaluation was to determine if he had a mental abnormality or personality disorder that makes him likely to commit predatory acts of future violence. RP 3/21/05, p. 9. He testified that he reviewed the form and signed it prior to participating in the evaluation, that he had no memory of not understanding it, and that he never asked Dr. Goldberg or anyone else for an attorney. RP 3/21/05, p. 9. He added that "I had no idea that I had a reason or a right to have one [an attorney] there." RP 3/21/05, p. 12.

Dr. Goldberg is an independent contractor with the Washington State Department of Corrections, not an employee of the Special Commitment Center. RP 3/22/05, p. 11. He testified that Mr. Kistenmacher did not have any questions about the substance of the form, did not express any misunderstandings about it, and never made any inquiry pertaining to an attorney. RP 3/22/05, p. 12. Dr. Goldberg also testified that he had never seen the form that Mr. Rockwell gave to

Mr. Kistenmacher on July 19, 2005, and did not know that Mr. Kistenmacher had previously been presented with it. RP 3/22/05, pp. 12-13. Dr. Goldberg explained that the presence of a third party can interfere with a forensic evaluation, and that this interference can occur even if the third party remains silent. RP 3/22/05, pp. 12-13.

Dr. Goldberg testified that he reviewed approximately 1200 to 1500 pages of materials pertaining to Mr. Kistenmacher prior to his three and a half hour forensic interview. RP 3/22/05, pp. 23-24. Dr. Goldberg explained that one of the documents he received was a list containing prior unadjudicated offenses Mr. Kistenmacher had admitted to during a Special Offender Sentencing Alternative evaluation [sic – Special Sex Offender Sentencing Alternative] conducted in 1995 by a woman named Ms. Macy. RP 3/22/05, pp. 25-26 & 118. During that evaluation, Mr. Kistenmacher disclosed twenty-eight separate incidents of sexual contact or sexual exposure involving minors.² RP 3/22/05, pp. 25-34. Mr. Kistenmacher told Ms. Macy that these acts occurred when he was between the ages of eight and forty-two,³ and that his victims were between the ages of five and seventeen. RP 3/22/05, pp. 25-34.

² A few of these incidents involved multiple contacts with the same victim, or described acts committed against several different victims.

³ During a video deposition conducted on March 2, 2005, Mr. Kistenmacher indicated that an unadjudicated sexual act occurred “at the age of 48, which would have been about 1989.” See CP 259. The Report of Proceedings regarding Dr. Goldberg’s

Dr. Goldberg testified that during his forensic interview of Mr. Kistenmacher, he asked about each of the admissions made to Ms. Macy. RP 3/22/05, p. 26. Dr. Goldberg testified that Mr. Kistenmacher told him he did not remember two of the incidents, but he admitted to the remaining twenty-six incidents, sometimes making very slight changes in describing the acts. RP 3/22/05, pp. 26-34. With regard to the five acts in which he told Ms. Macy he was between the ages of eight and eleven, Mr. Kistenmacher confirmed the accounts, but told Dr. Goldberg he believed he was in his mid-teens during these acts. RP 3/22/05, pp. 26-28.

Mr. Kistenmacher was born on September 13, 1941. CP 63. During his Special Sex Offender Sentencing Alternative (SSOSA) evaluation with Ms. Macy in 1995, and during his interview with Dr. Goldberg on August 2, 2004, all of the acts Mr. Kistenmacher admitted to were well outside the statute of limitations.⁴

testimony indicates that Dr. Goldberg referenced this sexual act as occurring "when he was age 41, this was in 1989." RP 3/22/05, p. 34. Since Mr. Kistenmacher's date of birth is September 13, 1941, he would have been 48 at that time, indicating that his statement during the video deposition is accurate. CP 63 and CP 259.

⁴ All of Mr. Kistenmacher's possible criminal acts which he discussed involve sexual contact with children. These acts would be governed by the statute of limitations set forth in RCW 9A.04.080(c) pertaining to Rape of a Child in the First and Second Degree, Child Molestation in the First and Second Degree, (former) Statutory Rape in the First and Second Degree, and Incest in the First Degree. RCW 9A.04.080(c) provides: "Violations of the following statutes shall not be prosecuted more than three years after the victim's eighteenth birthday or more than seven years after their commission,

On March 2, 2005, Mr. Kistenmacher was deposed by the State's attorney in the presence of his counsel. That video deposition was played for the jury. RP 3/21/05, p. 43. During that video deposition, Mr. Kistenmacher was again asked about each of the admissions he had made to Ms. Macy in 1995 regarding sexual conduct with minors. CP 213-264. During the deposition, Mr. Kistenmacher made substantially the same admissions he had made to Dr. Goldberg during the forensic evaluation, acknowledging that most of these acts occurred as described except for a few minor differences.⁵ CP 213-264.

Dr. Theodore Donaldson evaluated Mr. Kistenmacher and testified on his behalf. Dr. Donaldson testified that he also went through the admissions Mr. Kistenmacher had made to Ms. Macy in 1995, and that Mr. Kistenmacher had told him that all those prior offenses were "consensual." RP 3/23/05, p. 130.

Dr. Goldberg diagnosed Mr. Kistenmacher with pedophilia. RP 3/22/05, p. 50. Dr. Goldberg testified that he concluded to a reasonable degree of psychological certainty that Mr. Kistenmacher's pedophilia causes him serious difficulty in controlling his sexually violent behavior, and makes him more likely than not to commit predatory acts of

whichever is later. RCW 9A.44.073, 9A.44.076, 9A.44.083, 9A.44.070, 9A.44.100(1)(b), or 9A.64.020.

⁵ He also discussed one additional act omitted when he was 51-53 years old in which he brushed his hand against a girl in her early teens while in a store. CP 264.

sexual violence if he is not confined in a secure facility. RP 3/22/05, pp. 99-100. At the conclusion of trial, a jury concluded that Mr. Kistenmacher was a sexually violent predator.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Mr. Kistenmacher seeks review to argue two issues he asserts involve issues of substantial public interest, citing RAP 13.4(b)(4).⁶ First, he argues that he has statutory right to have counsel present at a forensic evaluation conducted pursuant to RCW 71.09.040(4) to determine if he met the criteria for being committed as a sexually violent predator. Second, he argues that there is a significant public interest that requires this Court to review whether he has a right because during his unique intake processing at the Special Commitment Center he was erroneously advised that he had a right to have counsel attend that evaluation.

These arguments were properly rejected by the Court of Appeals. As to his first argument that he has a statutory right to counsel at a forensic evaluation to determine if he meets the criteria of a sexually

⁶ At the court of appeals, Mr. Kistenmacher also argued briefly that he had a Constitutional right to counsel at a forensic evaluation conducted pursuant to RCW 71.09.040(4). The Court of Appeals rejected his argument in its entirety. Mr. Kistenmacher has not raised any constitutional issue in his Petition for Review nor suggested that the constitutional issue would be worthy of this Court's review. The State, therefore, does not address any constitutional right to counsel in this answer to the petition as the issue has been clearly abandoned.

violent predator, the Court of Appeals issued a well-reasoned decision that relied on precedent and was grounded in a proper interpretation of statutory and case law. There is no conflict among divisions and no need for this Court to address this particular statutory argument.

As to his second argument about the erroneous representations of an employee of the Special Commitment Center, that argument is, at most, a claim that would reflect estoppel. But Mr. Kistenmacher cannot show either reliance or injury that resulted from the mistaken representation. Moreover, the scenario arises from a rare and unique set of circumstances that do not have far-reaching effects of future cases.

The Court should therefore deny review.

A. The Legislature Did Not Provide Mr. Kistenmacher A Statutory Right To Counsel At A Forensic Interview

1. Statutory scheme

Revised Code of Washington RCW 71.09.040 sets forth the procedures for a person to be evaluated as a SVP. First, pursuant to subsection (1), if a judge makes an *ex parte* probable cause determination that a person is a SVP then he is taken into custody. Second, pursuant to subsection (2), an adversarial probable cause hearing is held within 72-hours. Pursuant to subsection (3), the person has the right to be represented by counsel during the adversarial probable cause hearing.

Pursuant to subsection (4), if the court again finds probable cause the person is transferred to an appropriate facility for an evaluation which “shall be conducted by a person deemed to be professionally qualified to conduct such an examination.” Nowhere in subsection (4), the section dealing with the forensic evaluation, does the statute provide for the right to counsel.

Additionally, RCW 71.09.050(2) sets forth the rights pertaining to experts during SVP proceedings, but makes no mention of the right to counsel during any evaluations. Subsection two provides:

Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professionally person of his or her own choice such examiner shall be permitted to have reasonable access to the person for the purposes of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person’s request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person’s behalf.

Although the statutory scheme addressing the use of experts details the rights to a defense expert and procedures pertaining to the psychological pre-commitment evaluation, it identifies no right to counsel in that process. Similarly, the provisions of the Washington Administrative Code (WAC) governing such evaluations fail to

specifically link the right to counsel to an evaluation performed under RCW 71.09.040(4). On this plain statutory structure, the issue presented by Mr. Kistenmacher does not reflect a significant question of law for this Court.

The implementing regulations are in accord with the statutes. WAC 388-880-030(2) states that “[t]he evaluation must be conducted in accordance with the criteria set forth in WAC 388-880-033.” Section 388-880-033 simply identifies what qualifications the evaluator must have, and does not provide for the right of an attorney to be present. WAC 388-880-050 is entitled “[r]ights of a person court-detained or court-committed to the special commitment center.” It provides, in relevant part:

(1) During a person’s period of detention or commitment, the department shall:

(a) Apprise the person of the person’s right to an attorney and to retain a professional qualified person to perform an evaluation on the person’s behalf.

Like RCW 71.09.050(2), this WAC references a general right to counsel, but treats it separately from the right to a defense expert, and there is no implication that there is a right to counsel during the State’s forensic evaluation.

2. The general right to counsel provided at “all stages of the proceedings” does not apply to forensic interviews

Mr. Kistenmacher’s issue relies entirely on a strained reading of RCW 71.09.050(1), which provides in relevant part:

At all stages of the proceedings under this chapter, any person subjected to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. (emphasis added)

Mr. Kistenmacher urged the Court of Appeals to reject the trial court’s conclusion that the right to counsel guaranteed in RCW 71.09.050(1) refers only to judicial proceedings, and not to other events such as forensic interviews. CP 118. A similar argument as that made by Mr. Kistenmacher, that “all stages of the proceedings” should apply to his forensic interview, was rejected in *In the Matter of the Dependency of J.R.U.-S.*, 126 Wn. App. 786, 100 P.3d 773 (2005).

In *J.R.U.-S.*, a set of parents became the subject of a dependency proceeding after medical personnel identified injuries to their child. A criminal investigation had also begun, but no charges had yet been filed. *Id.* at 790. As part of the dependency proceedings the Department of Social Services asked that the parents be evaluated to assess whether the parents’ psychological condition could endanger the child. The father argued that taking part in the evaluation would violate his Fifth

Amendment rights, and argued that he should not have to take part in the evaluation unless his counsel was present and he was given complete immunity from any incriminating statements he might make. The court commissioner ordered the evaluation to take place, but granted the father's request for counsel to be present and ordered that the evaluation only be disclosed to the parties and to treatment providers. *Id.* at 791. A different judge ruled that the mother could have counsel present at the evaluation, and that the evaluation would be sealed and given only to the parties. *Id.* at 792. The Department appealed.

On appeal the parents argued that RCW 13.34.090(2) provided them with a statutory right to counsel at the psychological evaluation, because the evaluations were statutorily authorized and therefore constituted a "stage" of the proceeding. The statute provides, in relevant part:

At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court.

The Court of Appeals disagreed, finding that a psychological evaluation is not a "proceeding" or "stage" of a proceeding. The court concluded that such an interpretation would lead to "absurd results," explaining that "[i]f the evaluation were considered a "stage" of the proceedings, then parents

would have a right to counsel at every counseling appointment, every visit with their children, and every other dispositional activity in a dependency case.” *J.R.U.-S*, 126 Wn. App. at 802.

The language of RCW 71.09.050(1) is indistinguishable from the language of RCW 13.34.090(2) addressed in *J.R.U.-S*. The only difference in wording is that RCW 71.09.050(1) grants a person the right to counsel at “all stages of the proceedings,” while RCW 13.34.090(2) grants a person the right to counsel as “all stages of a proceeding.” The evaluation under RCW 71.09.040(4) is similarly a statutorily-mandated evaluation, but not a stage of a proceeding where counsel must be provided. Just as in the case of dependency actions, persons subject to proceedings under RCW Chapter 71.09 are engaged in many activities outside of judicial proceedings, such as individual and group counseling sessions and routine administrative interactions at the Special Commitment Center, so that it would be absurd to extend a right to counsel to all interactions at the Center.

The statutory argument of Mr. Kistenmacher is not a significant question for this court because it follows directly from the indistinguishable precedent of *J.R.U.-S*. Moreover, as the Court of Appeals correctly reasoned, interpreting the right of counsel at “all stages of the proceedings” to extend to the psychological evaluation conducted

pursuant to RCW 71.09.040(4) leads to similar “absurd” results as those identified by Court of Appeals in *J.R.U.-S.*, further showing why the issue presented is not “significant” under RAP 13.4(b)(4). Slip Opinion at 7.

Mr. Kistenmacher’s only response to the court of appeals conclusion that his interpretation leads to absurd results is to suggest that “difficulties resulting from affording counsel during WSCC evaluations should be one within the province of the Legislature to remedy.” Petition at 17. But that is not legal authority or analysis undermining the court of appeals that shows any significance to the legal issue presented. He has therefore failed to demonstrate why his case raises an issue of substantial public interest for purposes of RAP 13.4(b)(4).

B. Mr. Kistenmacher Showed No Reliance Or Injury from And No Basis For Claiming A Right To Counsel Based On Mr. Rockwell’s Erroneous Representation

Mr. Kistenmacher also petitions for review of his argument that the actions of Mr. Rockwell somehow created a right to counsel at the forensic evaluation conducted by Dr. Goldberg. Petition at 17.

As a threshold matter, this issue is unique and there is no explanation why it could be significant precedent for the lower courts, worthy of review under RAP 13.4(b)(4). This issue is uniquely relevant only to Mr. Kistenmacher’s case.

Moreover, the court of appeals rejected Mr. Kistenmacher's argument, because he did not develop it in his brief and did not cite any legal authority supporting his assertion. Slip Opinion at 11, *citing Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290 (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration), *review denied*, 136 Wn.2d 1015 (1998); RAP 10.3(a)(5) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and reference to relevant part of the record).

Finally, although Mr. Kistenmacher never invoked the term "equitable estoppel" in his appellate briefing nor cited to any legal authority supporting his argument, the court of appeals recognized in dicta that the situation he complained of might be analyzed under the doctrine of equitable estoppel. Slip Opinion at 11. Equitable estoppel may apply where an admission, statement, or act has been detrimentally relied on by another party. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). However, equitable estoppel against the government is disfavored. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

To establish equitable estoppel against the government, there must be proof by clear, cogent, and convincing evidence of an admission, act, or

statement that is inconsistent with a later claim, another party's reasonable reliance on the admission, act, or statement, and injury to the other party that would result if the first party is permitted to repudiate or contradict the earlier admission, act, or statement. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 20. The doctrine may not be asserted against the government unless it is necessary to prevent a manifest injustice; it must not impair the exercise of government functions. *Id.*

The court of appeals ruling is unremarkable in recognizing that Mr. Kistenmacher was not entitled to equitable relief because he failed to show either reliance or injury. Slip Opinion at 11. In reaching this conclusion, the Court of Appeals emphasized that Mr. Kistenmacher made the same admissions he made to Dr. Goldberg regarding prior sexual contact with children during a 1995 SOSSA evaluation, to his own expert hired for the Sexually Violent Predator trial, and during a deposition at which his counsel was present. *Id.* Additionally, the court found that Mr. Kistenmacher offered no evidence to show that Mr. Rockwell was acting as a state agent, and his agreement to be interviewed by Dr. Goldberg without asking for an attorney belies any claim that he relied on Mr. Rockwell's representation that he could have one present. *Id.*

C. Even If Mr. Kistenmacher Had A Right To Have Counsel Present At Dr. Goldberg's Evaluation He Was Not Prejudiced By The Absence Of Counsel

The court of appeals correctly found that Mr. Kistenmacher failed to produce any evidence that the outcome of Dr. Goldberg's evaluation would have been different had an attorney been present. Slip Opinion at 11. Furthermore, Mr. Kistenmacher failed to show he was prejudiced by the absence of counsel during the forensic evaluation.

Mr. Kistenmacher acknowledges that persons who are subject to SVP proceedings are not entitled to the Fifth Amendment right to remain silent, because "their cooperation with the diagnosis and treatment procedures is essential." Pet. at 14, citing *In re Personal Restraint of Young*, 122 Wn.2d 1, 52, 857 P.2d 989 (1993). Thus, if counsel had been present during Dr. Goldberg's evaluation of Mr. Kistenmacher, his role would have been limited to that of an observer. All of the admissions addressed by Dr. Goldberg had already been made to Ms. Macy in 1995. As such, by verifying his prior admissions Mr. Kistenmacher was simply confirming information that already existed. More importantly, since all of those admissions are well outside the statute of limitations counsel would have had no valid legal basis upon which to object to these admissions. When Mr. Kistenmacher was deposed in the presence of his counsel, he again admitted to all these same prior uncharged acts without

any objection from his counsel. Given that the same admissions were made in the presence of counsel as were made in the absence of counsel, counsel's presence at the evaluation could have had no effect.

Moreover, Mr. Kistenmacher's video deposition where he admitted to all his prior uncharged offenses was played for the jury without objection by counsel. Mr. Kistenmacher was not prejudiced by the fact that the same counsel who represented him at his deposition and during the trial was not present at his evaluation.

Mr. Kistenmacher's after the fact complaint about a right to counsel is unsupported by any showing that counsel would have had any impact on the evaluation. As such, the Court of Appeals correctly concluded that Mr. Kistenmacher was not prejudiced by the absence of counsel at his evaluation. Slip Opinion at 11. Thus, absence of counsel at the forensic evaluation is not reversible error.

Non-constitutional error is not reversible unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

The record here demonstrates that no error occurred, and that even if there was error Mr. Kistenmacher was not prejudiced by the alleged error. That is because even if Mr. Kistenmacher had a statutory right to counsel, his counsel could not have objected to his statements regarding prior uncharged offenses outside the statute of limitations. Even if his counsel had been present, the same statements regarding these offenses would have been made. Evidence of Mr. Kistenmacher's prior uncharged offenses would have come before the jury through the deposition, regardless of whether or not counsel was present at his evaluation with Dr. Goldberg. The admission of Dr. Goldberg's testimony would therefore constitute harmless error under this record.

V. CONCLUSION

The State therefore asks that the Court deny the petition for review.

RESPECTFULLY SUBMITTED this 21st day of September, 2006.



MELANIE TRATNIK
WSBA # 25576
Assistant Attorney General
Attorneys for Respondent