

NO. 241688

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

In Re the Detention of:

David James Lewis,

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred in ordering a change of venue.
2. The trial court erred in refusing to dismiss the case for lack of jurisdiction and violation of due process.
3. The evidence was insufficient to support the verdict finding Appellant to be a sexually violent predator.

Issues Pertaining to Assignment of Error

1. Because Appellant's trial counsel had sent a questionnaire to residents of Columbia County to gather information in support of a motion, the trial judge found the jury pool was being tainted and *sua sponte* ordered a change of venue to Garfield County. Did the trial court violate Appellant's right to have his trial in the proper venue?
2. Appellant was being held in custody pending trial on a charge of Rape of a Child in the First Degree when the petition was filed. Because Appellant was

not “about to be released” when the petition was filed and no “recent overt act” was plead or proved, does his commitment violate due process of law?

3. Was the evidence sufficient to convince a rational trier of fact that all of the elements of the State’s case were proven beyond a reasonable doubt?

B. STATEMENT OF THE CASE

The State Attorney General’s office filed a sexually violent predator petition against Appellant on July 1st, 2003. At that time, Mr. Lewis was in custody, awaiting retrial in Walla Walla County, following reversal of his conviction for rape of a child in the first degree. CP 1-2. CP 11.

The Petition alleged that Mr. Lewis, whose named was changed from Roy Eaker, was convicted of Child Molestation in the First Degree in Columbia County in 1992. It further alleged that he suffered from a mental abnormality, pedophilia. CP 1.

Mr. Lewis had been released in 1999, but upon “release” he was arrested by a DOC officer for failure to have a provable address.

While being held in the Columbia County jail, the State filed a SVP petition in 1999. (On July 7, 1999, the Attorney General's Office had declined a request to file a SVP petition. CP 42-46.) Then, charges in Walla Walla county were filed, based on alleged acts in 1991-92, and the SVP petition was dismissed, on June 30, 2000. CP 53.

Mr. Lewis, under the name of Eaker was convicted of Rape of a Child in the First Degree, which was the conviction overturned, and it was that charge for which Mr. Eaker was awaiting re-trial in custody when the instant petition was filed. At the time of filing of the petition, his trial was set for July 14, 2003. CP 11. The Walla Walla charge was then dismissed on July 11th, 2003. CP 19.

The Columbia County Superior Court entered an Order determining probable cause for the SVP petition, apparently *ex parte*, on July 1, 2003. CP 14-15.

Mr. Lewis's original counsel on September 19, 2003, filed a motion to dismiss "because the State lacks jurisdiction", on the basis that Mr. Lewis was not "about to be released from custody" at the time of the filing of the petition. CP 18-23.

The trial court entered an order on October 1st, 2003, denying Mr. Lewis's motions, and affirming the existence of probable cause for the petition, and directing the custodial detention and evaluation of Mr. Lewis. CP 62-63.

Later, a second attorney representing Mr. Lewis filed a "Motion to Dismiss: Unconstitutionally Vague Violation of Due Process." RP 68-78. As part of the preparation for a motion to dismiss, Appellant's trial counsel mailed out questionnaires to residents of Columbia County, inquiring whether certain statutory terms were understandable to them, and whether they needed further definition. The questionnaires that were answered and returned were filed with the trial court on March 23, 2005. CP 104-164. .

Prior to filing of the questionnaires, on March 17th, 2005, the State moved that the court order Mr. Thronson to "stop" sending out the questionnaires, arguing it was "entirely improper. It should not have occurred. We are already tainting a jury pool." RP C 11-12. The State's attorney told the court that some people were already under summons for jury duty "conceivably in this trial ...". RP 12.

Mr. Thronson had already completed sending out the questionnaires, which totaled 125 sent out. He indicated he did not know who had been summoned for jury duty. He provided a court with the list of people to whom the questionnaires had been sent. The people had been “randomly picked out of the phone book ...”. RP C 13.

The responses to the questionnaire were designed to be returned anonymously. Counsel indicated he sent the questionnaires to “develop that evidence” relevant to issues of whether the statute in issue could be understood by persons of common and ordinary intelligence. He argued that “... I’ve got to discover the evidence to defend my client.” RP 14-15.

The trial judge estimated that the jury pool for Columbia County would consist of about 3,000 people out of 4,200 residents. And that assuming recipients of the questionnaire were married, that up to 250 people were exposed to the questionnaire, “pushing 10 percent of the jury pool.” RP C 16.

The trial judge stated that “this is absolutely reprehensible conduct” and that if the state’s counsel did not report it to the bar association,

that he would. RP 18, lines 10-13.

The trial judge then stated:

You have just poisoned the whole jury panel venery in
Columbia County.
On my own motion, I hereby change venue to Garfield County.

...
I'm also assessing terms to respondent's counsel for any extra
expense Columbia County has to go through for moving this trial over
to Garfield County.

...

State's motion is granted as expanded upon by me.

RP C 18, lines 14-19.

On March 25th, 2005 the trial court denied the motion to dismiss
by Mr. Lewis which was based on vagueness. RP 165-66.

Evidence presented to the jury included the following:

P.D. testified that she was now 26 years of age. Mr. Lewis was her
cousin. In the spring of 1991, she was living in Walla Walla. Her
mother was having a Tupperware party, and several of P.D.'s friends
were there. According to P.D., Mr. Lewis touched her on her breasts
and vagina, on the outside of her clothing. Her friend, Tracy, told her
that Mr. Lewis touched her but she was afraid she would be in trouble

if she told. RP E 9-13. P.D. reported what happened to her mother, and to a school counselor. RP E 15.

Before the incident described by P.D., Appellant had earlier bragged to her that he had touched other children, and that nothing was ever done. RP E 18. Later, when Mr. Lewis was in prison, he called her grandmother's house, and she answered the phone. Mr. Lewis told her it was her fault he got locked up. RP E 18-19.

J. F. testified that Mr. Lewis was her half brother and that she had not seen him since she was age six. In March of 1992, Mr. Lewis got her off the bus, and instead of taking her home, took her into a trailer that the family was going to be moving into. Mr. Lewis made her suck his penis and gave her a candy bar not to tell. RP E 22-25. She told her mother and father and the police about it. RP E 31. In later phone contact with Mr. Lewis, he blamed their mother and father for what he had done. RP E 33.

M.F. testified that he was now age 24 and described Mr. Lewis as his brother. He alleged that when he was nine years old, when the family lived in Walla Walla, that Mr. Lewis was about twice his size,

and that Mr. Lewis had M.F. suck his penis. He did so by telling M.F. he would get M.F. in trouble with their parents if he did not do so. This occurred several times. RP E 37-46. The last time it occurred was 1991 and M.F. did not tell anyone about it until 1995, when he learned it had happened to his sister as well. RP E 52-53.

Linda Frovarp, Mr. Lewis's mother, testified as to J.F.'s report to she and her husband as to what happened. RP E 59. After his conviction for that, he had called home on one occasion and asked to speak to S., her niece. Ms. Frovarp remained on the other line, and heard Mr. Lewis apologized to S., saying he shouldn't have done anything to her. RP E 62-63. Then he said "Well, it felt good." RP E 64.

Mr. Lewis also told his mother sometime around 195 that he felt he would re-offend. RP E 65.

Barbara Vinyard, a correctional officer at the Washington State Penitentiary, testified that there were complaints about Mr. Lewis "grabbing" other inmates, and watching them getting undressed. RP E 84. When questioned, he said he had poor impulse control. RP E

86-87. Similar complaints were made about Mr. Lewis within a couple of weeks. RP E 88.

John Blasdel testified that he had been an inmate in the segregation unit with Mr. Lewis. During a verbal altercation, another inmate said something about Mr. Lewis's sex crimes. In response, Mr. Lewis had said words to the effect of "This is what I can do to your family." RP 133.

Henry Morton was also an inmate in segregation with Mr. Lewis in about 1999. He testified Mr. Lewis would talk about "what he would do to kids" and said if he got out, he would do something to Mr. Morton's family. RP 143. That he would "screw" his kids, and he said the same thing about another inmate's family. RP 145-46.

Morton also alleged that Lewis and another inmate would ejaculate in a cup and swing the cup to each other's cell on a string and the other inmate would say he tasted Mr. Lewis's ejaculate. RP 146-47.

Donna Hubbs, of the Department of Corrections testified that an inmate named Evans complained that Mr. Lewis had touched him at

least ten times on the buttocks and at least seven times on his penis and scrotum. Another inmate complained he tried to grab his penis. RP 169.

As the release date for Mr. Lewis neared, Ms. Hubbs was involved in making plans for his release into the community. A process of "triage" was used for offenders who "have no community support" and who had a high likelihood of re-offending, and "the community wanted us to be more involved than just letting them lose with \$40 gate money and bus tickets." RP 179. She arranged application for food stamps for him upon his release, and for \$100 in gate money. But he had nowhere to go live. An apartment complex in Spokane that accepts sex offenders would not accept him because he did not have a \$250 deposit. RP 179-81. RP 193.

Ms. Hubb discussed with Mr. Lewis whether he would voluntarily commit himself as a sexually violent predator. He stated he would like to be out for a weekend first. He stated his chances of re-offending were 50/50. RP 183-84.

When his term of confinement ended he was “released” then arrested within minutes for violation of his community placement, for not having an approved address. He was escorted down to the community corrections office and arrested. RP 194.

Amy Phenix, Ph.D a clinical psychologist in private practice, was the State’s expert witness. She testified that “predatory acts” are sexually violent offenses :

against a person who is a stranger to them. They don’t know them at all. A person with whom they have no real established relationship, or what we call kind of a casual relationship.

RP 310, lines 13-25.

Or, it could be where a relationship was established to have sexual acts with the person. RP 311, lines 1-3. This would mean “grooming”, buying a child things or taking them places to establish a trusting relationship and taking them to isolated places. RP 311, lines 5-14.

Dr. Phenix had diagnosed Mr. Lewis with an antisocial personality disorder. RP 312. And with three other “mental abnormalities”, pedophilia, marijuana abuse, and child abuse. RP 314-15.

Dr. Phenix was of the opinion that Mr. Lewis’s pedophilia

predisposed him to commit criminal sexual acts in a degree constituting a menace to the health and safety of others. RP 330.

To Dr. Phenix, the term "likely" means "greater than a 50 percent chance." RP 342, lines 10-13. Her opinion was that he was likely to commit new sexually violent predatory offenses in the future. RP 342, lines 15-21. This was based on use of an actuarial instrument, called Static 99, as well as risk factors supported by current research. RP 342-45. Dr. Phenix in part based the reliability of the actuarial instrument on the belief that is under estimates likelihood of re-offending, because "[m]ost sex offenses are unreported." RP 346.

Dr. Phenix indicated that the margin of error for the instrument she used to predict Mr. Lewis's chance of reoffending could "take it below the 50th percentile", as phrased in the question posed. RP J 440, lines 16-18.

In fact the chance of re-offense could be as low as 44 percent. RP J 442-44.

Dr. Kenneth Wollert, called by Mr. Lewis, was of the opinion that because Mr. Lewis was willing to undergo treatment under certain

conditions, that he “does not present any differently than individuals who are nonpredatory sex offenders ...”. RP 592, lines 18-22. Wollert believed that the chance of re-offense was less than fifty percent, in fact, below sixteen percent. RP 664-65.

The jury returned a verdict that Mr. Lewis was a sexually violent predator, and he was committed to the Special Commitment Center. CP 199, CP 202-03.

This appeal followed.

C. ARGUMENT

1. The trial court erred in changing venue from Columbia County

A plaintiff's choice of forum should rarely be disturbed. J.H. Baxter & Co. v. Cent. Nat'l Ins. Co. of Omaha, 105 Wn.App. 657, 661, 20 P.3d 967 (2001); see Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

RCW 4.12.030 provides:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

(1) That the county designated in the complaint is not the proper

county; or,

(2) That there is reason to believe that an impartial trial cannot be had therein; .

The appellate court will review a trial court's decision on a motion to transfer venue for an abuse of discretion. Hickey v. City of Bellingham, 90 Wn.App. 711, 719, 953 P.2d 822 (1998). A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the trial court judge, without examination of potential jurors, and without examination of the responses of the 25 people who answered the questionnaires, in a summary manner, decided that venue would be transferred. It was an abuse of discretion to assume that all of the people who were sent the questionnaires had read them, that their spouses had read them as well , and to assume it would render those potential jurors impartial. The State represented that summons had already gone out to some people who could be called for this trial, there was no comparison of the list of people to whom questionnaires

had been sent with any list of people summoned. The judges decision was primarily based upon speculation. Even if ten percent of the jury pool had supposedly been tainted, if for example 36 people were brought in for a panel, then three or four would have to be excused, hardly rendering it impossible to pick a jury.

"[T]he perceived expertise of a given court, ..., is not a proper basis for a venue choice."(perception that another county would more efficiently handle case is not sufficient) Hatley v. Saberhagen Holdings, Inc. 118 Wn. App. 485, 489-490, 76 P.3d 255 (2003).

Because the trial judge changed venue without sufficient cause, the Order of Commitment should be reversed, and the case remanded for a new trial.

2. The court lacked jurisdiction over the Appellant

Mr. Lewis, whose name was formerly Eaker, had been found guilty of rape of a child in the first degree on November 1st 2000, in a Walla Walla County case. The conviction was reversed and remanded for new trial in State v. Eaker, 113 Wn. App. 111, 53 P.3d 37 (2002), rev. denied 149 Wn.2d 1003.

The new trial was scheduled for July 14th, 2003, with Mr. Lewis held in custody. On July 1st, 2003, the State filed a sexually violent predator petition in Columbia County. The pending Walla Walla County charges were dismissed on July 11th, 2003. CP 19.

RCW 71.09.030 permits filing of a "predator" petition only where "[a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement. ...".

Mr. Lewis was not about to be released at the time of the filing of the petition.

The Sexually Violent Predator Act was intended to be a last resort to protect society from individuals who would otherwise be released from criminal involvement. See RCW 71.09.010.

Where the petition is not properly based upon the fact that the subject of the petition is "about to be released", then, under In re Detention of Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002), the State is required to to plead and prove a "recent overt act."

Albrecht applies to a person who is incarcerated "where the State

files a sexual predator petition on an offender (1) who has been released from confinement (2) but is incarcerated the day the petition is filed (3) on a charge that does not constitute a recent overt act." 147 Wn.2d at 11 n. 11, 51 P.3d 73.

Albrecht held, "[a]n individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous." 147 Wash.2d at 11, 51 P.3d 73. This is crucial because due process requires proof of dangerousness to justify commitment. *See In re Detention of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). Young, 122 Wash.2d at 27, 857 P.2d 989 (citing Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809-10, 60 L.Ed.2d 323 (1979); Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)).

A violation of community placement, as discussed in Albrecht, could fall short of being an overt act. *See Albrecht*, 147 Wash.2d at 11, 51 P.3d 73. Since the State did not allege or prove a "recent overt act" to the jury at trial, there was no showing of dangerousness and Albrecht

and Young require reversal. Albrecht 147 Wn.2d at 11 & n. 11, 51 P.3d 73; Young, 122 Wash.2d at 59-60, 857 P.2d 989.

Mr. Lewis simply does not fall within the categories of persons the legislature has provided can be the subject of an SVP petition. The State has created a new category, those who are awaiting trial on criminal charges.

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the *maxim expressio unius est exclusio alterius* - specific inclusions exclude implication. Washington Natural Gas Co. v. Public Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969);

Landmark Devel., Inc. v. City of Roy, 138 Wn.2d 561 (1999).

The State failed to plead or prove Lewis either was about to be released from custody when the petition was filed, or that he committed a "recent overt act" before committing him as a sexually violent predator under chapter 71.09 RCW. Under our Supreme Court's holding in Albrecht the State's failure results in the lack of a

necessary element of proof to justify commitment. The commitment must be reversed and Lewis must be released.

The process of filing this petition was a procedural hall of mirrors. The first petition was filed after his sentence was served, but he was supposedly in violation of his sentence for not having a place to live. That petition was then dismissed because of criminal charges filed in Walla Walla County. Then a petition was filed while Mr. Lewis awaited re-trial on those charges. Then the Walla Walla charges are dismissed.

Allowing the State to claim that Mr. Eaker was about to be released from custody, when that was not the case, allows the State to circumvent the statutory requirements, including the other basis for filing a petition, which would be a "recent overt act."

This Court should reverse the Order of Commitment, and order that the petition be dismissed with prejudice.

3. The evidence was insufficient to support the verdict finding Appellant to be a sexually violent predator.

In reviewing a sufficiency challenge, the appellate court will view the evidence in the light most favorable to the State and determine if it could permit a rational trier of fact to find the essential elements beyond a reasonable doubt. State v. Tilton, 149 Wash.2d 775, 786, 72 P.3d 735(2003). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

Part of the information that Dr. Amy Phenix, the State's expert witness, based her opinion upon was that even through a victim named T. W. had denied to police that anything had happened, she had reportedly told a good friend that it happened. RP J 417, lines 12-23. Other than that, most of the incidents involving Mr. Lewis were against relatives, thus the facts do not meet even Dr. Phenix's own understanding of "predatory", nor do they meet the definition given to jurors in the instructions. CP 193.

Dr. Phenix indicated that the margin of error for the method she used to predict Mr. Lewis's chance of reoffending could "take it below the 50th percentile", as phrased in the question posed. RP J 440, lines

16-18.

In fact the chance of re-offense could be as low as 44 percent. RP J 442-44.

Therefore, the evidence is not sufficient to show Mr. Lewis was "likely" to re-offend, as even Dr. Phenix conceded that meant more than a 50/50 chance.

And, as argued in part 2 above, the State failed to prove either that Mr. Lewis was about to be released when the petition was filed, or that he had committed a recent over act.

Therefore the evidence is insufficient. The Order of Commitment should be reversed, and the petition dismissed with prejudice.

D. CONCLUSION

The Court should reverse and dismiss due to insufficiency, and due to violation of due process, or in the alternative, should order a new trial with venue in Columbia County.

Respectfully submitted,

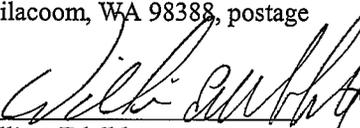
December 8th, 2005



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Certificate of Mailing

I hereby certify that on the 8th day of December , 2005, I mailed true and accurate copies of the foregoing Brief of Appellant to, Sarah Sappington, Assistant Attorney General, at 900 4th Ave., Ste. 2000, Seattle, WA 98164-1076, and to David Lewis , Appellant, at P.O. Box 88600, Steilacoom, WA 98388, postage prepaid.



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