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NO. 56171-5-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF ANDRE B. YOUNG,

STATE OF WASHINGTON,

Respondent,

v.

ANDRE B. YOUNG,

Appellant.

RECORDED
INDEXED
MAY 14 2011

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

The Honorable Richard Jones

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

D. STATEMENT OF THE CASE 3

E. ARGUMENT 4

THE COURT LACKED AUTHORITY TO FIND MR. YOUNG
IN CONTEMPT AND STAY HIS TRIAL INDEFINITELY FOR
REFUSING TO SUBMIT TO A MENTAL EVALUATION OR
DEPOSITION 4

1. The civil rules bar the court from holding Mr. Young in
contempt 4

2. The court's sanction is impermissible and unfair..... 10

F. CONCLUSION 13

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Haller v. Spectrum, 143 Wn.2d 126, 18 P.3d 540 (2001)..... 9

In re Detention of Petersen, 145 Wn.2d 789, 42 P.3d 952 (2002) 5

In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003) . 10

In re Detention of Ward, 125 Wn.App. 374, 104 P.3d 751 (2005) 5

In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1993) 5

In re the Detention of Broer, 93 Wn.App. 852, 957 P.2d 281 (1998),
rev. denied, 138 Wn.2d 1014 (1999) 7, 8

In re the Detention of Williams, 147 Wn.2d 476, 55 P.3d 597
(2002) 5, 8, 9

In re the Detention of Young, 120 Wn.App. 753, 86 P.3d 810, rev.
denied, 152 Wn.2d 1007 (2004) 3, 12

Washington Court of Appeals Cases

Carlson v. Lake Chelan Cmty. Hosp., 116 Wn.App. 718, 75 P.3d
533 (2003) 12

In re Detention of Mathers, 100 Wn.App. 336, 998 P.2d 336 (2000)
..... 5

In re Estate of Foster, 55 Wn.App. 545, 779 P.2d 272 (1989) 12

State v. Walls, 106 Wn.App. 792, 25 P.3d 1052 (2001)..... 11

Statutes

RCW 7.21.030..... 8
RCW 71.09.040..... 6, 7
RCW 71.09.090..... 3, 5

Court Rules

CR 1 5
CR 26 5
CR 37 1, 6, 7, 8, 9, 11
CR 81 5

A. SUMMARY OF ARGUMENT.

The trial court lacked authority to hold Mr. Young in contempt for refusing to submit to a psychological evaluation or a deposition, as the governing statute and court rules do not permit the court to find him in contempt for a discovery violation. Furthermore, the court-ordered sanction of an indefinite stay of proceedings of Mr. Young's commitment trial is untenable.

B. ASSIGNMENTS OF ERROR.

1. The court lacked authority to find Mr. Young in contempt for failing to submit to a mental examination or deposition.

2. The sanction of an indefinite stay of proceedings is unduly and necessarily harsh in light of the alternatives available and the liberty interests at stake.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Civil court rules govern sexually violent predator ("SVP") commitment proceedings unless the rule is inconsistent with a statute. Civil Rule 37 precludes the trial court from holding a party in contempt for failing to submit to a mental examination and no statute exists that is contrary to this court rule. Did the court improperly find Mr. Young in contempt for failing to comply with a court ordered mental examination?

2. Specific language in CR 37 does not permit a court to find a party in contempt for failing to submit to a deposition. Since this specific language governs broader language discussing sanctions permitted for a “deponent” generally, did the court lack authority to find Mr. Young in contempt for failing to submit to a State deposition?

3. Discovery sanctions must be based on a consideration of all circumstances of the case. Did the court abuse its discretion by failing to follow the mandatory protocol of considering all circumstances of the case before imposing the extreme sanction of contempt and staying the judicial proceedings?

4. A court may order a range of sanctions for failing to comply with discovery, but must order the least restrictive penalty necessary to either urge compliance or balance the parties’ interests. When the court had a wide range of less intrusive but very effective discovery sanctions available, was the court’s order holding the case in abeyance and maintaining Mr. Young’s indefinite civil commitment until he complied with the mental examination and deposition improper?

D. STATEMENT OF THE CASE.

Having been civilly committed under the sexually violent predator (“SVP”) civil commitment laws since 1991, Andre Young presented a *prima facie* case that he no longer meets the criteria for indefinite confinement and this Court ordered he receive a new trial pursuant to RCW 71.09.090. In re the Detention of Young, 120 Wn.App. 753, 755, 763, 86 P.3d 810, rev. denied, 152 Wn.2d 1007 (2004); CP 5-16.

Before trial, the State requested Mr. Young submit to an unlimited and wide-ranging mental examination. CP 118. Despite Mr. Young’s objection, the court ordered he submit to a mental evaluation by the State’s expert, including psychological tests and interviews. CP 118-19 (Order Finding Respondent in Contempt, attached as Appendix A). Mr. Young told the court he would not participate in the evaluation and the court found him in contempt. 4/1/05RP 11-12; CP 159-62.

The State also requested an unlimited video deposition of Mr. Young and the court granted this request. CP 119. Mr. Young refused to submit to the deposition. CP 159-60. Mr. Young sought discretionary review of the court’s order requiring he submit to the examination and deposition, which is pending in the Supreme

Court. See COA 55988-5 (motion for discretionary review filed on December 13, 2005).

As a punishment designed to encourage Mr. Young to submit to the State's evaluation and cross-examination by deposition, the court stayed Mr. Young's trial, thereby stopping him from seeking release from his indefinite civil commitment. CP 160; 4/1/05RP 15-16. The court ruled that Mr. Young's pretrial proceedings would resume only when he complied with the court-ordered mental evaluation and deposition, and said it would consider more severe sanctions such as jail if Mr. Young continued refusing to submit to the evaluation by the State's expert. CP 160-61.

Mr. Young timely appealed the court's contempt order. CP 163-67.

E. ARGUMENT.

THE COURT LACKED AUTHORITY TO FIND MR. YOUNG IN CONTEMPT AND STAY HIS TRIAL INDEFINITELY FOR REFUSING TO SUBMIT TO A MENTAL EVALUATION OR DEPOSITION.

1. The civil rules bar the court from holding Mr. Young in contempt. Civil court rules govern procedures in all civil cases,

including SVP proceedings. CR 1;¹ In re Detention of Young, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). The proceedings follow civil court rules unless a statute expressly provides for different procedures, pursuant to CR 81.² In re the Detention of Williams, 147 Wn.2d 476, 488, 55 P.3d 597 (2002); see In re Detention of Petersen, 145 Wn.2d 789, 801, 42 P.3d 952 (2002) (CR 26 governs discovery in SVP proceeding since statute not inconsistent with civil rule); see also In re Detention of Ward, 125 Wn.App. 374, 379, 104 P.3d 751 (2005) (civil rules govern post-trial motions for relief since no statute addresses such motions); In re Detention of Mathers, 100 Wn.App. 336, 998 P.2d 336 (2000) (summary judgment civil rules apply to SVP proceedings despite heightened burden of proof since statute not expressly inconsistent).

In the context of a new trial for a person previously committed under the SVP procedures, RCW 71.09.090(3) grants the State the right to an evaluation of the petitioner by an expert of

¹ CR 1 provides:

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

² CR 81(a) provides, in relevant part, that "except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings."

its choosing. This statute does not specify the procedures under which such examination shall be governed, but merely provides, "The prosecuting agency . . . shall have a right to a jury trial *and to have the committed person evaluated by experts chosen by the state.*" RCW 71.09.090(3). The lack of statutory procedural requirements dictating the terms of the evaluation stands in contrast to the procedures governing an initial commitment trial under RCW 71.09.040(3).³

CR 37 is the court rule governing sanctions that may be imposed for discovery violations. CR 37 provides a long list of sanctions the court may impose for various discovery violations (full text attached as Appendix A). Yet CR 37(2)(D) also provides that the court may not hold a person in contempt for failing to comply with an ordered mental examination:

In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey

³ RCW 71.09.040(4) provides:

If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone.

any orders except an order to submit to physical or mental examination.

(Emphasis added.). Thus, the civil court rules preclude contempt as a sanction for a party's failure to obey an order to submit to a mental examination.

The civil court rules govern all SVP proceedings unless they are inconsistent with a statute. No statute discusses the sanctions that may be imposed during discovery for failures of compliance. Consequently, the civil rules apply and under CR 37, the court may not use contempt as a sanction for a failure to comply.

In In re the Detention of Broer, 93 Wn.App. 852, 865, 957 P.2d 281 (1998), rev. denied, 138 Wn.2d 1014 (1999), the court upheld the use of contempt as a sanction for refusal to submit to an initial pretrial mental examination ordered under RCW 71.09.040(4), the statute governing trial procedures for initial civil commitment trials in SVP proceedings. Broer ruled that CR 37 did not apply because the SVP evaluation was conducted under rules governing a special proceeding. Id. at 865. Having decided that RCW 71.09.040 set forth a special proceeding, the court in Broer concluded that the civil rules governing discovery had no

application whatsoever and the court could rely on its inherent power to find someone in contempt as well as its authority under the general contempt statute, RCW 7.21.030. Id.

However, Broer was issued before the Supreme Court clarified the applicability of the civil court rules to SVP proceedings in Williams. Civil rules are mandatory unless they are inconsistent with a special proceeding. Williams, 147 Wn.2d at 488. The court in Broer did not find contempt proceedings to fall within the “special proceeding” exception to the civil rules. Nor did it find that the civil rules are inconsistent with any special proceeding. Accordingly, the civil rules must govern given the lack of inconsistency with a court rule. Williams, 147 Wn.2d at 488.

By disregarding the mandatory court rules governing the applicability of sanctions to discovery proceedings, Broer is incorrect. The civil rules expressly govern all SVP proceedings unless they are actually inconsistent with the civil rules. There is no SVP statute governing discovery sanctions, therefore the civil rules control. Under CR 37, contempt is not an authorized sanction for the failure to comply with a mental examination order. Thus, the court’s ruling must be reversed.

2. The court lacked authority to find Mr. Young in contempt for failing to comply with a deposition order. Civil rules govern deposition orders. Williams, 147 Wn.2d at 492. CR 37(b) addresses the failure to comply with discovery orders, including depositions. CR 37(b)(1) provides a court with authority to use contempt as a permissible sanction when a “deponent” fails to appear for a deposition. CR 37(b)(2) addresses the court’s authority to order sanctions when “a party” fails to comply with a discovery order.

A court rule addressing a more specific situation trumps a more general rule absent specific intent that the rule-creator intended otherwise. Haller v. Spectrum, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). Here, the rule declining contempt as an avenue to punish a party for failing to submit to a deposition is supported by sound policy judgments. The trial court has numerous avenues available to punish a party who refuses a deposition, and the sanction of stopping a case is extreme and violates the public policy favoring resolution of judicial proceedings and the principles of fundamental fairness that govern an SVP proceeding.

The court’s failure to impose less severe sanctions not only violates the terms of CR 37, but it is contrary to the rules

governing discovery violations, which require the court to first consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request. Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). In the case at bar, the court presumed that the deposition was permitted and therefore a failure to submit to it was *per se* contempt of court. 3/21/05RP 42; 4/1/05RP 11-16. The court did not weigh competing interests before summarily finding Mr. Young in contempt, rendering the contempt ruling improper and it must be reversed on remand.

3. The court's sanction is impermissible and unfair.

Although civil in nature, SVP proceedings involve significant deprivations of liberty akin to a criminal conviction and therefore they must accord the petitioner the fundamental fairness that underlies the right to due process of law. In re Detention of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003) ("Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection."); Thorell, 149 Wn.2d at 744 (standard of proof of criminal trials required in SVP proceedings based on significant deprivation of liberty and strict standards of legislative scheme). In

criminal cases, the principle of lenity requires that the procedure most favorable to the accused must be adopted when there is ambiguity as to the Legislature's intent. State v. Walls, 106 Wn.App. 792, 800, 25 P.3d 1052 (2001) (explaining principle of lenity). Similar rationale apply to an SVP trial in which life-long deprivation of liberty is at stake.

Since the statute contains no mechanism for discovery sanctions, CR 37 applies. CR 37 requires the court to consider a range of sanctions and commands it utilize the least severe sanction that will induce the party to comply with the court order.

In the case at bar, the court sanctioned Mr. Young by indefinitely staying the proceedings, so that he will remain confined as a sexually violent predator until he submits to the evaluation and a video deposition.⁴ CP 160-61; 4/1/05RP 15-16.

In imposing the sanction of indefinite confinement, the court adopted an extremely harsh sanction. Other sanctions

⁴ Mr. Young has separately appealed the court's lack of authority to order he submit to a video deposition. COA 55988-5 (motion for discretionary review pending). To the extent the civil rules govern the refusal to submit to a deposition, contempt is a permissible finding for a refusal, as long as the deposition request is not conducted in bad faith or in an effort to embarrass, annoy, or oppress the deponent. CR 37(a) (permitting contempt finding); CR 30(d) (permitting termination or limitation on deposition). Mr. Young asserts such a motive in the instant case, based upon the amount of information already available to the State and the highly intrusive nature of the deposition.

available would allow the trial to proceed but would penalize Mr. Young. CP 146-48. For example, the jury could be instructed that Mr. Young's refusal to submit to an evaluation or deposition, or it could be told that it must not hold the State's failure to have a recent evaluation of Mr. Young against the State. The court could limit Mr. Young from calling his own expert at trial, or bar Mr. Young from introducing recent evaluations of his mental state. See Carlson v. Lake Chelan Cmty. Hosp., 116 Wn.App. 718, 737, 75 P.3d 533 (2003) (exclusion of testimony is "extreme sanction" for discovery violation, quoting In re Estate of Foster, 55 Wn.App. 545, 548, 779 P.2d 272 (1989)). The exclusion of testimony is a permissible sanction for a willful violation of a court order. Id.

Under the facts of this case, the refusal to adopt alternative sanctions that would allow the trial to proceed is untenable. Mr. Young had been in the State's custody in as an SVP civil committee since 1990. The State had 15 years of routine, daily observation of Mr. Young. The State's expert at the show cause hearing presented information that persuaded the trial court that Mr. Young did not even make a prima facie case that conditions had changed and he was entitled to a new trial. Young, 120 Wn.App. at 758-59. Mr. Young received a new trial only

because the trial court was not allowed to weigh the evidence presented in the show cause hearing. Id. It is inconceivable that the State does not have vast information upon which it may proceed to re-trial, and it may receive the benefit of favorable instructions and evidentiary rulings as a consequence of Mr. Young's failure to submit to an evaluation. The indefinite stay of proceedings is grossly unfair and should not be countenanced as a punishment for Mr. Young's disinclination to submit to extremely invasive psychological testing.

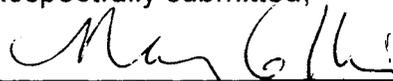
In sum, the State had substantial information on which it could argue at trial that Mr. Young should continue to be confined. The State never even made any particularized claim that it needed information from Mr. Young to proceed, it merely asserted its right to have him evaluated by its own expert. Since lesser sanctions are entirely appropriate given the substantial liberty interests at stake and the unlikelihood that a new evaluation would provide the State with any new ammunition to use in its effort to continue to confine Mr. Young. Accordingly, the court's sanction should be reversed and a less severe sanction ordered.

F. CONCLUSION.

For the foregoing reasons, Mr. Young respectfully requests this Court vacate the contempt finding and remand the case for further proceedings.

DATED this 20th day of December 2005.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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)	No. 02-2-07983-1 SEA
)	
In Re the Detention of)	
ANDRE BRIGHAM YOUNG,)	ORDER FINDING RESPONDENT IN
)	CONTEMPT
Respondent.)	
)	(inserted)
)	
)	
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This matter came before the court on the State's motion for contempt. Having considered the State's motion, respondent Young's response, the State's reply, Mr. Young's statements in open court and the arguments of counsel, the court hereby enters the following:

I. FINDINGS OF FACT

A. On March 21, 2005, this court ordered respondent to submit to an interview with the State's retained expert, Dr. Harry Hoberman. The court also ordered respondent to participate in a video deposition. A copy of the court's order is contained in the file.

B. The State scheduled its deposition of Mr. Young for April 5-6, 2005. The State also scheduled a psychological interview of Mr. Young by Dr. Harry Hoberman, the State's retained

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1 expert, for April 7-8, 2005. These dates were scheduled in accord with the February 2005 Agreed
2 Scheduling order.

3 C. Through his counsel, respondent Young has provided "formal notice" that Mr.
4 Young "will not appear at his deposition on April 4 and 5, 2005" and that he "will not appear for the
5 interview with Dr. Hoberman on April 7 and 8, 2005." As a result of this formal notice, the State
6 cancelled the deposition and interview.

7 D. In open court on April 1, 2005, Mr. Young confirmed that he was refusing to comply
8 with the requirements of the March 21, 2005 order. Mr. Young's refusal to comply with the order
9 of this court is done willingly and intentionally. His refusal to appear at, and participate in, the
10 deposition and interview constitutes contempt of court. *Mr. Young was provided*

11 E. It remains within respondent Young's power to comply with the court's order
12 requiring his attendance and participation at his deposition and the interview with Dr. Hoberman.

13 F. The remedial sanction most reasonably calculated to result in respondent's
14 compliance with this court's order regarding the deposition is to *stay the proceedings*
15 ~~place respondent Young in the King County Jail~~ until he purges his contempt. The court has considered lesser coercive sanctions,
16 but finds that they are unlikely to secure Mr. Young's compliance with the court's order and would
17 work to prejudice the ability of the State to present its case. *The court will consider*

18 *the possibility of a progressive sanction, including jail, if the stay fails*
II. CONCLUSIONS OF LAW

19 A. Respondent is in contempt of court under RCW 7.21.010(1)(b) & (c).

20 B. The court has the authority to place respondent in civil contempt under RCW 7.21,
21 CR 37 and the court's inherent authority to enforce its orders.

22 *to secure Mr. Young's compliance with the March 21, 2005 order.*

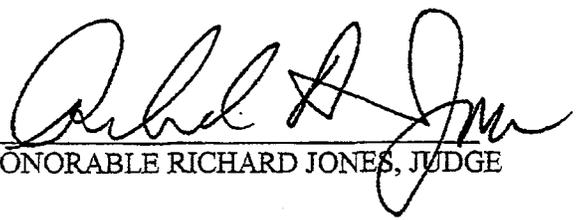
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IT IS THEREFORE ORDERED THAT ^{all trial proceedings are} ~~respondent Andre Brigham Young shall~~
~~immediately be placed in the King County Jail, where he shall remain until he purges his contempt~~
~~his contempt~~ ^{Stayed and respondent shall remain at SEC until he purges}
of this court by completing his deposition and his interview in accord with the March 21, 2005
order. The trial date of June 13, 2005 is stricken during the period that respondent is in contempt of
this court. The parties shall ^{appear before the court on July 15, 2005 to} ~~keep the court informed of Mr. Young's willingness to purge his~~
~~contempt.~~ ^{review the status of the contempt. Mr. Young may appear}
^{by phone. The court shall hear Mr. Young's motion to substitute}
DATED this 15 day of April, 2005. ^{counsel on April 25, 2005 at 8:30 a.m.}


HONORABLE RICHARD JONES, JUDGE

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1 Presented by:

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David J.W. Hackett, WSBA #21236

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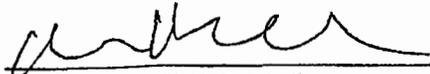
Barbara Flemming, WSBA #20485

Senior Deputy Prosecutors

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Dennis Carroll, WSBA #

Christine Jackson, WSBA #

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Attorney for Respondent

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