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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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In re the Interest of:

ESTEVAN S., JR.
(dob 12/28/91)

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY, JUVENILE
COURT DIVISION

The Honorable Robert Inouye, Court Commissioner

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The juvenile court violated RCW 7.21.040 by imposing a criminal contempt sanction upon Estevan without following the statutory procedures.

2. The juvenile court violated the separation of powers doctrine by resorting to its inherent authority to impose criminal contempt sanctions without explaining why the statutory procedures were inadequate.

3. The juvenile court violated Estevan's right to due process and fundamental fairness by finding him in contempt and imposing a criminal sanction upon him without affording him the same protections afforded other criminal defendants.

4. The juvenile court violated RCW 13.40.160 by imposing a manifest injustice disposition without making the requisite findings.

5. The juvenile court violated Estevan's right to due process and equal protection by failing to grant him credit for time served.

6. The juvenile court violated Estevan's right to substantive and procedural due process by ordering him to submit to inpatient treatment without finding by clear, cogent, and convincing evidence that he was both chemically dependent and dangerous.

7. The juvenile court violated the Family Reconciliation Act by ordering inpatient treatment as part of an at-risk youth proceeding.

8. The juvenile court violated the Involuntary Treatment Act by ordering inpatient treatment without meeting the substantive or procedural requirements of the Act.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Washington's criminal contempt statute provides that a punitive sanction for contempt of court may be imposed only in a separate action initiated by a public prosecutor. A court violates the separation of powers doctrine if it resorts to its inherent authority to punish contempt without specifically finding the statutory procedures inadequate. Where the juvenile court invoked its inherent authority to impose a criminal contempt sanction upon Estevan, without following the statutory procedures and without finding the statutory procedures inadequate, did the court violate the criminal contempt statute and the separation of powers doctrine? (Assignments of Error 1, 2)

2. Due process and fundamental fairness mandate that an individual subject to criminal contempt be afforded the same rights as other criminal defendants, including a neutral and detached

magistrate and the initiation of a criminal action by filing of charges by the prosecutor. Where no criminal charges were filed, no disinterested prosecutor was involved, and the judge advised a party to ask for contempt and then performed direct examination of this party, must the contempt order be vacated as a violation of due process? (Assignment of Error 3)

3. To impose a "manifest injustice" disposition above the standard range, the court must find by clear and convincing evidence that a disposition within the standard range would be clearly too lenient, and must state its reasons on the record. Where a judge imposed a disposition of 45 days' detention for contempt, instead of a disposition within the standard range of 0-30 days for a gross misdemeanor, and did not find by clear and convincing evidence that a disposition within the standard range would be clearly too lenient, must the disposition be vacated? (Assignment of Error 4)

4. A sentencing court's denial of credit for time served violates a juvenile offender's right to due process and equal protection. Did the juvenile court violate Estevan's constitutional rights when it imposed punitive detention without granting credit for time served? (Assignment of Error 5)

5. Under the Due Process Clause, an individual may not be involuntarily committed for drug and alcohol rehabilitation unless a court finds by clear, cogent and convincing evidence that the individual is chemically dependent and that the dependency creates a serious risk of substantial harm. Did the juvenile court violate Estevan's right to due process when it ordered him to submit to long-term inpatient treatment without making the requisite findings? (Assignment of Error 6)

6. The Family Reconciliation Act prohibits a court from ordering inpatient treatment as part of an at-risk youth proceeding. Did the juvenile court violate the Family Reconciliation Act by ordering Estevan to submit to inpatient treatment as part of an at-risk youth action? (Assignment of Error 7)

7. The Involuntary Treatment Act prohibits a court from ordering inpatient treatment unless it finds by clear, cogent, and convincing evidence that the person "presents a likelihood of serious harm or is gravely disabled as a result of chemical dependency." Did the juvenile court violate the Involuntary Treatment Act by ordering Estevan to submit to inpatient treatment without making such findings? (Assignment of Error 8)

C. STATEMENT OF THE CASE

Estevan S. is a teenager whose mother, Jeanette Silva, filed an at-risk youth ("ARY") petition alleging Estevan ran away, drank alcohol, and was beyond parental control. CP 35-37. On April 4, 2007, Juvenile Court Commissioner Robert Inouye granted the petition and ordered Estevan not to run away, to follow his mother's rules, to attend school, and to avoid drugs and alcohol. 4/4/07 RP 9-10; CP 21-22.

On April 18, the court found Estevan in contempt of the ARY dispositional order and ordered him to serve five days in detention with the option of purging the contempt by writing a 4000-word essay. CP 19; 4/18/07 RP 22-24. The court warned Estevan that next time he violated the order the court would not limit itself to statutory remedies:

Next, your mom was asking for any help the Court could give. I see from the notes that we talked before about a different kind of special court hearing that's called an inherent contempt hearing. If your mom files these papers again, saying that you're not listening to her, and if at the beginning she puts in those papers that she wants a special contempt hearing, a special inherent contempt hearing, and if we go ahead with her request, you could end up facing a lot more jail time, not just three or four days, not necessarily a purge option, not just seven days, it could be 30 days, it could be more. And it could be

including requirements for things like inpatient drug treatment.

4/18/07 RP 24-25. The judge repeated, "I'm again reminding your mother that she has that possibility if she puts in her papers next time that she's asking for a special inherent contempt." 4/18/07 RP 25.

On April 26, Estevan's mother filed a motion and order to show cause alleging that Estevan violated the ARY order after his release from detention. 5/10/07 RP 1; CP 40. Estevan's mother wrote, "I am asking for inherent contempt!" Id. Although it was Ms. Silva's brother (Estevan's uncle) who allegedly gave the child alcohol and encouraged him to skip school, and who also allegedly assaulted Ms. Silva and her husband, Ms. Silva had not sought a restraining order against her brother but instead asked the court to punish her son. CP 40; 5/15/07 RP 9-10, 18-22.

The Court issued an "Inherent Contempt Pre-Trial Order," outlining the "potential consequence which the youth could be facing, if the court later determines that it is necessary to exercise inherent contempt powers." CP 16. The potential consequences included "[i]ncarceration for a period of time ... not limited to 7 days,

30 days, or any other set number of days.” CP 16. The order stated it would be “in the court’s discretion whether the youth [would] have an opportunity to purge some or all of that time” and whether credit would be given for time served. CP 16.

After Estevan had already been detained for five days, Commissioner Inouye held an “inherent contempt” hearing, at which he performed direct examination of Ms. Silva and the other witness, social worker Brenda Sipes. 5/15/07 RP 3-18, 23-28. When Ms. Sipes expressed confusion about the process, the commissioner responded, “Well, traditionally we’d have the party ask you questions.” 5/15/07 RP 24. The court nevertheless encouraged the witness to just “go ahead and talk and we’ll see if there are any objections.” 5/15/07 RP 24.

Estevan’s attorney argued that Estevan was no longer in contempt because he had been in detention for the past five days. 5/15/07 RP 31. He also pointed out that there had only been one previous contempt finding within this cause, and that “Estevan hasn’t even been given the statutory maximum under this, so I think we’re moving to the inherent contempt prematurely.” 5/15/07 RP 31. Ms. Silva argued inherent contempt was not premature because Estevan had been the subject of a previous ARY order

which had been dismissed, and that he needed inpatient drug treatment. 4/18/07 RP 17; 5/15/07 RP 35.

The court concluded that Estevan had violated the ARY order and that the statutory civil contempt power was not an adequate remedy because "Estevan has been held in contempt twice and sentenced to 5 days['] detention each time, with no discern[ible] effect." CP 12. The court found that his behaviors had "affected Estevan's health (due to substance abuse) and education." CP 12. In the commissioner's opinion, Estevan "needs extended inpatient treatment, more than just the basic 28 days which is offered at Sundown M." CP 11. The court further noted that Estevan had declined to meet with the social workers assigned to help the family. CP 13.

The court concluded that "[t]he statutory criminal contempt powers, as found at RCW 7.21.040, are not available in this case," and that "[t]here is a reasonable basis for believing that some other specific period of detention will achieve what a civil statutory 'seven' days will not." CP 13. Finally, the court concluded that Estevan needed extended inpatient treatment and that if released, he would resume his alcohol use. CP 13.

The court "sentenced" Estevan to "45 days in detention, starting now, which are not subject to purge." CP 13. The court "suspended" all but two days of the sentence on the condition that Estevan comply with prior ARY disposition orders and that he "participate in such inpatient treatment program as his parents are able to arrange." CP 13-14. The order warned, "If he is not complying with court orders, he could be incarcerated for another part of the 43 days." CP 14. The court further mandated:

Estevan shall attend such inpatient treatment as his parents can arrange. Once he has completed it, he shall resume attending the 1:30 Tuesday ARY contempt review hearings, to check on his progress and compliance with court orders. Noncompliance can result in imposition of more of the postponed days. He must participate in any recommended after-care treatment.

Six months after discharge from i[n]patient treatment, if Estevan is following court orders and remaining sober, the contempt will be purged and any remaining days will be stricken.

CP 14.

Estevan appeals. CP 4-9.

D. ARGUMENT

1. THE JUVENILE COURT ERRED IN RESORTING TO ITS INHERENT CONTEMPT AUTHORITY TO IMPOSE A CRIMINAL SANCTION WITHOUT EXPLAINING WHY STATUTORY CRIMINAL CONTEMPT PROCEEDINGS WOULD BE INADEQUATE AND WITHOUT AFFORDING ESTEVAN PROTECTIONS REQUIRED BY DUE PROCESS.

- a. The juvenile court imposed a criminal sanction. There are two types of sanctions judges may impose for contempt of court: (1) a civil (remedial) sanction or (2) a criminal (punitive) sanction. Different procedural requirements apply to each type of sanction. In Estevan's case, the court imposed a criminal sanction without following the procedures required for this type of remedy. Accordingly, the contempt order should be vacated.

A contempt sanction is civil and remedial rather than punitive only if "the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order." Hicks v. Feiock, 485 U.S. 624, 635 n.7, 99 L.Ed.2d 721, 108 S.Ct. 1423 (1988). The individual must be afforded "the immediate opportunity to purge" the contempt. In re the Interest of J.L., 140 Wn. App. 438, 445, 166 P.3d 776 (2007) (emphasis in original). For example, where a contemnor may avoid or terminate

a sanction by complying with a discovery order, the sanction is civil because the contemnor "carries the keys of his prison in his own pocket." International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 and 833, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911)). "A detained contemnor should have opportunity to fulfill a purge condition by the next available hearing day, so as to present a request to the court at the earliest time." In re the Interest of M.B., 101 Wn. App. 425, 462, 3 P.3d 780 (2000).

In contrast, a contempt sanction is criminal in nature when it is imposed to punish completed acts of disobedience without providing an immediate opportunity to purge the contempt. In re the Interest of R.V.M., 2007 Wash. App. LEXIS 2866, No. 58938-5-III, slip op. at 9 (Wash., October 22, 2007); M.B., 101 Wn. App. at 446. For example, where a trial court fined a teachers' association \$1000 for violating an anti-strike injunction, the fine constituted a criminal sanction because the court's desire was "not to force adherence to its present order ..., but to bolster respect for its future orders." R.V.M. at 10 (quoting Mead School Dist. No. 354 v. Mead Educ. Ass'n., 85 Wn.2d 278, 286, 534 P.2d 561 (1975)). In

R.V.M., a 30-day sentence was criminal in nature, not civil, because the court did not provide the youth with an opportunity to purge the contempt. Id. at 11.

The sanction in this case, as in R.V.M. and J.L., is criminal in nature. Estevan was sentenced to 45 days “not subject to purge.” CP 13. The sanction was punitive notwithstanding the court’s statement that “six months after discharge from inpatient treatment, if Estevan is following court orders and remaining sober, the contempt will be purged and any remaining days will be stricken.” CP 14. “To be valid, a purge condition must be within the contemnor’s capacity to complete at the time the sanction is imposed.” J.L., 140 Wn. App. at 447; see also Bagwell, 512 U.S. at 824 n.1 (fines suspended on condition of future compliance were “criminal in nature”); Hicks v. Feiock, 485 U.S. 624, 640 n.11, 99 L.Ed.2d 721, 108 S.Ct. 1423 (1988) (suspended or probationary sentence is criminal); M.B., 101 Wn. App. at 456 (the “concept of a suspended sentence does not belong in a coercive order”).

In M.B., the court struck down a contempt order as criminal and violative of due process because the earliest the youth could comply with the order and “purge” the contempt was three months later. 101 Wn. App. at 457. Here, the earliest Estevan could

comply with the order and “purge” his contempt was six months after finishing inpatient treatment – itself an unconstitutional condition (see Part 3 below). Therefore, the sanction imposed on Estevan was a determinate criminal sentence suspended on conditions, not a remedial civil penalty. See J.L., 140 Wn. App. at 446.

b. The juvenile court violated the separation of powers by imposing a criminal sanction without following the procedures set forth in the criminal contempt statute and without explaining why those procedures would be inadequate. Because the sanction imposed in this case was criminal, not civil, the court was required to comply with the procedures outlined in Washington’s criminal contempt statute, unless it explicitly found those procedures inadequate. The court failed to do so, thereby violating both the statute and the separation of powers doctrine.

Washington’s criminal contempt statute provides that a punitive sanction for contempt of court may be imposed only in a separate action initiated by a public prosecutor. RCW 7.21.040(2)(a), (b); R.V.M. at 11. A judge presiding in an action to which the contempt relates may ask a public prosecutor to act, or may appoint a special counsel to prosecute the action “if required

for the administration of justice.” RCW 7.21.040(2)(c). A judge who requests prosecution is disqualified from presiding at the trial. Id.

As in R.V.M., the procedure here did not comply with the statute. There was no separate criminal action. No public prosecutor was involved and no formal complaint or information was filed. The proceeding was initiated by a “motion and order to show cause” filed by Estevan’s mother in the ongoing civil case under the At-Risk Youth statute. 5/10/07 RP 1; CP 40. Estevan’s mother wrote, “I am asking for inherent contempt!” Id. And as in R.V.M., the commissioner presided at the hearing despite having essentially invited the prosecution himself. See R.V.M. at 11-12; 4/18/07 RP 24-25 (Commissioner Inouye advises Estevan’s mother to request inherent contempt next time).

Furthermore, although a “pretrial order” indicated that “incarceration” was a “potential consequence,” it erroneously stated that there was no maximum penalty that could be imposed. CP 16 (“time is not limited to 7 days, 30 days, or any other set number of days”). In fact, the maximum penalty a judge may impose for contempt of court is one year. RCW 7.21.040(5); Cf. U.S. Const.

amend. 8 (barring "cruel and unusual punishments"); Wash. Const. art. 1, § 14 (barring "cruel punishment").

The court's failure to follow the designated procedures violated not only the statute, but also the separation of powers doctrine. The purpose of this constitutionally rooted doctrine is "to prevent one branch of government from aggrandizing itself or encroaching upon the fundamental functions of another." State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The decision of whether and how to charge an individual is an executive decision made by the prosecuting attorney. See State v. Finch, 137 Wn.2d 792, 809, 975 P.2d 967 (1999). Setting criminal penalties is a function of the Legislature. State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). The Legislature also establishes the procedures for imposing such penalties. See State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980).

While a court may invoke its inherent authority when necessary to protect itself, inherent contempt must be a last resort because it "uniquely is liable to abuse." Bagwell, 512 U.S. at 831 (citations omitted). "Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, [inherent] contempt proceedings leave the offended judge

solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct.” Id.

Accordingly, “[u]nless the legislatively prescribed procedures and remedies are specifically found inadequate, courts should adhere to them and are not free to create their own.” R.V.M. at 19-20 (quoting Mead, 85 Wn.2d at 288); see M.B., 101 Wn. App. at 431 (“the juvenile court may not exercise inherent contempt powers unless the statutory powers are clearly inadequate”).

Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.

Bagwell, 512 U.S. at 839 (quoting Bloom v. Illinois, 391 U.S. 194, 208, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968)).

Here, the court found the civil contempt statute inadequate, but that does not justify resort to inherent powers. Rather, the next step is to refer the matter for a criminal contempt prosecution under the criminal contempt statute. R.V.M. at 23; see also M.B., 101 Wn. App. at 451 (rejecting argument that juvenile courts “can rely on their inherent contempt authority, rather than impose statutorily based punitive or remedial contempt sanctions”). Courts may not

resort to inherent authority “unless the statutory powers are in some specific way inadequate. Otherwise, a resort to inherent powers effectively nullifies the statutes.” R.V.M. at 23; M.B., 101 Wn. App. at 452.¹

R.V.M. is dispositive. Here, as in that case, the record does not contain a finding that the statutory procedure is inadequate for the purpose of punishing criminal contempt, nor does it contain evidence that would support such a finding. See R.V.M. at 20. As in R.V.M., there is no indication that the court tried unsuccessfully to refer the matter to a public prosecutor. Referral to a prosecutor ensures a procedure that supports the integrity of judicial proceedings. R.V.M. at 20. Because the statute assures the involvement of a disinterested prosecutor, it is not only adequate but superior to the procedure used by the court below in the exercise of its inherent authority. R.V.M. at 21. The juvenile court should have followed the statute and referred the matter to a disinterested prosecutor. The order of detention is an improper and untenable use of the court’s inherent authority, and must be

¹ The court here deprived the defendant of fair process and effectively nullified the statute by declaring the criminal contempt statute “unavailable.” CP 13. If the statute was “available” in R.V.M., it was available here. Resort to inherent authority is allowed only if necessary to protect the court. In re Salary of the Juvenile Director, 87 Wn.2d 232, 252, 552 P.2d 163 (1976).

reversed as a violation of the doctrine of separation of powers. See R.V.M. at 25.

c. The juvenile court violated due process and fundamental fairness by imposing a criminal sanction without affording Estevan the protections afforded criminal defendants. In addition to violating the separation of powers doctrine, the juvenile court violated Estevan's right to due process and fundamental fairness.

At a minimum, due process requires notice and the opportunity to be heard by a neutral magistrate. State v. Karas, 108 Wn. App. 692, 699, 32 P.3d 1016 (2001); see also Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Young v. United States ex. Rel. Vuitton et Fils S.A. et. Al., 481 U.S. 787, 798-99, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). But minimum due process does not suffice in a criminal contempt hearing. "Criminal contempt is a crime in the ordinary sense." Bagwell, 512 U.S. at 826 (quoting Bloom, 391 U.S. at 201). Thus, "[n]o court, including the juvenile court, may impose criminal contempt sanctions unless the contemnor has been afforded the same due process rights afforded other criminal defendants." J.L., 140 Wn. App. at 448; see Bagwell, 512 U.S. at 833 "criminal contempt sanctions are entitled to full criminal process"); King v. Dept. of Soc.

and Health Servs., 110 Wn.2d 793, 800, 756 P.2d 1303 (1988) (“[a]lthough a court has statutory as well as inherent power to impose a civil contempt sanction, it may not impose a criminal contempt sanction unless the contemnor has been afforded those due process rights extended to other criminal defendants”).

These rights include the initiation of criminal action by filing of charges by the prosecutor, assistance of counsel, privilege against self-incrimination, and proof beyond a reasonable doubt. J.L., 140 Wn. App. at 448; M.B., 101 Wn. App. at 440; State v. Buckley, 83 Wn. App. 707, 713, 924 P.2d 40 (1996)). “Criminal contempt proceedings must be initiated by a criminal information filed by the State in order to comply with due process.” In re the Interest of Rebecca K., 101 Wn. App. 309, 317, 2 P.3d 501 (2000); J.L., 140 Wn. App. at 444.

Multiple due process violations occurred here, any one of which alone requires reversal. First, as discussed above, this action was initiated by Estevan’s mother through a show cause motion. 5/10/07 RP 1; CP 40. Because the proceeding was not initiated by a criminal information filed by the State, Estevan’s right to due process was violated and the contempt order must be vacated. J.L., 140 Wn. App. at 448-49.

Second, this matter was not heard by a neutral magistrate. In addition to presiding over the contempt hearing, the judge in this case also served as part of the prosecution team. He advised Ms. Silva to seek inherent contempt, 4/18/07 RP 24-25, and then performed direct examination of both prosecution witnesses. 5/15/07 RP 3-17, 23-27. When the second witness expressed confusion regarding the process, the judge acknowledged, "Well, traditionally, we'd have the party ask you questions." 5/15/07 RP 24. The judge's taking on the party's role in this case violated Estevan's due process right to a neutral and detached magistrate.

Finally, the other "prosecutor" in the matter, Ms. Silva, was not disinterested. Fundamental fairness – as well as the appearance of fairness doctrine – dictates that the court either refer the matter to the executive branch for prosecution or appoint a disinterested special prosecutor if the executive branch declines to prosecute. Young, 481 U.S. at 801, 806, 808-09. Here, the only "prosecutors" were the mother and the judge. As discussed above, the judge's performance of the prosecutorial function violated Estevan's right to a neutral magistrate. The mother's performance of the prosecutorial function violated his right to a disinterested prosecutor, because she was trying to get help for her child. Thus,

she “cannot be characterized as anything other than a private, interested party.” R.V.M. at 20. Her functioning as a prosecutor violated not only her son’s right to due process but the public’s right to have a prosecutor representing its interests rather than those of a private party.

For these reasons, the inherent contempt hearing violated due process and fundamental fairness, and these shortcomings provide an independent basis for reversal.

2. THE JUVENILE COURT ERRED IN IMPOSING A MANIFEST INJUSTICE DISPOSITION AND IN DENYING CREDIT FOR TIME SERVED.

Even if the juvenile court appropriately imposed criminal sanctions, it erred in failing to grant credit for time served and in sentencing Estevan to more than 30 days’ detention. Again, criminal contempt is “a crime in the ordinary sense.” Bagwell, 512 U.S. at 826 (quoting Bloom, 391 U.S. at 201). Juvenile crimes are governed by RCW Ch. 13.40. Under that statute, the standard-range sentence for a juvenile offense equivalent to an adult gross misdemeanor is 0-30 days of confinement. RCW 13.40.0357; RCW 13.40.020(16). Given that the maximum penalty for contempt is one year, juvenile contempt is equivalent to an adult gross misdemeanor. RCW 7.21.040(5); RCW 9A.04.040.

To impose a “manifest injustice” disposition above the standard range, the court must find by clear and convincing evidence that a disposition within the standard range would be clearly too lenient, and must state its reasons on the record. RCW 13.40.160(2); State v. M.L., 134 Wn.2d 657, 660, 952 P.2d 187 (1998). Here, the juvenile court imposed a 45-day sentence, instead of a sentence within the standard range of 0-30 days, without providing any reasons on the record for imposing a manifest injustice disposition. CP 10-14. For this reason, too, the order should be vacated.

The juvenile court further erred in denying credit for time served. A sentencing court’s denial of credit for time served violates a juvenile offender’s right to due process and equal protection. In re the Personal Restraint of Trambitas, 96 Wn.2d 329, 331-33, 635 P.2d 122 (1981). The juvenile court violated Estevan’s constitutional rights when it imposed punitive detention without granting credit for time served, and the order must be vacated on this ground as well.

3. IN ORDERING ESTEVAN TO SUBMIT TO INPATIENT TREATMENT, THE JUVENILE COURT VIOLATED DUE PROCESS, THE FAMILY RECONCILIATION ACT, AND THE INVOLUNTARY TREATMENT ACT.

a. The juvenile court violated Estevan's right to due process.

It is axiomatic that involuntary civil commitment constitutes a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972). This is true regardless of whether the institutionalization is for mental illness or chemical dependency. Recovery Northwest v. Thorslund, 70 Wn. App. 146, 149 n.2, 851 P.2d 1259 (1993); see Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Given the gravity of the deprivation, substantive due process prohibits the involuntary commitment of an individual for substance abuse treatment unless the individual is both chemically dependent and dangerous. See O'Connor v. Donaldson, 422 U.S. 563, 575, 45 L.Ed.2d 396, 95 S.Ct. 2486 (1975) (mental illness alone not a constitutionally adequate basis for involuntary commitment); Foucha v. Louisiana, 504 U.S. 71, 78, 112 S. Ct. 1780; 118 L. Ed. 2d 437 (1992) (dangerousness alone not a constitutionally adequate basis for involuntary commitment). Procedural due

process requires proof of these twin conditions by clear, cogent and convincing evidence. Addington, 441 U.S. at 433.

It is insufficient to detain an alcoholic or drug addict merely on the basis that the State wishes to benevolently provide treatment. Treatment of Mays, 116 Wn. App. 864, 871 n.5, 69 P.3d 1114 (2003) (citing O'Connor, 422 U.S. 563). In Mays, for example, this Court struck down a statute as violative of substantive due process where “[t]he legislature apparently intended to create a mechanism for treating chronic alcoholics who had previously had unsuccessful detoxification efforts, but who did not exhibit the level of dangerousness required for other detainees.” Mays, 116 Wn. App. at 873. The court reiterated the constitutional requirement that the risk of danger to self or others must be substantial and the harm must be serious before detention is justified. Mays, 116 Wn. App. at 870 (citing In re Harris, 98 Wn.2d 276, 283-84, 654 P.2d 109 (1982)). Similarly, the court struck down a different portion of the involuntary treatment statute in another case because its requirement that the individual “constitute a danger” did not meet the due process standard of “substantial risk of serious harm.” Thorslund, 70 Wn. App. at 150-51.

The juvenile court's order subjecting Estevan to inpatient treatment violated both substantive and procedural due process. The court did not find by clear, cogent and convincing evidence that Estevan's substance abuse created a substantial risk of serious harm. Rather, the court found that the teen's alcohol problem has "affected Estevan's health."² CP 11, 12. Because this finding does not satisfy due process, the order to participate in inpatient treatment must be vacated.

b. The juvenile court violated the Family Reconciliation Act and the Involuntary Treatment Act. In addition to violating due process, the juvenile court's order committing Estevan for treatment violated Washington statutes governing at-risk youths and civil commitment.

Washington's Family Reconciliation Act explicitly strips the court of the power to order inpatient treatment for at-risk youths like Estevan: "No dispositional order or condition of supervision ordered by a court pursuant to this section shall include involuntary commitment of a child for substance abuse or mental health treatment." RCW 13.32A.196. The court may require outpatient

² The court also found that Estevan agreed he needed treatment, but this does not cure the constitutional defects. "Voluntary treatment becomes involuntary when it is the only means to purge a contempt." M.B., 101 Wn. App. at 450 n.84.

treatment, but not inpatient treatment. M.B., 101 Wn. App. at 459-60. Here, the court violated the Family Reconciliation Act by ordering Estevan to submit to extended inpatient treatment. CP 14.

Consistent with due process, the Involuntary Treatment Act provides that a court may only order inpatient treatment after finding by clear, cogent, and convincing evidence that the person “presents a likelihood of serious harm or is gravely disabled as a result of chemical dependency.” RCW 70.96A.140(1), (4).³ “Gravely disabled” means either “(a) is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety, or (b) manifests severe deterioration in routine functioning evidenced by a repeated and escalating loss of cognition or volitional control over his or her actions and is not receiving care as essential for his or her health or safety.” RCW 70.96A.020(12); see In re Detention of LaBelle, 107

³ The Legislature has created another process by which parents, without involving the courts, can attempt to commit their children involuntarily. RCW 70.96A.245. This provision does not apply to ARY cases in which the court is involved. A court may not commit children involuntarily as part of the At-Risk Youth process. RCW 13.32A.196. Instead, it must abide by the due process protections afforded under the Involuntary Treatment Act. RCW 70.96A.140.

Even if RCW 70.96A.245 could apply, it was not complied with here. That provision dictates that a minor may not be involuntarily committed for more than 72 hours unless a “professional person” has determined it is a “medical necessity.” RCW 70.96A.245(3). Here, no professional person so testified, yet the judge ordered Estevan’s commitment for “more than just the basic 28 days.” CP 11.

Wn.2d 196, 204, 728 P.2d 138 (1986); Mays, 116 Wn. App. at 870-71.

In order to avoid the erroneous commitment of such persons under the gravely disabled standard, the State must present recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment which presents a high probability of serious physical harm within the near future unless adequate treatment is afforded.

LaBelle, 107 Wn.2d at 204-05. To justify commitment under subsection (b) of the “gravely disabled” definition, inpatient treatment “must be shown to be essential to an individual’s health or safety and the evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered.” LaBelle, 107 Wn.2d at 208.

The Act also outlines the procedures to be followed in determining whether the substantive requirements of substantial harm or grave disability have been shown. For example, the hearing should include the testimony of “at least one licensed physician who has examined the person whose commitment is sought.” RCW 70.96A.140(3). Also, the person whose commitment is sought “shall be informed of his or her right to be

examined by a licensed physician of his or her choice." RCW 70.96A.140(9).

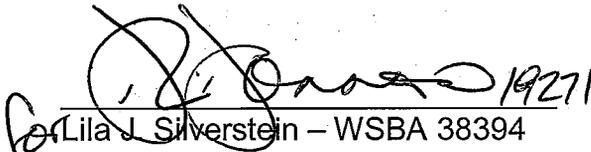
The juvenile court here violated the Involuntary Treatment Act in several ways. First, the court did not enter a finding of substantial harm or grave disability. Second, the hearing did not include the testimony of a physician or any medical professional. Third, Estevan was not informed of his right to be examined by a licensed physician of his choice. For this reason, too, the order to submit to inpatient treatment must be vacated.

E. CONCLUSION

For the reasons set forth above, Estevan S. respectfully requests that this Court vacate the inherent contempt order.

DATED this 30th day of November, 2007.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant Estevan S.

Appendix A

FILED

2007 APR 26 PM 3:45

THE SUPERIOR COURT OF WASHINGTON, IN AND FOR YAKIMA COUNTY, JUVENILE DIVISION

In the Interest of: Estevan Silva Jr

Cause No. 07-7-003492

Date of Birth: 12/28/91

MOTION AND ORDER TO SHOW CAUSE (ORTSC)

MOTION

My name is Jeanette Silva. My child's name is Estevan Silva Jr.

On 11/06 the court signed an order which required my child to do these things:
Go to school. Leave with permission if He ask first.

My child has disobeyed that court order in these ways:

Since his realese from Detention he's been comming home around 1:30am for 2 days. He left was gone the night before & came home the next morning. He does not want to comply with his court order that Christina is helping him/family.

Does not want to go to school

At this time my child is absent from home without my permission, and I am asking that a warrant be issued for the arrest of my child, whose description is: Height 6'1 Weight 170 Hair Black Eyes Brown Sex M Ethnicity Hispanic Indian Birth Date 12/26/91

I ask that the court schedule a contempt hearing and impose appropriate sanctions. I declare under penalty of perjury under the laws of the State of Washington that this information is true. Dated 4/26/07, at Yakima, Washington, by:

I am asking for inherent contempt!

Jeanette Silva Signature of parent Telephone number 865-2084

ORDER TO SHOW CAUSE

IT IS HEREBY ORDERED that above-named youth shall appear before the Yakima County Juvenile Court (1728 Jerome Avenue, Yakima, WA) to show cause why a contempt order should not be entered and sanctions imposed:

The hearing is scheduled for Tuesday at 1:30 p.m. The youth shall also meet with their attorney on Monday at 3:00 p.m. The parent shall have copies of this Order served on the other parties, and arrange any necessary transportation for the youth. At the court hearing, the sanctions which could be imposed include commitment to juvenile detention, community service hours, or other remedial sanctions. **WARNING TO YOUTH:** If you fail to appear at this hearing after receiving proper notice, a warrant may issue for your arrest.

There is probable cause to believe that the youth named and described above has violated a CHINS or A-RY placement order. A warrant shall issue for the youth's arrest. Bail is set at \$ 2,000 cash or bond. Upon apprehension the youth shall be delivered to Yakima County Juvenile Detention, and a detention hearing shall be held to appoint counsel and schedule a show cause hearing.

DATED 4-26-07, by: [Signature] Judge / Court Commissioner

- White Legal File
- Green Juvenile Court Social File
- Canary Parent
- Pink Child
- G.Rod Assigned Counsel

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

IN THE INTEREST OF:)	
)	COA NO. 26164-6-III
ESTEVAN S. JR. (DOB 12/28/1991),)	
)	
APPELLANT.)	
)	

CERTIFICATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 30TH DAY OF NOVEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE OPENING BRIEF OF APPELLANT TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> JEANETTE SILVA	<input checked="" type="checkbox"/> U.S. MAIL
101 SOUTH G STREET	<input type="checkbox"/> HAND DELIVERY
TOPPENISH, WA 98948	<input type="checkbox"/> _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2007.

X _____ *gru*

FILED
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STATE OF WASHINGTON
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