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King County Prosecutor
Juvenile Division

NO. 67461-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSH SANCHEZ,

Appellant.

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COURT OF APPEALS DIVISION 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Helen Halpert, Judge

APPELLANT'S REPLY TO THE BRIEF OF RESPONDENT

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 ORIGINAL

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I. REPLY TO RESPONDENT'S ISSUES PRESENTED

The State's formulation of the issues presented incorrectly assumes that RCW 4.24.550 is still controlling authority on the issue of the release of the Juvenile Sexual Behavior and Risk Assessment (hereinafter SSODA evaluation) to the King County Sheriff for purposes of conducting so called "risk assessments".

Authority for conducting risk assessments is now exclusively relegated to the jurisdiction of the End of Sentence Review Committee by virtue of the legislative enactment of SSB 5204.

II. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The State again misstates the Sheriff's obligations regarding risk assessments. Prior to the adoption of SSB 5204 the Sheriff **was** obligated to classify sex offenders pursuant to RCW 4.24.550. With the adoption of SSB 5204 the sheriff has been displaced by the End Of Sentence Review Committee who is now charged with that obligation.

Trial counsel requested the trial courts consideration of SSB 5204 (effective date July 22, 2011), which directly addresses the issue of the release of psychological evaluations to the End-of-Sentence Review Committee for purposes of conducting risk assessments pursuant to Section 5 thereof at subsections (2) and (4).

The trial court advised counsel that SSB 5204 was not relevant at all. VRP August 4, 2011, at page 19

III. ARGUMENT

1. Subsequent to the adoption of SSB 5204 the state still maintains that RCW 4.24.550 (6) mandates the release of SSODA evaluations to the King County Sheriff for purposes of conducting risk assessments. *Brief of Respondent at page 2.*

RCW 4.24.550 was expressly amended by SSB 5204 at Section 5(2) which reads:

In order for public agencies to have the information necessary to notify the public as authorized by RCW 4.24.550, the secretary shall establish an end of sentence review committee **for the purposes of assigning risk levels**, reviewing available release plans, and making appropriate referrals for sex offenders. Emphasis added.

2. Albeit a laudable gesture, the state's assertions to the effect that the Sheriff's "policy" that such evaluations are exempt from disclosure pursuant to a PRA request, is an issue definitely subject to differing interpretations. That issue is the subject of protracted controversy (in the context of a SSOSA evaluation) in the matter of *Koenig v Thurston County* 155 Wn.App. 398, 229 P.3d 910 (2010) (Supreme Court No.

37446-3-II). The parties are awaiting a ruling out of the Washington Supreme Court as of this writing.

The State maintains that the SSODA evaluation is not subject to re-release to the public pursuant to *Koenig v Thurston County*. Only time (and the Supreme Court) will answer that question.

Additionally there are those that have opined that RCW 13.50.050 is unconstitutional, in part due to recent decisional law related to PRA requests and the openness of courts. What then happens to the protections previously afforded by that statute?

3. RCW 72.09.345 was amended by SSB 5204.

Title 72 of the RCW's deals with state institutions, and chapter 72.09 thereof, deals with the department of corrections. RCW 72.09.345 reads:

72.09.345. Sex offenders--Release of information to protect public--End-of-sentence review committee--Assessment--Records access--Review, classification, referral of offenders--Issuance of narrative notices

(1) In addition to any other information required to be released under this chapter, the department is authorized, pursuant to RCW 4.24.550, to release relevant information that is necessary to protect the public concerning offenders convicted of sex offenses.

(2) In order for public agencies to have the information necessary to notify the public as authorized in RCW 4.24.550, the secretary shall establish and administer an end-of-sentence review committee for the purposes of assigning risk levels, reviewing available release plans, and making appropriate referrals for sex offenders.

As noted, Subsection 1 states that the department (DOC) is authorized pursuant to RCW 4.24.550 to release relevant information that is necessary to protect the public concerning offenders convicted of sex offenses.

Subsection 2 of RCW 72.09.345 delineates how that information it is to be obtained.

Subsection 2 specifically states that **the End of Sentence Review Committee will gather the information necessary to notify the public as authorized by RCW 4.24.550 for purposes of assigning risk levels,** reviewing available release plans and making appropriate referrals for sex offenders. Emphasis added.

By any literal and reasonable interpretation, RCW 4.24.550 has been amended and displaced by SSB 5204.

4. RCW 42.56.070 states:

42.56.070. Documents and indexes to be made public

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, **or other**

statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

Emphasis added.

SSB 5204 has pre-empted the field of information obtained for purposes of assigning risk levels.

Additionally the state maintains that the internal policies of the King County Sheriff prohibit re-disclosure to third parties of the SSODA evaluations. Although the state has not identified which of the exemptions contained within RCW 42.56.070 prohibit re-disclosure, the defense would agree that public policy and the rights to privacy contained within RCW 42.56.070 support non-dissemination of the SSODA evaluations.

As noted previously there are those that might suggest that RCW 13.50.050 is unconstitutional, and if that be true, CrR 4.7 would supersede the non-disclosure features of RCW 13.50.050.

Regardless, SSB 5204 has now displaced the King County Sheriff with the End Of Sentence Review Committee and the issue of non-disclosure and internal policies of the King County Sheriff are now moot.

Additionally RCW 13.50.050 actually deals with Records **Not** Relating To Commission of Juvenile Offenses.

As also noted by the defense previously, this latter embolden section is critical because the records the King County Sheriff Office was seeking are strictly relegated to a Juvenile Offender matter and therefore reproduction to third parties was previously prohibited by RCW 13.50.100

RCW 13.50.100 (4)(a) reads in principle part;

(a) Information that may be released shall be limited to information regarding investigations in which: (i) The juvenile was an alleged victim of abandonment or abuse or neglect; or (ii) the petitioner for custody of the juvenile, or any individual aged sixteen or older residing in the petitioner's household, is the subject of a founded or currently pending child protective services investigation made by the department subsequent to October 1, 1998.

Nowhere in this section is there any support for re-dissemination of the SSODA evaluation to the King County Sheriff for purposes of conducting risk assessments particularly since SSB5204 is now controlling. As a matter of fact none of the requisite subsections are satisfied in this case.

As noted previously, state and federal policies also support the State's recognition for an individual's right to privacy regarding his health, which is found under RCW 70.02.005, where the legislature makes the following two findings: "Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other

interests”, and “Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.” RCW 70.02.005(1) and (4).

At the federal level, Josh’s privacy rights in the evaluation are also protected. SEE: *45 CFR SUBTITLE C §160*

Like a vacated conviction (which Josh has the ability to pursue pursuant to SSB 5204 §4(12)), a statute that permits sealing is a factor identified in GR 15 that supports a finding of compelling privacy or safety interests that may outweigh the public interest, and a factor the court can consider when determining if sealing is appropriate.

Under GR 15 (c)(2) a court may prohibit re-dissemination to the King County Sheriff of the SSODA evaluation if there are identifiable compelling safety or privacy concerns that outweigh the public interest in access to a document and redacting a document would not adequately address those concerns.

Article 1 Section 7 of the Washington constitution provides “No person shall be disturbed in his private affairs, or his home invaded,

without authority of law.” The Washington Supreme Court has recognized that the defendant’s right to privacy includes the right to nondisclosure of intimate personal information or confidentiality. See *O’Hartigan v Department of Personnel*, 118 Wn. 2d 111, 821 P.2d 44 (1991). Several statutes govern the confidentiality and limited release of medical and mental health records.¹

The information contained in forensic SSODA Evaluation is highly sensitive and personal not just as to Josh, but to all collaterals involved in the evaluation process. Releasing the SSODA evaluations to the King County Sheriff for purposes of conducting risk assessments is no longer statutorily authorized and violates the Appellant’s privacy rights and those of the third parties (collaterals) involved in the process. Once the harm is done(by making this sensitive information available to the King County Sheriff and thereby subject to a PRA request), the damage cannot be undone.

¹ See RCW 70.02.060 governing release of medical records, and RCW 71.05 630 governing release of mental health records, RCW 71.05.390 governing release of information about civil mental commitment proceedings, RCW 70.02.005(1) (“Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient’s interests in privacy, health care or other interests.”)

IV. CONCLUSION

What would happen to treatment prospects if these evaluations are released to the public?

Is the community better protected without SSODA evaluations and without treatment?

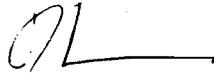
What if all the collaterals are reluctant to participate in the process knowing that intimate details of their private lives will become an open book for the public such as Mr. Koenig?

Mr. Sanchez is compelled by statute to participate in a SSODA evaluation if he wants to take advantage of sentencing options. He has not raised a mental health defense. Therefore, the public (and the King County Sheriff) has little if any interest in the protected information contained in the SSODA Evaluation.

Under the circumstances in this case, public access to the SSODA evaluation poses a serious and imminent threat not only to Mr. Sanchez's privacy rights, but those of all the collaterals involved. The rehabilitative goals of the statute and the evaluation process integral to the same must surely outweigh the public's right to such reports.

Given the implementation of SSB 5204 there is no longer statutory support for the release of the SSODA evaluation to the King County Sheriff for conducting risk assessments. The suggestion that it be should done because it used to be permissible or mandated flies in the face of the 4th, 5th, 6th and 14th amendments to the United State's Constitution, and analogous provisions of the Washington State Constitution, to which Josh and all similarly situated individuals are entitled.

Respectfully submitted this 27th day of February, 2012.



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