

59808-2

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NO. 59808-2-I

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

In re Detention of Charles DeCuir,

STATE OF WASHINGTON,

Respondent

v.

CHARLES DECUIR,

Appellant.

COURT OF APPEALS
DIVISION ONE
DEC 15 2009

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

The Honorable James H. Allendoerfer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. DE CUIR DID NOT WAIVE HIS RIGHT TO COUNSEL.

The State claims De Cuir waived his right to psychological exam counsel by signing a form stating he had the right to counsel at his own expense. Brief of Respondent (BOR) at 41.¹ This form misled De Cuir and was not a valid waiver.

Dr. Robert Wheeler conducted an extensive forensic psychological examination on De Cuir. CP 209; 4RP 456. Although the State scheduled this exam before De Cuir's probable cause hearing, it was his RCW 71.040(4) psychological exam. See Supplemental Brief of Appellant (SBOA), filed contemporaneously with this brief.

De Cuir had a statutory right to appointed counsel at his psychological exam. RCW 71.09.040(2); In re Strand, ___ Wn.2d ___, 217 P.3d 1159, 1165 (Slip Op. filed October 8, 2009). He had the right to consult appointed counsel prior to his exam and the right to appointed counsel when the exam took place. Id.; In re Kistenmacher, 163 Wn.2d 166, 173, 178 P.3d 949 (2008).

¹ The section of the form referred to stated:

I understand that I can talk to a n attorney at my own expense before I with Dr. Wheeler. I either have talked with an attorney and agreed to participate or have agreed to participate without talking to an attorney first.

The right to counsel at public expense is an essential element of the right to counsel. State v. Hopkins, 134 Wn.App. 780, 785, 142 P.3d 1104 (2006). In civil cases involving liberty interests it requires a knowing, intelligent waiver. In re Welfare of G.E., 116 Wn. App. 326, 332-34, 65 P.3d 1219 (2003). (when the statute presumes the appointment of counsel, the standard is similar to the waiver of counsel applicable in criminal proceedings). A waiver is not valid if it follows a misleading warning. Hopkins, 134 Wn. App. at 785. Without accurate advice of his right to counsel, De Cuir could not knowingly and intelligently waive that right.

2. ALL EVIDENCE OBTAINED FROM WHEELER'S WRONGFUL INTERVIEW OF DE CUIR MUST BE SUPPRESSED.

The proper remedy for violation of the right to counsel is suppression of the tainted evidence. Spokane v. Kruger, 116 Wn.2d 135, 136, 803 P.2d 305 (1991). When the tainted evidence is an inculpatory statement, the statement or the witness's testimony may be suppressed. In re Kistenmacher, 163 Wn.2d 166, 175, 178 P.3d 949 (2008). In Kistenmacher the Court stated:

If Kistenmacher, without assistance of counsel, had made inculpatory admissions to Dr. Goldberg, suppression of those statements or even Dr. Goldberg's testimony might well be the appropriate remedy. . . . Assuming the

appropriate remedy is to strike those portions of Dr. Goldberg's testimony that were based on information Kistenmacher would not have disclosed in the presence of counsel, Kistenmacher has not shown he is entitled to relief. He has made no effort to show that Dr. Goldberg's testimony would be different in any respect had his lawyer been given notice of, and had been present at, the examination.

163 Wn.2d 166, 174-75 (citations omitted).

The State claims similar statements De Cuir made in the past prevented prejudice in Wheeler's wrongful interview. BOR at 46. This argument fails for two reasons: (1) De Cuir's statements to Wheeler were an essential part of the evaluation; and (2) portions of Wheeler's testimony was based on false and exaggerated statements De Cuir would not have made with counsel.

The State claims De Cuir's past statements made Wheeler's interview harmless. BOR at 46. RCW 71.09 concerns the present, however, not the past. RCW 71.09.060(1). The statements detailed by the State were made to Dr Ted Mausshardt, a counselor De Cuir saw prior to his offense. *Id.* at 46-48; 4RP 271-75. The State mentions two other witnesses, but their testimony was less detailed. BOR at 48; Rockwell video deposition at 32; 4RP 809. Wheeler's examination took place after De Cuir's expected release date. 4RP 456. Because De Cuir's statements

to Wheeler were more recent and because they were made after he had served his sentence, this made them a key part of Wheeler's evaluation. RCW 71.09.060(1). Wheeler examined De Cuir for nine hours and fifteen minutes. 4RP 461. These interviews were not an insignificant part of Wheeler's testimony.

De Cuir tended to exaggerate and fabricate. 4RP 851, 864. He had sadistic sexual fantasies, but he did not act on them. 4RP 865. At the same time he was pressured to exaggerate his sexual fantasies in treatment. 4RP 867. He liked to portray himself as engaged in sexually sadistic behavior. Id. His named partner however, revealed this claim to be completely false. 4RP 867-68. It is documented that De Cuir lied to Wheeler about this instance of sexually sadistic behavior. Id. He may have believed this was what Wheeler wanted to hear. 4RP 851. De Cuir was more reliable in his deposition. 4RP 858-59. After advice of counsel, De Cuir was more reliable and less apt to exaggerate his sexual misbehavior. 4RP 859. Depriving De Cuir of his right to counsel impacted Wheeler's testimony.

The State compares De Cuir's case to Kistenmacher. BOR at 46. Kistenmacher did, however, have counsel at the time of his examination, did not make any inculpatory statements, and made essentially the same

admissions in the evaluation interview as he had in the presence of counsel. De Cuir did not have the opportunity to consult counsel at any time prior to his examination, did make inculpatory statements and was less exaggerated and more circumspect in the presence of counsel. Error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. In re Kistenmacher, 163 Wn.2d at 174-76. The proper remedy for violation of right to counsel is suppression of the evidence tainted by the violation. Spokane v. Kruger, 116 Wn.2d at 136. Here, Wheeler's testimony was significantly based on DeCuir's statements made in violation of his right to counsel. De Cuir's case must be reversed and Wheeler's testimony suppressed.

B. CONCLUSION

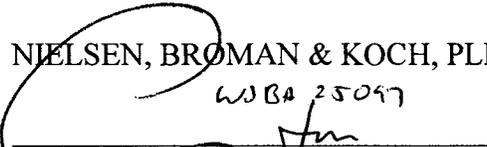
For the reasons stated here, in the Brief of Appellant and Supplemental Brief of Appellant De Cuir commitment must be reversed.

DATED this 15th day of December, 2009.

Respectfully submitted,

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CHARLES DeCUIR,)

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COA NO. 59808-2-1

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DIVISION ONE

DEC 15 2009

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*

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