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No. 66822-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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IN RE: DETENTION OF ELMER CAMPBELL

STATE OF WASHINGTON,

Respondent,

v.

ELMER CAMPBELL,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

THE PROSECUTION CANNOT REVISIT AN ORDER GRANTING A NEW TRIAL WHEN IT NEVER APPEALED THAT ORDER AND CANNOT OVERTURN THE ORDER BASED ON A STATUTORY AMENDMENT THAT IS NOT RETROACTIVELY APPLIED

1. Cases where the trial court denied a new trial on annual review are inapt comparisons but the State never acknowledges that fundamental difference. The prosecution insists that “well-settled” precedent requires this Court to treat Campbell’s appeal as “interlocutory.” This purportedly controlling precedent is In re Det. of Petersen, 138 Wn.2d 70, 95, 980 P.2d 1204 (1999), and In re Det. of Turay, 139 Wn.2d 379, 392-93, 986 P.2d 790 (1999). But unlike Peterson and Turay, Campbell was granted a new trial during annual review. This distinction marks an important difference between those cases and Campbell’s case.

Under former RCW 71.09.090(2) (1996), the court “shall” set a new trial to determine whether a detained individual may continue to be totally confined if it finds the State has not met its burden of establishing probable cause for continued commitment. “Shall” operates as a mandatory requirement. Crown Cascade, Inc. v. O’Neal, 100 Wn.2d 256, 261, 668 P.2d 585 (1983) (the word “shall”

in a statute is presumptively imperative and operates to create a duty). By using the word “shall,” the legislature directed a new trial when the court finds the State has not proven the basis for continued confinement.

In Petersen, the trial court found no probable cause for a new trial, and ordered the commitment continue. The court ruled this order is not reviewable as of right because commitment under RCW 71.09 is an indefinite term of confinement, for which the State must show annually there is probable cause to continue the confinement. 138 Wn.2d at 85-86. When the trial court finds there is probable cause for the continued confinement, the status quo continues. Id. at 86. The continuation of the status quo is “not the equivalent of a new disposition.” Id. But the “continuation of the status quo” does not apply when the court finds there is probable cause to revisit the continued confinement and orders a new trial.

Turay involves a procedure morass that makes its application confusing as well as its holding inaposite. Mr. Turay filed a direct appeal that included pretrial and post-trial motions, as well as a finding of no probable cause for a new trial on annual review. 139 Wn.2d at 387. The Supreme Court agreed that under

Petersen and RAP 2.2(a)(1), review of the trial court's post-commitment order denying a new trial on annual review should be treated as a motion for discretionary review. But the Turay Court also noted that Turay was not appealing from a denial of a motion to vacate a judgment and he did not argue any other provisions of RAP 2.2(a) applied. Id. at 393 n.8.

Petersen and Turay involve challenges to post-commitment findings upholding the continued commitment, and the driving force in the court decisions was the finding of "no probable cause." Here, rather than explaining how those cases that involve denials of requests for new trials control the different issue involving the court's affirmative grant of a new trial, the State's brief simply ignores this distinction.

It also cites In re Det. of Jacobson, 120 Wn.App. 770, 772, 780-81, 86 P.3d 1202 (2004), where the Court of Appeals reversed the trial court's order granting a new trial on annual review. But the most pertinent point of Jacobson is that it shows the proper mechanism available to the State if it contests the trial court's order granting a new trial. The State may seek timely discretionary review, as it did in Jacobson.

In Campbell's case, the State never sought appellate review of the trial court's order granting Campbell a new trial. Instead it prepared for trial and engaged in extensive litigation as part of that trial preparation, as detailed in Campbell's Opening Brief, 4-8, and 14-17. By forgoing timely appellate review, the State waived its substantive challenge the court's ruling granting Campbell a new trial and it may not subvert the court's order by continuing to urge the court to change its mind based on later annual reviews.

2. The triggering event of the court's order granting Campbell a new trial undermines the State's reliance on later statutory amendments to attack the basis for the new trial order.

The prosecution complains that the trial court's order granting a new trial to Campbell was flawed due to later legal developments and amendments to RCW 71.09.090 that altered the substantive basis governing when a court may order a new trial.

The legislature amended RCW 71.09.090 in 2005, as the prosecution explains in its Response Brief, at 21-22. But those changes are not applied retroactively, as the court held in In re Det. of Elmore, 162 Wn.2d 27, 36, 168 P.3d 1285 (2007). The "triggering event" for the prior version of the statute to govern the proceedings occurs when there is a probable cause hearing on

annual review. Id. at 36 n.7. Campbell's probable cause hearing occurred in 1996, and therefore, the version of the statute in effect at that time controls. Id. The changes to the statute do not apply retroactively to Campbell.

When the trial court vacated its order granting Campbell a new trial, it did so without an in-court hearing. CP 452-53. The grounds for its ruling are based on the "current statute," but without acknowledging that this current statute does not retroactively apply to its earlier ruling under Elmore. CP 452-53. Moreover, Campbell did not contest the annual review hearings held after the court granted him a new trial because he justifiably relied on the order granting him a new trial. His reliance was reasonable based on the lengthy litigation preparation that had occurred as documented in the Opening Brief; the State's concession that Campbell was entitled to a new trial, see CP 298; and the court's rejection of the State's prior efforts to reconsider its order granting Campbell a new trial, see CP 185. See Lawyers Title Ins. Corp. v. Soon J. Baik, 147 Wn.2d 536, 551, 55 P.3d 619 (2002) ("reliance is justifiable if it is reasonable under the circumstances").

Campbell should receive the new trial that was ordered in 1996. The State's disingenuous efforts to revisit that ruling based

on its claim that the trial court had not reviewed the proper June 1996 evaluations is contrary to the record. The court gave the State an opportunity to correct its insufficient evaluation and the State failed to do so. CP 174-75. The June 1996 evaluation was filed in the trial court at the time it was written and was the basis of the arguments the State raised in August and October 1996, as well as June 1997, to urge the court to vacate the order granting a new trial. CP 221 (timeline); CP 228 (CP 249-53 (October 1996 seeking reconsideration based on June 1996 evaluation); CP 274 (order denying reconsideration).

The State falsely portrays the court's 2011 order vacating the prior order granting a new trial as based on the failure to read a 1996 evaluation. Instead, the court reevaluated its decision and vacated its prior ruling after applying the wrong statutory scheme. The court lacked authority to vacate its order granting a new trial and Campbell should receive a new trial upon remand.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Campbell respectfully requests this Court remand his case for a new trial.

DATED this 12<sup>th</sup> day of December 2011.

Respectfully submitted,



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