

No. 68579-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE DETENTION OF CLAY PARSONS

STATE OF WASHINGTON,

Respondent,

v.

CLAY PARSONS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **Parsons had the right to be present at a trial that would determine the deprivation of his liberty for potentially the rest of his life and the court unreasonably and incorrectly restricted that right**

When a court applies the wrong legal standard, it necessarily abuses its discretion. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). “A discretionary decision ‘is based on untenable grounds or made for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” In re Rhome, 172 Wn.2d 654, 668, 260 P.3d 874 (2011) (quoting *inter alia* State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

An indefinite civil commitment trial requires the same fundamental procedural protections as a criminal prosecution given the life-long loss of liberty that may flow. See In re Det. of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1993); see also In re Det. of McCuiston, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012), cert. denied, 133 S. Ct. 1460 (2013) (“Because civil commitment involves a massive deprivation of liberty, it must meet the demands of substantive due

process.”). Once committed, long-term confinement is expected and intended. McCouston, 174 Wn.2d at 389-90.

In criminal cases, the constitutional right to be present stems from the due process clause. State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011). While article I, section 22 explicitly gives an accused person the right to be present, the federal constitution does not contain this express requirement and thus, the right to be present is culled from the protections of the Sixth and Fourteenth Amendments. Id.

Clay Parsons’ due process rights include the right to be present throughout his trial that would decide whether he would be indefinitely and involuntarily confined. The court illegitimately conditioned Clay Parsons’ right to be present by agreeing to allow Parsons to waive his right to be present only on the condition that he could never change his mind and by ruling Parsons would not be permitted to return to the courtroom during the trial. 2/29/12RP 3-4. This condition was illegitimate. Unless Parsons’ behavior was so extremely disruptive that he interfered with the jury’s decision-making, he should have been permitted to attend the proceedings, and there was no claim Parsons was ever disruptive. The State asserts that because Parsons never asked to return, he has not shown that the court’s ruling harmed him.

But the court's ruling left him without any basis to ask to return to the courtroom. He had been told that once he did not attend a part of the trial, he had permanently lost his right to appear at any part of the trial.

Contrary to the State's perception of State v. Garza, 150 Wn.2d 360, 368, 77 P.3d 347 (2003), this case is an important precedent because it demonstrates that when the court sets up a scenario that denies a person his right to be present at trial, the error occurs at the time of the denial, without regard to whether the defendant later made sufficient efforts to try to attend the court proceedings. It also echoes the requirement that courts must indulge every presumption against waiver of the right to be present at trial in a criminal case. Id. The impermissible restriction on Parson's right to be presented improperly restricted his ability to return to the courtroom and denied him his fundamental right to observe the trial at which he faced a severe, life-long, denial of his liberty.

2. The trial court lacks authority to make psychiatric and psychological determinations that are contrary to the expert's opinion and undermine the scientific basis of the analysis

It is beyond dispute that the threshold standard for a civil commitment petition of probable cause mandates that the court “must assume the truth of the evidence presented; it may not ‘weigh and measure asserted facts against potentially competing ones.’” McCouston, 174 Wn.2d at 382 (quoting In re Det. of Petersen, 145 Wn.2d 789, 798, 42 P.3d 952 (2002)). The court may not weigh the credibility of an expert's opinion. In re Det. of Ward, 125 Wn.App. 381, 387, 104 P.3d 747 (2005). Instead, the court takes the assertions in the expert's evaluation as true, and determines whether the evidence suffices to establish probable cause. Id.

The State goes on at length about the details of the evaluation by the Joint Forensic Unit psychologist, Dr. Will Damon. Damon discussed Parsons' offenses from many years before, his mental health diagnoses, and his likelihood of re-offense in the manner specifically required for indefinite involuntary commitment under RCW ch. 71.09.

After this thorough review and based on Damon's expertise and experience, Damon concluded that Parsons did not present the required

likelihood of reoffending necessary to seek a civil commitment. Damon evaluation, at 73-74. The State now asserts that the trial court had free reign to reject this expert assessment and sua sponte engage in its own expert analysis of the tools on which Damon relied. There are two fundamental problems with the trial court's own weighing of the facts to find probable cause.

First, the court misrepresented the required elements of RCW 71.09's indefinite commitment criteria. The statute explicitly demands sufficient risk of only a certain type of behavior – “predatory acts of sexual violence” – and it defines “predatory” and “sexually violent offenses” to specify the type of future conduct that must be “more likely than not” to occur. RCW 71.09.020(10), (17). The trial court improperly diluted this constitutionally critical distinction and based its ruling on whether Parsons was “likely to engage in future violent criminal offenses.” 5/20/10RP 19.

Second, the court engage in its own psychological decision-making, both misrepresenting the nature of Damon's findings and conclusions and then imposing the court's “clinical judgment” as a substitute for Damon's findings. The State does not respond to the trial court's improper insertion of personal belief into the actuarial tests at

the root of risk assessment. Even a trained and credentialed psychologist may not “simply incorporate” his own judgment into an actuarial score “absent any systematic, transparent procedure for doing so that is recommended by the authors of the scale” without risking “nullifying the advantage of objectivity” the actuarial test is designed to provide. In re Rosado, 889 N.Y.S.2d 369, 381 (NY Supreme Ct 2009).

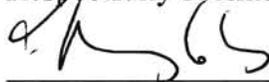
The court’s improper analysis led to its erroneous probable cause determination, which undermines the prosecution of Parsons under RCW ch. 71.09.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant’s Opening Brief, Mr. Parsons respectfully requests this Court remand his case for further proceedings.

DATED this 9th day of May 2013.

Respectfully submitted,



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