NO. 44500-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TODD PLACE AKA: TODD MCKOWN,

Petitioner.

RESPONDENT'S RESPONSE BRIEF

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I. IDENTITY OF RESPONDING PARTY

Respondent herein is the State of Washington, by and through Robert W. Ferguson, Attorney General, and Jeremy Bartels, Assistant Attorney General.

II. STATEMENT OF THE CASE

The history of the present appeal stems from what was originally filed as a "Motion to Dismiss" based on the issues decided in *In re the Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951 (2008). In response, the State pointed out that there was no avenue to "dismiss" a final judgment, and Martin had timely filed a motion *prior* to final judgment, and properly preserved the issue for appeal. The State posited that the court would consider Mr. McKown's motion one for relief pursuant to CR 60. After receiving the State's response brief in this matter, the Appellant changed his argument from a motion to "dismiss" to a CR 60(b)(11) motion for relief from judgment, a change in argument that the trial court confirmed at oral argument. At oral argument, Mr. McKown limited his argument to CR 60(b)(11) stating that his request was made within a "reasonable" time for the sole reason that he had obtained new counsel (his 3rd and 4th attorneys since 2000).

Now, on appeal, Mr. McKown argues a third avenue for relief, that his original judgment was void under CR 60(b)(5) because the State

lacked authority to file the petition in the first place, which means that the Superior Court lacked authority to decide the matter. In essence, Mr. McKown has raised a "lack of standing" defense for the first time on appeal.

The general history of the matter of In Re the Detention of Place (McKown's previous name) is as follows:

The State petitioned for Mr. Place/McKown's (hereinafter McKown) civil commitment as a sexually violent predator (SVP). On November 20, 2000, this Court entered an order civilly committing Respondent to the custody of the Department of Social and Health Services (DSHS) as a sexually violent predator pursuant to RCW 71.09.060(1). *See* CP at 2-14. *See also* CP at 15-26. This constituted this Court's final judgment on the State's Petition. The findings of fact and conclusions of law that were the basis of the order of commitment were stipulated by the parties. *Id.* There were a considerable number of supporting documents attached to the stipulation, with exhibits marked "A" through "HH." *Id.* The stipulated facts and conclusions of law specifically relevant to the present issues included:

> The Respondent understands that, *if* the Court accepts this Stipulation and enters the order proposed by the parties, he will be under the jurisdiction of the Court until such time as he is unconditionally discharged.

CP at 4;

> This Court has jurisdiction over the subject matter of this cause, as well as personal jurisdiction over the Respondent herein.

Id at 12.
and,

> The Findings of Fact establish beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined in RCW 71.09.020.

Id.

The Supreme Court of the State of Washington decided the *Martin* matter in May, 2008. Mr. McKown noted his motion to dismiss his order of commitment to be heard 55 months after the publishing of the *Martin* decision. Mr. McKown never challenged the jurisdiction of the trial court, the venue of the trial court, nor the authority of the State to file this petition until the motion that is the subject of this appeal. *See* Court File. Indeed, Mr. McKown expressly and impliedly waived the claims he is now raising. (*Id* at 5.)

III. ARGUMENT

A. Respondent's Arguments that the Judgment is Void under CR 60(b)(5), that the Trial Court Lacked Authority to Hear the Case, and that the Trial Court Lacked Personal Jurisdiction Over the Respondent Were Not Briefed or Addressed at the Trial Court Level Should Be Disregarded

In Washington, the appellate Courts may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). The defense of lack of standing is an affirmative defense that may not be raised

for the first time on appeal. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.* ___ Wn. App. ___, 298 P.3d 99 (2013).

The only issue in front of this Court is whether the trial court erred in ruling that Mr. McKown's motion under CR 60 was untimely. The only argument Mr. McKown offered on this issue was that his delay was "reasonable" under CR 60(b)(11) because he had recently hired a new attorney. ***Mr. McKown has assigned no error to the trial court's analysis of this issue and has not argued that his delay was reasonable.*** His only argument in this appeal is that the underlying judgment was void under CR 60(b)(5) and was therefore not time barred. This argument was never raised at the trial court level and should not be entertained now. To the extent that Mr. McKown is now arguing that the judgment was void because the State never had standing to file the case, a standing challenge, despite its downhill consequences, does not implicate a jurisdictional question and cannot be raised for the first time on appeal. *See Trinity* 298 P.3d at 106.

B. Respondent's Motion for Relief from Judgment was Untimely and the Trial Court Properly Denied the Motion for this Reason.

In this matter, the Respondent initially moved for "dismissal" of his "case" 12 years after final judgment was entered through an *agreed* order of commitment. In response, the State explained in its brief that

"dismissal" is not an available remedy to a respondent after the entry of final judgment, which the State argued was time-barred. Respondent agreed with this position, and changed his motion to one for post-judgment relief pursuant to CR 60, and more specifically, pursuant to CR 60(b)(11). At no time did the Respondent challenge the original court order as being "void" and, consequently, never made an argument that his Motion was made pursuant to CR 60(b)(5), as he now claims. In fact, the only reason that "voidness" and "subject matter jurisdiction" were even discussed, was because the State had preemptively argued these issues in its briefing, before Respondent changed his argument to conform to the Rules of Civil procedure.

In Washington, CR 60(b) sets forth the time limitations for any requests for relief made pursuant to that rule. For some types of CR 60(b) motions, the motion must be filed within one year of the entry of judgment. CR 60(b)(1), CR 60(b)(2), and CR 60(b)(3). For all other CR 60 motions, such motions must be made "within a reasonable time." CR 60(b)(11). The one exception to the timeliness requirement is a motion made pursuant to CR 60(b)(5) alleging that the underlying judgment is void; such a motion may be raised at any time. *Ellison v. Process Systems Inc. Const. Co.*, 112 Wn. App. 636, 50 P.3d 658, *review denied* 148 Wn.2d 1021, 66 P.3d 637 (2002). As discussed in the following sections,

Mr. McKown's Motion was untimely under CR 60 because it is not a motion attacking a void judgment, nor was it made within a "reasonable time" as required by CR 60.

To be clear, Respondent's only justification for a CR 60 motion for relief from his 12-year-old judgment was based on the single argument that he had obtained a new attorney, which made his 12-year delay "reasonable" under CR 60(b)(11). This was the only justification given to the court for the delay and the court exercised its discretion ruling that obtaining a new attorney does not circumvent a reasonable timeliness requirement under CR 60(b)(11). The Court was well within its discretion making this ruling.

1. This Court had subject matter jurisdiction over the Sexually Violent Predator proceedings against Mr. McKown and personal jurisdiction over Mr. McKown, therefore the judgment in this matter is not "void" under CR 60(b)(5).

To qualify as a motion for relief from a "void" judgment, under CR 60(b)(5), the moving party must show that the court lacked jurisdiction to issue the order. *State v. Ward*, 125 Wn. App. 374, 379, 104 P.3d 751 (2005) (citing *Metro. Fed. Sav. & Loan Ass'n of Seattle v. Greenacres Memorial Association,* 7 Wn. App. 695, 699, 502 P.2d 476 (1972)). Regarding jurisdiction, "[g]enerally, all superior courts have precisely the same subject matter jurisdiction because they have the same authority to

adjudicate the same 'types of controversies." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003). Disputes over which superior court has authority to decide a controversy are issues of venue, not jurisdiction. *Id* at 317.

In his brief, Mr. McKown relies heavily on the case *In re Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989) to argue that "acting outside of authority" is a separate avenue from "jurisdiction" in challenging an order for voidness. Brief of Appellant at 12-13. In fact, Mr. McKown asserts, falsely, that he had argued the original order of commitment was "void" at the trial court level. *Id* at 13. McKown never argued that any order was "void" to the trial court and, again, asserts this issue for the first time to this Court. What Mr. McKown failed to point out in his current argument is that *Leslie* actually referred to a *court's* acting outside of its authority as a *jurisdictional issue*, which is why it could be raised so many years after the entry of the original judgment, specifically stating:

> In entering a default judgment, a court may not grant relief in excess of or substantially different from that described in the complaint... Further, ***a court has no jurisdiction to grant relief beyond that sought in the complaint.*** To grant such relief without notice and an opportunity to be heard denies procedural due process.

Thus, the *Leslie* Court's ruling is consistent with the case law establishing that jurisdictional flaws are the only type that render a judgment void.

Even so, the expansion of the jurisdictional definitions reflected in *Leslie* and *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 874 P.2d 182 (1994) (which relies on *Leslie*) is something that the Courts of this State have been attacking recently, and effectively terminating many so-called "jurisdictional" challenges, such as those claimed by Mr. McKown in this case.

For the last couple of years, the Court of Appeals has been addressing the issue of parties shoehorning non-jurisdictional errors into the realm of subject matter jurisdiction. The Court has taken action against the expansion of issues into the jurisdictional realm of "voiding" judgments based on ancillary legal errors that should have been addressed prior to the entry of judgment.

> Judicial opinions sometimes misleadingly state that the court is dismissing for lack of jurisdiction when some threshold fact has not been established. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). ***Litigants who have failed to preserve a claim of error in the trial court will then seize upon such casual references to "jurisdiction" in appellate opinions as a basis to argue that an issue may be raised for the first time on appeal. That is what has happened here.*** Harveyland's argument that the eight employee limitation is "jurisdictional" ***rests on snippets of case law***

> ***not intended to be precedential as to the scope of the superior court's subject matter jurisdiction.***
> * * *
> As the United States Supreme Court has observed, "jurisdiction" is a word of too many meanings. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Courts have sometimes been "profligate" in the use of the term, producing "unrefined dispositions" that the Court has referred to as "drive-by jurisdictional rulings." *Arbaugh,* 546 U.S. at 510–11, 126 S. Ct. 1235. Our Supreme Court has similarly observed that " 'improvident and inconsistent' " use of the term " 'subject matter jurisdiction' " has caused it to be confused with a court's authority to rule in a particular manner. *Marley,* 125 Wash.2d at 539, 886 P.2d 189, quoting *In re Marriage of Major,* 71 Wash.App. 531, 534–35, 859 P.2d 1262 (1993); "If the phrase is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error." *Marley,* 125 Wash.2d at 539, 886 P.2d 189; *see also Williams,* 254 P.3d at 821, 822 (Idaho court caused confusion by conflating the term "jurisdiction" with factual issues relevant to whether a tort action is barred).
> * * *
> Despite these cautionary rulings, the terminology of subject matter jurisdiction continues to pop up outside its boundaries like a jurisprudential form of tansy ragwort. This case provides us with one more opportunity to stamp it out.

Cole v. Harveyland, LLC, 163 Wn. App. 199, 205-209, 258 P.3d 70 (2011) (*Emphasis added*).

This year, the Court of Appeals again reduced the issue of what orders are "void" under CR 60(b)(5), and cautioned courts to refrain from expanding what constitutes "void" judgments beyond strictly construed jurisdictional analysis.

> A court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over a claim. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 540, 886 P.2d 189 (1994). ***We use caution in characterizing an issue as jurisdictional or a judgment as void, because the consequences of a court acting without subject matter jurisdiction "are draconian and absolute."*** *Cole v. Harveyland, LLC,* 163 Wn. App. 199, 205, 258 P.3d 70 (2011).

Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co. ___ Wn. App. ___, 298 P.3d 99, 106 (2013) (Emphasis added).

Any other irregularity, "even fundamental errors of law, simply render the judgment voidable." *Ward* at 379. Judgments that are merely voidable are not properly attacked pursuant to CR 60(b)(5). *Id.*

As discussed below, Mr. McKown identifies an issue that is non-jurisdictional in nature, but attempts to elevate it to a jurisdictional analysis. This argument is without merit and should be rejected.

2. Mr. McKown's "new" attack, raised for the first time on appeal, is a thinly-veiled standing challenge that was waived.

Originally, Mr. McKown attacked his agreed order of commitment because the trial court lacked subject matter jurisdiction over the case, relying almost exclusively on the *Martin* decision. Then, between his opening brief and oral argument, Mr. McKown agreed that *Martin* did not support his subject matter jurisdiction argument, and amended his argument to a challenge under CR 60(b)(11). The trial court ruled that this

argument was untimely, as he had waited 12 years to challenge his final order of commitment. Now, for the first time on appeal, Mr. McKown argues that the order of commitment is "void" under CR 60(b)(5) because 1) the State lacked the authority to file the original petition and 2) because the State lacked authority to file the petition, the trial court lacked authority to reach the merits of the petition and enter a final order. Brief of Appellant at 16. Challenging a civil litigant's "authority" to initiate an action in civil court is, without question, a standing challenge.

To qualify for relief from a "void" judgment, under CR 60(b)(5), ***the moving party must show that the Court lacked jurisdiction***, all other errors result in something other than voidness. *Cole* at 209. (Emphasis added). A challenge to the standing of a party to file a claim is an affirmative defense that must be pleaded and proven, or it is waived. *See Ullery v. Fulleton*, 162 Wn. App. 596, 603-604, 256 P.3d 406 (2011). If a party waives its challenge to standing, then the trial court can reach the merits of the case. *Ullery* at 604. Standing, as discussed in the very recent Court of Appeals case, *Durland v. San Juan County*, has never impinged on a Court's jurisdiction to hear a matter, and cannot be raised for the first time on appeal. *Durland v. San Juan County*, ___ P.3d ___, 2013 WL 3324220 (Wash. App. Div. I). Specifically, the Court explained:

> In federal courts, a plaintiff's lack of standing deprives the court of subject matter jurisdiction, making it impossible to

> enter a judgment on the merits. *Fleck & Assocs., Inc. v. City of Phoenix,* 471 F.3d 1100, 1102 (9th Cir.2006). By contrast, the Washington Constitution places few constraints on superior court jurisdiction. *See* CONST. art. IV, § 6 ("The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."); *see also Ullery v. Fulleton,* 162 Wash.App. 596, 604, 256 P.3d 406, *review denied,* 173 Wash.2d 1003, 271 P.3d 248 (2011). *Accordingly, if a defendant waives the defense that a plaintiff lacks standing, a Washington court can reach the merits. Ullery,* 162 Wash.App. at 604, 256 P.3d 406. *Therefore, in Washington, a plaintiff's lack of standing is not a matter of subject matter jurisdiction. Id.*

Mr. McKown seeks to expand the alleged errors in this case into the jurisdictional realm so that the judgment could be considered "void" pursuant to CR 60(b)(5). This is the exact type of unwarranted expansion of the draconian erasure of established judgment based on "snippets" of case law that the Court of Appeals is actively "stamping out" in its recent decisions. *Cole* at 205-206. This expansion was also expressly rejected in both the *Durland* and *Trinity* cases, as shown above, and this Court should again reject the argument in the present case.

3. Respondent waived his defense of Lack of Standing (or "authority to file").

In Washington:

> The [common law] doctrine of waiver ordinarily *applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.* It may result from an

> express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 409-410, 259 P.3d 190 (2011) (quoting *Bowman v. Webster,* 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). (Emphasis added).

Regardless of the common-law doctrine of waiver, the affirmative defense of "lack of standing", in particular, is waived if not affirmatively pleaded. *Tyler Pipe Indus., Inc. v. Dep't of Revenue,* 105 Wn.2d 318, 327, 715 P.2d 123 (1986) ("If the issue of standing is not submitted to the trial court, it may not be considered on appeal.") *vacated on other grounds, Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue,* 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987).

Regarding the issue of common-law waiver, in the present case, Mr. McKown entered into a document that stipulated facts and conclusions of law regarding his commitment as a sexually violent predator. CP at 2-14. Among the stipulations were the following:

> The Respondent understands that, *if* the Court accepts this Stipulation and enters the order proposed by the parties, he

> will be under the jurisdiction of the Court until such time as he is unconditionally discharged.

Id at 5.

> This Court has jurisdiction over the subject matter of this cause, as well as personal jurisdiction over the Respondent herein.

Id at 12.

> The Respondent is legally competent to enter into the Stipulation presented by, the parties.

Id.

> The Respondent has entered into the Stipulation knowingly, voluntarily and intelligently, and without coercion.

Id.

> The Findings of Fact establish beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined in RCW 71.09.020.

Id.

> The Respondent acknowledges that he has received a copy of the Petition and Certification for Determination of Probable Cause filed in this cause which allege that he is a sexually violent predator as defined in RCW 71.09.020.

Id at 2.

The remainder of the stipulation establishes, at length, that Mr. McKown was informed of all of his rights relating to these proceedings and at trial. He acknowledged that he understood all of those

rights and that he voluntarily and knowingly waived them in order to enter into the agreement. CP at 2-14.

It is clear that Mr. McKown voluntarily submitted to the authority of the petition filed by the State in this matter, and agreed that he met the definition of "Sexually Violent Predator" as defined in the petition. He never once challenged the State's "standing" to file the petition. He also unequivocally requested that the Court find that he fell under its authority as well as the authority of the State, and agreed to submit to State custody for confinement. Mr. McKown also waived his right to appeal, which is an effective waiver to challenge any error alleged in the order of commitment which *he presented* to this Court. Clearly, Mr. McKown has also affirmatively and expressly waived any claim to personal jurisdiction challenges.

Even if the affirmative waivers enumerated above are not conclusive, both the agreement, taken as a whole or piecemeal, the agreement that he be committed as a sexually violent predator, as well as the passage of 12 years since then, is "*such conduct as warrants an inference of the relinquishment of such right*" under a common-law analysis. Mr. McKown has waived the present challenges to his commitment order and his motion and appeal must fail.

IV. CONCLUSION

Since the entry of the ***agreed*** order civilly committing Mr. McKown to the Special Commitment Center, he had the opportunity to challenge that initial commitment for 12 years prior to his filing the subject motion for post-judgment relief. He had no cognizable reason that would justify the delay in filing the motion, and certainly not one that could justify a 12-year delay. Now, in this late hour, he submits a third argument, never before briefed, that attempts to fabricate a jurisdictional issue from a non-jurisdictional standing argument, simply to invoke an analysis of a "void" order under CR 60(b)(5). Not only was this argument not briefed below, but the argument is wholly bereft of merit in the face of ample and unambiguous case law to the contrary. The ruling of the trial court has not been challenged on its actual merits, because no justifiable challenge exists. The ruling of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of August, 2013.

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NO. 44500-0

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention Of: TODD PLACE, a.k.a. Todd McKown Appellant	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On August 21st, 2013, I sent via electronic mail and deposited in the United States mail a true and correct copy of the Respondent's Response Brief and Declaration Of Service, postage affixed, addressed as follows:

JOHN A. HAYS jahays@qwestoffice.net
1402 BROADWAY
LONGVIEW, WA 98632-3714

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of August, 2013, at Seattle, Washington.

Kelly Hadsell

KELLY HADSELL

WASHINGTON STATE ATTORNEY GENERAL

August 21, 2013 - 4:20 PM

Transmittal Letter

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