

No. 45512-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Detention of:

MICHAEL SEASE,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF PETITIONER

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A. INTRODUCTION

Michael Sease was initially committed based upon his diagnoses of antisocial personality disorder and borderline personality disorder. At trial, the State's expert concluded those two diagnoses made Mr. Sease more likely than not to reoffend. The State's expert specifically told the jury that a third diagnosis, narcissistic personality disorder did not make him more likely than not to reoffend. Based on that evidence the jury found Mr. Sease met the criteria for commitment.

After more than 5 years of commitment and treatment, Mr. Sease no longer meets the diagnostic criteria for either antisocial personality disorder or borderline personality disorder. Instead, the only remaining diagnosis is narcissistic personality disorder. Based upon his positive change through treatment Mr. Sease petitioned for his release under RCW 71.09.090.

Although the State's evidence failed to establish Mr. Sease continued to meet the definition of a sexually violent predator (SVP) and Mr. Sease presented evidence sufficient to establish probable cause to believe his mental condition had changed as a result of treatment, the court erroneously denied Mr. Sease's petition for a release trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding Mr. Sease was not entitled to a new trial under RCW 71.09.090.

2. The trial court's ruling denying Mr. Sease a new trial deprives Mr. Sease of due process contrary to the Fourteenth Amendment.

3. In the absence of sufficient evidence to support it, the trial court erred in entering Finding of Fact 3.

4. In the absence of sufficient evidence to support it, the trial court erred in entering Finding of Fact 4.

5. In the absence of sufficient evidence to support it, the trial court erred in entering Finding of Fact 5.

6. In the absence of sufficient evidence to support it, the trial court erred in entering Finding of Fact 6.

C. ISSUES PRESENTED

1. RCW 71.09.090 requires a court order a new trial where the State fails to offer prime facie evidence that a committed person's condition has not changed such that he no longer meets the definition of a SVP. Here, the State's experts agree Mr. Sease no longer suffers from either mental condition which led to his commitment. Did the State meet its burden of proof?

2. RCW 71.09.090 requires a court order a new trial where the committed person establishes probable cause to believe his condition has changed as a result of treatment. Where Mr. Sease offered expert opinion that the mental conditions which led to his commitment no longer exist due to his positive response to treatment did the trial court err in denying him a new trial under RCW 71.09.090?

3. The Fourteenth Amendment's guarantee of substantive due process is violated where the State continues to confine a person once the mental condition which led to commitment has resolved. In such instances further commitment is permitted only after trial on the question of "current mental illness and dangerousness." Where the conditions which led to his commitment have been resolved, can the State constitutionally continue to confine Mr. Sease without affording him a new trial on his current mental illness?

D. STATEMENT OF THE CASE

Prior to Mr. Sease's commitment trial in 2007, Dr. Dennis Doren, an expert retained by the State diagnosed Mr. Sease with three personality disorders: (1) antisocial personality disorder; (2) borderline personality disorder; and (3) narcissistic personality disorder. *In re the Detention of Sease*, 149 Wn. App. 66, 71, 201 P.3d 1078 (2009). At

trial, Dr. Doren testified before the jury that Mr. Sease's "antisocial personality disorder and his borderline personality disorder, each make him likely to engage [engage in predatory acts of sexual violence if he is not confined to a secure facility]." *Id.* at 72-73. Dr. Doren described the narcissistic personality disorder, however, as merely "'other risk considerations' for re-offense." *Id.* at 72.

In his most recent annual review, Dr. Kirk Newring allows Mr. Sease has made "some progress in his treatment." CP 262 . Dr. Newring added "despite . . . setbacks it appears he is continuing to progress." *Id.* Critically, the State's evaluators no longer diagnose Mr. Sease with either antisocial personality disorder or borderline personality disorder. Instead, the State's experts now opine that he suffers only from narcissistic personality disorder. CP 256.¹

Missing from Dr. Newring's evaluation is a conclusion that Mr. Sease continues to meet the definition of sexually violent predator. Specifically he never concludes that Mr. Sease is more likely than not to commit crimes of sexual violence as a result of his disorder. Instead

¹ Dr. Newring also diagnosed Mr. Sease as suffering from alcohol dependence, cognitive disorder and borderline intellectual functioning. CP 256. However none of these diagnoses were offered as justification for further commitment.

the evaluation merely concludes Mr. Sease's mental condition "seriously impairs" his ability to control his behavior. CP 263.

The evaluation reports actuarial risk assessments indicating Mr. Sease is only 19.6% and 27.7% likely to reoffend in five and ten years respectively. CP 258. Although it states it is difficult to say which apply to Mr. Sease, the evaluation addresses other factors which may increase the risk of reoffense. CP 258-62. But after doing so, the evaluation never opines or concludes Mr. Sease is more likely than not to reoffend.

Moreover, the report does not address how a current diagnosis of narcissistic personality disorder makes Mr. Sease more likely to reoffend when Dr. Doren specifically told jurors it did not.

Dr. Brian Abbot offered his own evaluation of Mr. Sease. Dr. Abbott stated that in assessing Mr. Sease's current mental condition it was necessary to assume the initial diagnoses of antisocial personality disorder and borderline personality disorder were properly made. CP 313. Dr. Abbott detailed Mr. Sease's participation in treatment while confined. CP 308-09. Dr. Abbot's review of treatment records led him to conclude "it is apparent he has made steady progress dealing with the two commitment personality disorders as evidenced by the lack of

symptoms necessary to substantiate he suffers from Antisocial Personality Disorder and Borderline Personality Disorder currently.” CP 308. Dr. Abbott noted that each annual reviewer following Mr. Sease’s commitment in 2007 had been unable to conclude Mr. Sease met the diagnostic criteria for either disorder. CP 309-10.

Based upon the change in diagnosis and the evaluation offered by the State, Mr. Sease argued the State had not met its burden under RCW 71.09.090 to show he continued to meet the requirements for confinement. Appendix at 9-10, 23-25. Alternatively, based upon Dr. Abbott’s evaluation, Mr. Sease argued he met his burden of showing probable cause to warrant a new trial on his release.

The trial court concluded Mr. Sease was not entitled to a new trial. CP 359-61; RP 37-38.

This Court granted Mr. Sease’s motion for discretionary review.

E. ARGUMENT

A court must order a new trial under RCW 71.09.090 if either (1) the State fails to present prima facie evidence that the committed person continues to meet the definition of an SVP, or (2) probable cause exists to believe that the person’s condition has so changed that he no longer meets the definition of an SVP.

The trial court did not find Mr. Sease suffered from either diagnosis which led to his commitment. CP 359-61. The court, nonetheless, concluded his mental condition had not changed. CP 360. A new trial was warranted under both alternatives.

Mr. Sease remains indefinitely confined based upon an evolving diagnosis. That diagnosis has never been found to support commitment by a jury. Indeed, the jury was told by the State that diagnosis does not support commitment. The evolving opinions of the State's experts render the show cause provisions of RCW 71.09.090 a hollow promise, as it does not matter what progress Mr. Sease makes in treatment so long as an evaluator employed by the State imagines and opines a new diagnosis warrants continued confinement.

1. The State did not offer prime facie evidence that Mr. Sease continues to meet the definition of a sexually violent predator.

a. Mr. Sease's condition has changed.

Even where an initial commitment is proper, the State violates due process when it continues to confine a person who is no longer both mentally ill and dangerous. *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (reversing where individual was dangerous but no longer suffered from psychosis). "Periodic

review of the patient's suitability for release" is required to render commitment constitutional. *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 3043 (1984). Due process mandates that the State release a committed person "when the basis for holding him or her in the psychiatric facility disappears." *State v. Somerville*, 86 Wn. App. 700, 710, 937 P.2d 1317 (1997) (reversing and remanding for conditional release due to insufficient evidence of mental illness, even though State's psychiatrist reported defendant currently suffered from "impulse control disorder not otherwise specified, in partial remission"). Specifically, assuming "the initial commitment was permissible, 'it [can] not constitutionally continue after that basis no longer exists.'" *Foucha*, 504 U.S. at 77 (quoting, *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L.Ed.2d 396 (1975)).

Consistent with those holdings, the Supreme Court concluded commitment under RCW 71.09 does not offend substantive due process because it is "tailored to the nature and duration of **the** mental illness" *In re the Detention of Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993) (emphasis added). This Court has previously explained the State's burden at the show cause hearing:

State must make its prima facie case for continued commitment by presenting evidence that (1) the SVP's

mental abnormality or personality disorder has not changed, and (2) this mental abnormality will likely cause the SVP to be a danger to the community if released.

In re the Detention of Fox, 138 Wn. App. 374, 397, 158 P.3d 69, 80 (2007) (citing *In re the Detention of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002)).

Here, the State did not prove that Mr. Sease's disorders remained unchanged. Indeed, the State's evidence established the opposite. While he was committed based upon diagnoses of antisocial personality disorder and borderline personality disorder, he no longer suffers either condition. Instead, the State now says he only suffers one disorder, narcissistic personality disorder. However, the only evidence ever presented to a jury was that that disorder did not make him likely to reoffend. And importantly, Dr. Newring still does not draw that conclusion.

b. *There is no statutory authority to continue to confine Mr. Sease based upon a new diagnosis.*

The State does not dispute that Mr. Sease no longer meets the criteria of either diagnoses which led to his commitment. Instead, ignoring dictates of due process and the Supreme Court's interpretation of the statutory scheme, the State argued below that so long as its

evaluator believes Mr. Sease meets the diagnosis of “a” mental illness even if not “the” mental illness that led the jury to commit him, the State may continue to confine him. Specifically the State opined, that Mr. Sease’s confinement could be continued based upon the very diagnosis the state’s own expert had told the jury would not support commitment at trial. In essence, the State contended that a commitment trial is merely a threshold requirement, which when crossed permits indefinite confinement based upon the ever-evolving opinions of the evaluators retained by the State.

In response to Mr. Sease’s motion for discretionary review the State went so far as to claim that in assessing whether someone’s mental condition has changed their diagnosis is immaterial. Response at 3. This is a truly remarkable claim for application of a statute which is grounded in the treatment of mental conditions. If the diagnosis is immaterial, it begs the question why do the state’s evaluators bother to offer any diagnosis at all? If the diagnosis is immaterial, why then did the Legislature require that to establish a “personality disorder” the State must offer evidence of a licensed psychiatrist or psychologist? RCW 71.09.020(9). If a change in diagnosis does not equate to a change in condition the later term is devoid of meaning. Plainly a

person's diagnosis is quite material to his condition and a change in that diagnosis is very material to the question of whether his condition has changed.

The State's claim is based entirely upon an overly broad reading of a single case. In support of its argument, the State relied upon the opinion in *State v. Klein*, 156 Wn.2d 103, 124 P.3d 644 (2005). *Klein* involved an appeal of a release trial concerning a person previously found not guilty by reason of insanity. The relevant statute places the burden of proof upon the petitioner to establish she no longer suffers from "a" mental illness and is no longer dangerous. The trial court found the committed person continued to suffer from a mental illness that made her dangerous, and thus denied her petition for release.

The first distinction between *Klein* and this case is the procedural posture of each case. Here, the question is whether Mr. Sease is entitled to a trial on his release, there the question was whether following such a trial there was sufficient evidence to deny the petition for release. *Klein* concluded there was factual support for the trial court's decision to deny the petition after trial. Nothing in that opinion even holds that the trial court was required to deny the committed

person's petition. The Court merely found there was substantial evidence to support that conclusion. *Klein's* conclusion that there was substantial evidence to support the result of the trial, does not lead to the conclusion that the committed person was not entitled to the trial in the first place. But that is the position the State has advanced here, and which the trial court relied upon. In fact, that the petitioner in *Klein* was entitled to a hearing on her petition supports Mr. Sease's claim that he is also entitled to such a trial.

Second, RCW 10.77.200, the statute at issue in *Klein*, requires the committed person to prove by a preponderance of the evidence that he no longer suffer from "a mental disease or defect" which made him a danger to others or substantially likely to commit criminal acts. *Klein* found it significant that the statute used the indefinite term "a mental disease or defect" instead of "the mental disease or defect." 156 Wn.2d. at 119. RCW 71.09.090 does not employ the indefinite article upon which *Klein* relied. In fact, *Young* made clear the duration of commitment is limited to the period during which the person suffers "the" mental illness which led to commitment. 122 Wn.2d at 39, *Fox*, 138 Wn. App. at 397.

In addition, under the insanity statutes, once a person is acquitted based upon insanity, their insanity is presumed to continue until they prove otherwise. *State v. Platt*, 143 Wn.2d 242, 250, 19 P.3d 412 (2001). There is no similar presumption or burden of proof under RCW 71.09. Indeed, the State and not the committed person has the initial obligation of producing prime facie evidence justifying continued confinement. *See Petersen*, 145 Wn.2d at 796 (State bears the burden of proof at the show cause hearing).

Unlike RCW10.77.200, RCW 71.09.090 does not permit continued confinement based on any mental disease or defect. Instead, consistent with due process the scope and duration of commitment is limited to the duration of the mental illness which led to commitment in the first place. *Young* 122 Wn.2d at 39. Because the jury did not commit Mr. Sease based upon his narcissistic personality disorder, and was in fact told that disorder did not warrant commitment, the State may not now justify his continued confinement based upon that disorder.

b. *Mr. Sease confinement based upon a new diagnosis violates his right to Due Process unless he is first afforded a trial on whether that diagnosis makes him an SVP.*

Foucha demonstrates the constitutional limits of detention.

There the defendant was found not guilty by reasons of insanity, most likely due to a drug induced psychosis. 504 U.S. at 74-75. Because he was both mentally ill and dangerous, Mr. Foucha was committed to a state hospital. *Id.* at 74. Several years later state doctors concluded that while he was still dangerous, he no longer suffered psychosis, although he did have antisocial personality disorder. *Id.* at 75. The State maintained that because he was still deemed dangerous his indefinite commitment could constitutionally continue based upon the new diagnosis.

The Supreme Court rejected the state's claim because "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared." 504 U.S. at 78. The Court held that if the state wished to continue to confine him he was first entitled to a determination of "current mental illness and dangerousness." *Id.* In doing so the state was required to provide "the protections constitutionally required in a civil commitment proceeding." *Id.* at 79 (Discussing *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)).

Here, as in *Foucha*, there has not been a determination of “current mental illness and dangerousness” in a manner which provides “the protections constitutionally required in a civil commitment proceeding.” That is all Mr. Sease seeks. Mr. Sease does not argue that his change in condition mandates his release. Instead, consistent with the holding in *Foucha*, his change in condition mandates a new trial.

Further, even if the State may continue to commit a person who no longer suffers from the diagnoses upon which the jury committed him, it still must offer evidence that the newly minted diagnosis supports the conclusion that the person is an SVP. *See* RCW 71.09.090(2)(c)(i) (State must offer prime facie evidence that person continues to meet definition of SVP). The State did not do that here.

Dr. Newring never tied his replacement diagnosis to Mr. Sease’s likelihood to reoffend. In fact, he never concluded that Mr. Sease is more likely than not commit new sexual offenses. First, even accepting the State’s argument that it is free to substitute one diagnosis for another, there remains the problem that there is no evidence that substitute diagnosis makes Mr. Sease more likely than not to reoffend. Instead, all Dr. Newring concluded was that Mr. Sease has a mental conditionally which seriously impairs his ability to control his offense

behavior. CP 263. But even if true, that does not mean he is more likely than not to reoffend.

Further, Dr. Newring never addressed how narcissistic personality disorder now makes Mr. Sease more likely to reoffend, when at trial the State told the jury it did not. There is no explanation of that change of position.

Here, “the” mental illness has been resolved as a result of treatment. The State does not dispute that Mr. Sease no longer meets the criteria of either diagnoses which led to his commitment. Because the jury did not commit Mr. Sease based upon his narcissistic personality disorder, and was in fact told that disorder did not warrant commitment, the State may not now justify his continued confinement based upon that disorder. That is not to say the State could not seek to commit Mr. Sease based upon a newly-minted diagnosis, just that due process dictates that the State do so at a new trial and not simply based upon the opinion of the State’s evaluators. The State did not present prime facie evidence that Mr. Sease continues meet the requirements for commitment.

2. Mr. Sease established probable cause that his condition had changed as a result of treatment.

Probable cause exists where there are sufficient facts which if believed would establish a proposition. *Petersen*, 145 Wn.2d at 797. When assessing whether probable cause exists, a court is not permitted to weigh the evidence. *Id.* at 798. Under RCW 71.09.090(4)

Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial, or less restrictive alternative revocation proceeding, of a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

Mr. Sease's evidence more than satisfies the probable cause standard.

Dr. Abbott's evaluation provides that Mr. Sease has participated in treatment and as a result of treatment his condition has changed, specifically he no longer meets the criteria for either diagnosis upon which the jury's verdict was based. Dr. Abbott's evaluation contains his professional opinion that as a result of treatment Mr. Sease no longer meets the definition of a sexually violent predator. That conclusion together with the support Dr. Abbott offers, would permit a juror to conclude Mr. Sease no longer meets the criteria for

commitment. That conclusion is bolstered by the State's evidence that Mr. Sease no longer suffers either disorder that led to his commitment.

Because the court may not balance competing claims in assessing probable cause, it does not matter that the State's evaluator disagrees with Dr. Abbott's assessment. The question is not whether Mr. Sease or the State has more or better evidence to the contrary. The question is not whether the State or Mr. Sease is more likely to prevail at trial. Instead, the only question is whether Dr. Abbott's report contains sufficient facts which if believed would allow a jury to conclude Mr. Sease does not meet the criteria for commitment. It plainly does.

Dr. Abbot specifically found that the inability to diagnose Mr. Sease with either of his original disorders was due to a positive response to treatment. CP 313. Dr. Abbot concluded the result of Mr. Sease a risk assessment of only 27% over 10 years established he was not more likely than not to reoffend. CP 326-28. Thus, Dr. Abbott concluded Mr. Sease no longer meets the definition of SVP. CP 313. That evidence satisfies the standard of probable cause. *Petersen*, 145.

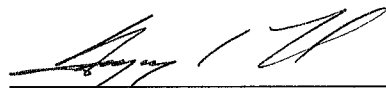
The trial court's findings that Mr. Sease's mental condition has not changed, CP 134 (Findings of Fact 5 and 6), are contrary to the

evidence. So too, the court's finding that he had not engaged in treatment. *Id.* (Finding of Fact 4.) Plainly there was evidence presented of both. Importantly, the task before the court was not to finally determine the factual issues, but rather assess whether probable cause existed to warrant a trial on the factual issue. That is a much lower standard, and the court's finding of fact do not reflect an appreciation of that distinction. Because they are contrary to the factual record and fail to reflect the proper legal standard, the trial court's findings of fact should be stricken. Mr. Sease met his burden of establishing probable cause to warrant a new trial under RCW 71.09.090.

F. CONCLUSION

For the reasons above, this Court should reverse the trial court's order and direct the trial court to grant Mr. Sease trial under RCW 71.09.090.

Respectfully submitted this 30th day of June, 2014.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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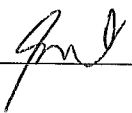
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)	
MICHAEL SEASE,)	NO. 45512-9-II
)	
)	
APPELLANT.)	

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