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No. 70750-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Detention of:

DENNIS BREEDLOVE,

Respondent.

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

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Statutes

Court Rules

Other Authorities

A. INTRODUCTION

The trial court granted Dennis Breedlove's petitions for a trial under RCW 71.09.090. That court granted a trial to address two issues. First, the fact finder will determine whether Mr. Breedlove may be released to a less-restrictive alternative. The State agreed that issue merited a trial. Second, the court found there was sufficient evidence to permit the fact finder to determine whether Mr. Breedlove should be unconditionally released based on evidence that he had positively changed through treatment.

Although it conceded in the trial court that there was no statutory limitation on what constitutes "treatment," and although it did not properly present this argument to the trial court, the State now contends "treatment" is narrowly limited to include only sex offender treatment. Because the State both invited the error and failed to properly preserve any objection, the State is foreclosed from making this argument on appeal. Moreover, the trial court properly concluded the term "treatment" is not defined by RCW 71.09. Thus, this court should affirm the trial court's ruling.

B. ISSUES PRESENTED

1. The doctrine of invited error prevents a party from complaining of an error on appeal where it created the error below. The doctrine applies whether the error was intentionally or inadvertently created. In direct response to a question by the trial court, the State agreed that nothing in RCW 71.09 limits the term "treatment" as used in RCW 71.09.090. On review, the State now contends the statute does narrowly define the term treatment. Does the doctrine of invited error bar the State's claim?

2. Pursuant to RAP 2.5, an party may not raise an argument on review that it did not first properly present to the trial court. CR 59 does not permit a party to raise a new legal argument for the first time in a motion to reconsider. Where the State raised its argument that "treatment" is statutorily limited for the first time in a motion to reconsider, and previously conceded there was no statutory limitation, did the State properly present its claim to the trial court?

3. RCW 71.09.090 requires the trial court to order a trial on a person's unconditional release if there is probable cause to believe that the person no longer meets the definition of a sexually violent predator (SVP) and that the change is a result of treatment. Where Mr.

Breedlove presented evidence that, if believed, as a result of treatment he no longer meets the definition of a SVP did the court act within the range of its discretion in granting a trial on the issue?

C. STATEMENT OF THE CASE

Mr. Breedlove filed petitions requesting a trial on a less restrictive alternative and/or his unconditional release. CP 80-86, 146-56. He offered an evaluation prepared by Dr. Christopher Fisher in support of his claim that he no longer met the criteria of an SVP and that a less restrictive alternative was appropriate. CP 157-200. Dr. Fisher pointed to Mr. Breedlove's participation in a self-confrontation course. CP 169-70.

The parties agreed Mr. Breedlove met the criteria for a trial on his petition for release to a less-restrictive alternative. RP 3, 30.

Mr. Breedlove also petitioned to permit the fact finder at that trial to address his unconditional release. CP 146-56. The State objected. CP 11-16. The State acknowledged Mr. Breedlove had engaged in sexual offender treatment during two different periods during his confinement. RP 12. The State acknowledged there was no statutory definition of what constituted treatment. RP 19-20. The State,

nonetheless, argued Mr. Breedlove had not engaged in "relevant" treatment. RP 16.

The trial court reasoned that in the absence of a statutory definition of the term treatment, Mr. Breedlove had satisfied his burden of establishing that he had made a positive change through participation in treatment. CP 31-33.

Despite its earlier concession to the contrary, the State for the first time in a motion to reconsider argued the term "treatment" in RCW 71.09.090 is limited to sex offender treatment as defined by the department. CP 3-9. The court denied the State's motion. CP 1.

The State filed sought discretionary review contending the term "treatment" means sex offender treatment as defined by the department. The State's motion does not address either its prior concession or its failure to properly present its statutory construction claim to the trial court.

D. ARGUMENT

The Court should affirm the trial court's decision to permit the fact finder at Mr. Breedlove's trial to consider not only his release to a less restrictive alternative but also to consider Mr. Breedlove's unconditional release.

1. **The State invited the error.**

The State contends the trial court erred in concluding that treatment as used in RCW 71.09.090 does not mean "sex offender treatment program" as defined by the SCC. *See* Brief of Appellant at 12 and 16. This is a specious claim at best.

The trial court specifically asked the deputy attorney general whether there was anything in the statute which limited the definition of "continuing treatment" to any particular type of treatment. The following exchange occurred:

> Court: "[I]s there anything that requires continuing treatment to be the SOTP program or whatever the program is at the, you know, the commitment center?
>
> Mr. Bartels: As far as is there an existing course that is the only course that meets that definition?
>
> Court: Yes.
>
> Mr. Bartels: No.
>
> Court: Okay.
>
> Mr. Bartels: Absolutely not. . . . .

RP 19-20. In the trial court the State plainly conceded there was no statutory limitation on the term "treatment" much less anything limiting the term to treatment as defined by the department. Its argument on review that the trial court erred in failing to so limit the term "treatment" is barred by the doctrine of invited error.

The purpose of that doctrine is to "prohibit[] a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam,* 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson,* 126 Wn.2d 315, 893 P.2d 629 (1995). The doctrine applies even in cases where the error "results from neither negligence nor bad faith." *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (citing *State v. Studd,* 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)). Whether it was intelligent or negligent or wholly inadvertent, it is clear that the State invited the error of which it now complains. The State is precluded from challenging that ruling on now.

2. Because it did not properly present the claim to the trial court, RAP 2.5 precludes the State from raising its claim that "treatment" is narrowly defined by statute.

RAP 2.5(a) provides in part:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first

> time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

"RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The State did not timely raise this issue.

At the show cause hearing the State conceded that nothing in the statute limited the term "treatment" to that defined by the SCC. RP 19-20. Accepting the State's concession, the trial court found the term "treatment was undefined." RP 31. Despite its prior concession, the State then filed a motion to reconsider where for the first time the State argued that treatment means "sex offender treatment." CP 3-9. Those arguments are parroted in the State's brief.

"CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Inst.,* 130 Wn. App. 234, 241, 122 P.3d 729 (2005), *review denied,* 157 Wn.2d 1022, 142 P.3d 609 (2006), (quoting *JDFJ Corp. v. Int'l Raceway, Inc.,* 97 Wn. App. 1, 7, 970 P.2d 343 (1999)); *Hook v. Lincoln County. Noxious Weed Control Bd.*, 166 Wn. App. 145, 158, 269 P.3d 1056 (2012). The State did not raise its

statutory argument that treatment was narrowly defined. In fact the State agreed it was not. The State could not raise that issue in a motion to reconsider. Thus, the issue was not properly preserved under RAP 2.5.

A trial court's decision on a motion to reconsider under CR 59 is reviewed for an abuse of discretion. The denial of a motion to reconsider is reviewed for an abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). A court abuses its discretion only when

> the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. A 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.

State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal citations omitted). This standard recognizes that on certain issues a trial court must be permitted to choose from a "range of acceptable choices." *Rohrich,* 149 Wn.2d at 654. The State cannot meet standard here.

Having presented a new legal argument in a motion to reconsider, one which contradicted its own previous statements, the

State cannot show that the trial court's decision denying its motion to reconsider was a manifest abuse of the court's discretion.[1]

In addition, there is nothing untenable about the court's ruling. The order denying the motion to reconsider provides only

> This MATTER having come before the Court on motion of the Petitioner for a Motion to Reconsider the Order Granting Respondent an Unconditional Release trial.
> The COURT having read the brief submitted by Petitioner, reviewed the relevant statutes and applicable sections of the Washington Administrative Code (WAC), the court finds the following:
> The WAC sections referenced in Petitioner's Motion do specify that Respondent's individual treatment plan (ITP) must address sex offender specific treatment. RCW 71.09.090(4)(b)(ii) neither defines "treatment" nor reference "sex offender" treatment of "treatment as defined under the ITP."

As the order states WAC 388-880-040 does require an ITP to address sex offender specific treatment. As the order states, RCW 71.09.090(4)(b)(ii) does not define any terms much less specify what treatment means. Those are correct statements of the law and the State

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[1] Importantly, while RAP 2.5 precludes the State from raising this issue for the first time on appeal, that rule specifically permits this Court to affirm the trial court on any basis. RAP 2.5(a) provides in part ". . . . A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." *See also*, *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 282, 96 P.3d 386 (2004) (court can affirm a lower court's decision on any basis adequately supported by the record). Thus, regardless of whether Mr. Breedlove presented this argument to the trial court, the record is fully developed and makes clear the State improperly presented a new legal claim in its motion to reconsider.

has not argued otherwise. The court's order does not rest upon a misstatement of the law or an untenable view of the facts. The court's order was not an abuse of discretion. *Rohrich*, 149 Wn.2d at 654.

3. Because review was improvidently granted, this Court should dismiss this matter.

Even after granting discretionary review courts have recognized their ability to dismiss discretionary review as improvidently granted. *See Pappas v. Hershberger*, 85 Wn.2d 152, 154, 530 P.2d 642, 643 (1975) (concluding that because issues were not properly preserved or presented in lower courts petition for review was improvidently granted); *State v. Smith*, 90 Wn. App. 856, 862, 954 P.2d 362 (1998) (motion for discretionary review was improvidently granted as it did not meet grounds of RAP 2.3). This is such a case.

The State's motion for discretionary review complained that the trial court committed probable error which renders further proceedings useless. However, it is now clear that the State invited the error and did not preserve the claims it now raises. Thus, the State cannot complain of either obvious or probable error as any error was invited by the State.

In response to the State's motion for discretionary review, Mr. Breedlove sought to strike the hearing date and continue the time for

filing a response until such time as the State provided a copy of the transcripts of the relevant proceedings. Counsel argued those transcripts were necessary to permit this Court to determine whether any error occurred. The State refused to provide such transcripts insisting they were unnecessary in determining whether discretionary review was appropriate. The commissioner denied the motion to strike, and accepted the State's representation that the exhibits it had attached to its motion were "the sum total of the evidence" necessary to decide the motion for discretionary review. However, upon review of the transcripts, prepared by the State after review was granted, it is now clear the State's representation was misleading. The transcripts reveal the State both invited the error it claims and failed to properly present or preserve the argument it wishes to make. Had the record been provided it is clear the State could not have argued the court committed either obvious or probable error.

Moreover, further proceedings are not useless. The State concedes Mr. Breedlove is entitled to a trial on his petition for a less restrictive alternative. RP 30. That trial will occur regardless of the outcome of this discretionary review. The only issue to be resolved on discretionary review is whether that trial will also address Mr.

Breedlove's petition for unconditional release as well. Because further proceedings, a trial under RCW 71.09.090 will occur in any event, and this review will only decide the scope of that trial, the court's order does not render further proceedings useless.

A former Supreme Court Commissioner offered the following commentary on RAP 2.3.

> How much havoc must an order cause to 'render further proceedings useless' as required for review under subsection (b)(1)? One recent case seems to suggest that the test is whether a decision on an interlocutory review will 'avoid a useless trial.' Clearly something else is also required, however. Any time a trial court erroneously denies a well-founded summary judgment motion, pretrial review would prevent a useless trial. Yet the appellate courts rarely grant discretionary review of trial court orders denying motions for summary judgment. Several of the few reported cases where such review was afforded even take pains to advise that it will not be granted ordinarily.
>
> In short, many pretrial errors can prejudice, and thus in a sense render useless, further trial court proceedings. Yet the appellate courts want nothing to do with the great majority of those cases until a final judgment is rendered. The appellate system operates with a plain and intentional bias against interlocutory review. . . .

Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1546-47 (1986) (Footnotes omitted.) This is certainly not the case that should overcome the bias against interlocutory review. Right or wrong

the trial court's ruling does not render further proceedings useless. Instead, as the State has conceded a trial must still occur. All this discretionary review could possibly resolve is the scope of issues to be addressed at that trial. Rather than overcome the bias against interlocutory appeals, this case illustrates precisely why such a bias exists.

This court should dismiss the motion for discretionary review as improvidently granted.

4. Even if this Court looks past the host of procedural hurdles created by the State's ever-evolving litigation strategy, the trial Court did not abuse its discretion in denying the State's motion to reconsider.

Again, the court's decision on the State's motion to reconsider is review for an abuse of discretion. *Rivers*, 145 Wn.2d 685.

The State contends the term "treatment" in RCW 71.09.090 means sex offender treatment as defined by the department. While it asserts this is the plain legislative intent, the State's argument rests upon a pyramiding of assumptions and narrow interpretations of unrelated statutes and regulations.

The State argues that in RCW 71.09.800 the legislature authorized the department to draft regulations pertaining to treatment at

the SCC. Brief of Appellant at 13. Pursuant to statute, the department drafted WAC 388-880-040. The State offers that regulation as requiring committed person to "engage in sex offender specific treatment." Brief of Appellant at 13-14.

WAC 388-880-040 provides in part:

> (1) When the court detains a person or commits a person to the SCC, SCC staff persons designated by the clinical director shall develop an individual treatment plan (ITP) for the person. The resident shall have an opportunity to participate in the treatment planning process.
> (2) The ITP shall be based upon, but not limited to, the following information as may be available:
> (a) The person's offense history;
> (b) A psycho-social history;
> (c) The person's most recent evaluation; and
> (d) A statement of high risk factors for potential reoffense, as may be ascertained over time.
> (3) The ITP shall include, but not be limited to:
> (a) A description of the person's specific treatment needs in:
> (i) Sex offender specific treatment;
> (ii) Substance abuse treatment, as applicable;
> (iii) Supports to promote psychiatric stability, as applicable;
> (iv) Supports for medical conditions and disability, as applicable;
> (v) Social, family, and life skills.
> (b) An outline of intermediate and long-range treatment goals, with cognitive and behavioral interventions for achieving the goals;
> (c) A description of SCC staff persons' responsibilities; and
> (d) A general plan and criteria, keyed to the resident's achievement of long-range treatment goals, for recommending to the court whether the person should be released to a less restrictive alternative . . . .

A separate regulation provides:

> **"Individual treatment plan (ITP)"** means an outline the SCC staff persons develop detailing how control, care, and treatment services are provided to a civilly committed person or to a court-detained person.

WAC 388-880-010.

The State correctly points out that WAC 388-880-040 does require an ITP to describe an offender's specific needs in sex offender specific treatment. But the regulation also plainly requires such plan address a host of other offender-specific forms of treatment. By is use of the phrase "but not limited to," the regulation is nonexclusive in what may be included in the treatment plan. The regulation also requires the plan address SCC duties to the person. Importantly it does not require the plan to specify any particular form of treatment only that it must describe "the person's specific treatment needs." Moreover, the regulation does not require any particular outcome or a measurement of progress. Most importantly, and contrary to the State's assertion, the regulation does not require a person "engage" in any form of treatment. Instead, the regulation merely describes the contents of the treatment plan.

Additionally, by its breadth, the regulation necessarily recognizes "treatment" involves a variety of different things for different persons. To limit the term "treatment" in RCW 71.09.090 to include only sex offender treatment ignores the broad scope of the regulation and the department's own belief that treatment is far broader than that.

Nothing in the cited regulations narrows the definition of "treatment" to only include sex offender treatment. As the State properly conceded below, nothing in RCW 71.09 defines the term treatment much less limits it to SCC's sexual offender treatment program. Indeed, at the show cause hearing the State conceded it was an open point whether a person could retain a private individual to provide treatment even while detained at the SCC. RP 14. The term "treatment" as used in RCW 71.09.090 is not narrowly defined anywhere in the statute to mean only sex offender treatment. The trial court did not abuse its discretion in denying the State's motion to reconsider.

5. The trial court properly found Mr. Breedlove established probable cause to warrant a trial on his unconditional release.

Because the State concedes Mr. Breedlove is entitled to an LRA trial, the only question on review is whether at that same trial the fact finder will also address the question of whether he is entitled to his unconditional release.

As the State acknowledges in its own brief, Dr. Fisher stated Mr. Breedlove had changed through treatment. Brief of Appellant at 20. The State's evaluation also noted Mr. Breedlove had participated in treatment. CP 113,119. Thus, there was evidence which if believed could allow a rational trier of fact to find that Mr. Breedlove no longer met the definition of an SVP.

Importantly, to establish probable cause, Mr. Breedlove need not conclusively establish the proposition. Nor does it matter that there was evidence that might establish a contrary proposition, nor does it matter if the court found such evidence more persuasive. Instead, probable cause exists where there are sufficient facts which if believed would establish a proposition. *In re Detention of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). When assessing whether probable cause exists, a court is not permitted to weigh the evidence. *Petersen*, 145

Wn.2d at 798. On appeal, that determination must be afforded "due weight." *Id.* at 800.

Here, there was evidence that Mr. Breedlove had participated in treatment, and that his risk of re-offense was less than 50%. CP 113, 117, 119, 169, 173-80. That evidence, if believed, would establish the proposition that he is no longer an SVP. Thus, the trial court properly found probable cause exists sufficient to permit the fact finder to determine both whether he should be released to a less restrictive and alternatively whether he should be unconditionally released.

The State asks this Court to disregard the trial court's finding, i.e., to not afford it due weight and to instead make a different finding of probable cause. This Court cannot do that. *Petersen*, 145 Wn.2d at 800. The State cannot show any legal defect in the trial court's order. It simply does not like the outcome. Again, the State's true point of contention is its belief of what is or is not treatment. But as set forth argument, that argument is not properly before this court.

The commissioner's ruling granting discretionary review concludes the State showed probable error in "that Dr. Fisher identified no substantial change in Breedlove's mental disorder paraphilia." Ruling at 12. This conclusion is erroneous for a number of reasons.

First, the State never made such an argument.

Second, Mr. Breedlove is not required to show that he no longer has a particular diagnosis, merely that his condition has changed such that he no longer meets the definition of sexually violent predator. RCW 71.09.090. Dr. Fisher provided such evidence. Dr. Fisher allowed that the diagnostic criteria of pedophilia still existed. Dr. Fisher noted however, that actuarial risk assessment produced a result of less than 50%, *i.e.*, below the more likely than not standard. CP 173-80. On this point the State's expert also agreed Mr. Breedlove's actuarial risk level placed him below the 50% mark. CP 116-17.

The trial court properly found there was probable cause to believe Mr. Breedlove no longer meets the definition of an SVP. The court properly ordered that the fact finder that considers whether Mr. Breedlove will be released to a less restrictive alternative will also consider whether he is entitled to his unconditional release.

E. CONCLUSION

For the reasons above, this Court should affirm the trial court's ruling.

DATED this 27th day of June, 2014.

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DIVISION ONE

IN RE THE DETENTION OF	)	
	)	
	)	
DENNIS BREEDLOVE,	)	NO. 70750-7-I
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	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 27TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JUNE, 2014.

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