No. 94203-0

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHN DOE G, JOHN DOE I, and JOHN DOE H,
as individuals and on behalf of others similarly situated,

Respondents,
v.
DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON

Appellant,
v.
DONNA ZINK, a married woman,

Appellant.

REPLY TO ANSWER TO PETITIONS FOR REVIEW

DONNA ZINK
Pro Se Appellant
P.O. Box 263
Mesa, WA 99343
(509) 265-4417
dzink@centurytel.net

Table of Contents

TABLE OF AUTHORITIES

Washington State Supreme Court

Washington State Court of Appeals

Revised Code of Washington

Civil Court Rules

I. ARGUMENT

1. Chapter 70.02 RCW Is Not An Internal PRA Exemption

Doe claims Chapter 70.02 RCW is an internal exemption under Chapter 42.56 RCW, the Public Records Act (PRA). This is false. Chapter 70.02 RCW is an exemption that lies outside the PRA. Furthermore, while Chapter 70.02 RCW does exempt patient health care records, the records sought by Zink are used and maintained by a trial court for sentencing those convicted of a sex crime and are at all times open to the public in the court file and are not confidential. Furthermore, SSOSA evaluations are available through the prosecuting attorney's office under RCW 9.94A.475 and .480 and the sheriff's office (RCW 4.24.550(6)).

Furthermore, the order entered by the Honorable John H. Chun, only enjoined release of the SSOSA evaluations for all Level I sex offenders (CP 753). If SSOSA evaluations are exempt under Chapter 70.02 RCW, release of non-Leveled, Level II and Level III sex offenders would also be exempt from production under Doe's argument.

Finally, many agencies have released SSOSA evaluations due to this Court's decision in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012))(CP 718). Due to the differing responses in production of SSOSA evaluations, the determination of whether SSOSA evaluations are "health care" records and exempt or "sentencing" records and available for public

inspection is of paramount importance for continuity of responses by all agencies maintaining SSOSA evaluations. Otherwise, as is the case here, some agencies will withhold the records while others will not.

2. SSOSA Evaluations Are Not "Health Care Information"

Doe argues that sex offenders are mentally ill and are receiving mental health care through our judicial and penal systems. This is an absurd reading of our penal code. A convicted sex offender is not seeking mental health treatment. While SSOSA evaluations are ordered and used to determine whether sex offenders are "amendable to treatment" their amenability to treatment is assessed to determine whether the sex offender can be returned safely (relative risk) to the community or whether prison is more appropriate (RCW 9.94A.670). A SSOSA evaluation is not used to determine what treatment is appropriate for a mental health diagnosis as suggested. The proposed treatment plan is just that; proposed. Since the SSOSA evaluator cannot be the sex offender treatment provider (RCW 9.94A.670(13)), except in limited circumstances, a new treatment plan would be needed when the convicted sex offender enters court ordered treatment. Zink has not requested any records from the treatment provider.

While it is an accurate statement that SSOSA evaluations identify convicted sex offenders, the sex offender's identity is disclosed due to public conviction of a felony and not as a patient seeking treatment. A sex

offender's identity is not confidential and, as previously discussed, is available in the courts and reported in the media at the time of arrest. Therefore, the identity of sex offenders is not relevant to whether SSOSA evaluations are exempt and the definition under RCW 70.02.010(16) does not apply.

3. Convicted Sex Offenders Are Not Receiving Treatment. They Are Being Sentenced For a Crime They Willingly Committed

Doe claims that the "experts" have testified that SSOSA evaluations are no different from any other clinical evaluation. While a similar technique may be used to administer a SSOSA evaluation, that does not make them health care records. SSOSA evaluations are specifically used to sentence those convicted of sex offenses and not those seeking treatment for a mental health condition. Furthermore, it is the provisions in the statutes set out by our Legislature and not the treatment providers that determines whether records are exempt under the PRA. Doe has not identified any statutory provisions clearly enunciating that convicted sex offenders are suffering from a mental health condition or are being treated for a mental health condition. Sex offenders are criminals who committed a crime against the people and can obtain release into the community instead of prison if they can prove, through use of the SSOSA evaluation, that they will not commit another sex crime while on probation.

Further, while treatment providers would be required to maintain the SSOSA evaluations as protected health information and confidential under Chapter 70.02 RCW, public agencies maintaining the records (Department of Corrections (DOC), prosecutor, sheriff and court) are required to keep the records open to the public (RCW 9.94A.475, .480 and RCW 4.24.550(6)). Zink did not seek records from any treatment providers. The records were requested from a public agency required to maintain the records as public records (RCW 9.94A.475, .480) and (RCW 4.24.550(6)).

4. Convicted Sex Offenders Are Not Patients Until After Treatment Starts

Doe claims Zink raised an argument not previously raised. First, review under the PRA is de novo. Second, the petitions for review are based on the decision of Division I that the records were exempt under RCW 42.56.360(2) because it incorporates Chapter 70.02 RCW. Doe's argument that both Zink and DOC did not properly raise the issue is not logical.

Doe argues that RCW 42.56.360(2) would become superfluous because the "other statute" exemption already incorporates confidentiality requirements that exist independently of the PRA under RCW 42.56.070(1). This argument is absurd. RCW 42.56.070(1) and RCW 42.56.360(2) can easily be harmonized and do not render one or the other superfluous. RCW 42.56.360(2) is a specific exemption for medical records while RCW 42.56.070(1) incorporates all "other exemptions" found outside the PRA not

specifically mentioned in the PRA and has nothing to do with whether RCW 42.56.360(2) applies to sex offender records or the DOC.

5. Department Of Corrections Is Not a Health Care Provider

While DOC may be mandated to provide health care to those incarcerated within their facility, DOC is not required or licensed to administer that health care and sex offenders receiving SSOSA sentencing are not incarcerated. If a SSOSA evaluation is accepted and ordered, the sex offender is released into the community with DOC supervision. Therefore, the DOC has no obligation to provide health care to sex offenders not imprisoned.

Furthermore, the healthcare provided during incarceration is done at a clinic, either onsite and off, by doctors and nurses and not by DOC employees supervising inmates. All medical records generated by that treatment provider would remain at the treatment facility unless it related to the supervision of an inmate. *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 366-67, 112 P.3d 522 (2005) specifically speaks to the issue of who qualifies as a "health care provider." As argued, DOC does not meet the definition and, while they may be responsible for prisoner's access to health care, they are not the ones providing that health care.

6. Doe Raises Additional Issue in Their Reply Brief

Doe argues that even if DOC is not a health care provider, SSOSA evaluations are exempt as confidential pursuant to RCW 70.02.230(1). As

noted by Doe (Reply pg. 12, *fn.* 5), Division I declined to determine whether RCW 70.02.230 applied to SSOSA evaluation. Therefore, no decision concerning RCW 70.02.230 as it applied to SSOSA evaluation was made. Doe has not properly requested review of Division I's decision concerning application of RCW 70.02.230 in their reply. However, in the spirit of making sure the "Legislative Intent" under the provision of the PRA are properly applied, Zink does not object to review of this issue should the Court decide to do so.

7. <u>Redaction of Records is Mandatory and Zink Did Provide Argument</u>

Zink did request review of the trial court's use of RCW 7.40.020 rather than RCW 42.56.540 (Zink Opening Brief pg. 34-37). Zink specifically argued that RCW 42.56.540 controls in all issues of enjoining public records. Further, Zink provided argument in her reply brief (pg. 15-19) citing to *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 77 Wn.2d 467, ¶35, 300 P.3d 799 (2013)(pg. 17). While her argument may not have been as refined as others, it was none the less an argument that the Court must apply RCW 42.56.540 to Zink's request. Furthermore, although our Courts are to review cases based on the issues brought forward. Our Courts are not to ignore clear statutory requirements and well established case law simply because it was not properly briefed.

What makes Division I's opinion especially disconcerting is that the Court determined public records are exempt if an agency refuses to redact which is in conflict with the strongly worded mandate of the people that agencies will redact any exempt information and provide the records. *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, ¶8, 327 P.3d 600 (2013).

8. Court Rules Require Courts Know the Identity of All Parties

Doe claims the Supreme Court has already approved pseudonymity in passing. This is an absurd reading of the decision in *N. Am. Council on Adoptable Children v. Dep't of Soc. & Health Servs.*, 108 Wn.2d 433, 739 P.2d 677 (1987). A trial court is required to know the identities of parties in order for justice to be served in our judicial system.

> Every action shall be prosecuted in the name of the real party in interest.

Civil Rule (CR) 17(a). The court is required to know the identity of each party in order to ensure that the action is prosecuted in the name of the real party with interest.

> [T]he title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and **the names of the parties to the action, plaintiff and defendant**.

(CR 4(b)(1)(i))(emphasis added). In order to summon Zink into this action, the summons was required to provide the true name and identity of the party(ies) summoning her into court in the caption of the summons.

> In the complaint the title of the action shall include the names of all the parties…

CR 10(a)(1) The complaint filed by the court clerk was required to contain the true names and identities of Doe(s) in order for the complaint and summons to be filed. Court rules and our Washington State Constitution cannot be ignored simply because a party would otherwise not bring suit. Division I's opinion is in conflict with court rules and the decision in *Hundtofte v. Encarnación*, 181 Wn.2d 1, 330 P.3d 168 (2014).

9. <u>The Public Record Act Prevails In All Conflicts</u>

Doe argues that the decision in *Neighborhood Alliance of Spokane County v. City of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011) forecloses Zink's argument concerning class action under the provisions of RCW 42.56.540. Doe's argument that is not accurate for two reasons.

First, in *Neighborhood Alliance* the Court opined:

> We have previously held that, unless express procedural rules have been adopted by statute or otherwise, the general civil rules control.

Id. ¶20. RCW 42.56.540 is an express procedural rule that has been adopted by statutes and therefore the general rules do not apply.

Second, the Court was discussing filing a special proceeding and not the provisions of a particular statute. RCW 42.56.540 outlines the mandatory criteria which must be followed in order to enjoin records belonging to the public and prohibits class action of entire classes of records. If a class of records is to be exempt, that exemption must come from the Legislature and not the courts.

Further, the PRA controls all issues of conflict (RCW 42.56.030). Obviously there is conflict in Division I's opinion concerning class action under the PRA which needs a decision of our Supreme Court.

II. CONCLUSION

Whether SSOSA evaluations are open to public scrutiny as sentencing documents or closed to scrutiny as health care/mental health records must be ultimately determined by our Supreme Court for clarity and continuity. Furthermore, the issue of which agencies are considered health care providers and which are not is of great importance. If DOC is a health care provider based on the fact that they must ensure inmates get health care, does that also make a sheriff's department, prosecuting attorneys office, or a trial court a health care provider as well since they are not required to provide health care?

Whether a party can bypass court rules and file an action in pseudonymity is of great public concern and must be addressed by the Supreme Court for clarity and continuity in our judicial system. Especially in light of the fact

that there is no definitive test to determine who qualifies for use of pseudonymity and who does not.

Whether a person can initiate a class action under RCW 42.56.540 to enjoin an entire class of records from production when that person is not named in all records being enjoined is of great public importance as it allows a court to enjoin the "public's" records without a Legislative mandate to do so.

All of these issues are in need of a decision by the Supreme Court.

RESPECTFULLY SUBMITTED this 24th day of March, 2017

By _____

Donna Zink
Pro se

III. CERTIFICATION OF SERVICE

I declare that on the 24th day of March, 2017, I did send a true and correct copy of appellant's "*Reply to Answer to Petitions for Review*" via e-mail service to the following addresses as agreed upon by all parties to this matter:

- BENJAMINE GOULD
  WSBA #44093
  Keller Rohrback LLP
  1201 Third Avenue, Suite 3200
  Seattle, WA 98101
  Phone: 206-623-1900/Fax: 206-623-3384
  Email: bgould@kellerrohrback.com;

- PRACHI V. DAVE
  WSBA #50498
  ACLU of Washington Foundation
  901 5th Ave, Suite 630
  Seattle, WA 98164
  Phone: 206-624-2184/Fax:
  Email: pdave@aclu-wa.org; and

- TIMOTHY J. FEULNER
  WSBA #45396
  Washington State Attorney General
  Corrections Division OID #91025
  800 Fifth Avenue, Suite 2000
  PO Box 40116
  Olympia, WA 98504-0116
  Phone: 306-586-1445/Fax:
  Email: TimF1@atg.wa.go.

Dated this 24th day of August, 2017.

By /Donna H Zink/
Donna Zink
Pro se