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CASE #: 67922-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DONNA CHARBONNEAU ON BEHALF OF OLIVIA
CHARBONNEAU

Respondents,

v.

TANNER FOSTER,

Appellant.

2012 JUL 27 PM 1:57
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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

The Honorable Charles Snyder

REPLY BRIEF OF APPELLANT FOSTER

WILLIAM J. JOHNSTON
Attorney for Appellant Foster

401 Central Avenue
Bellingham, WA 98225
ph. (360) 676-1931
fx. (360) 676-1510

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1. Introduction

There are two overarching questions in this appeal. The first relates to the standard of review of the Superior Court's revision and reversal of the contested factual hearing before Commissioner Verge, finding that Charbonneau had proven her allegation of rape. Verge had earlier found to the contrary. What is the Washington standard for review of these cases, i.e. contested factual hearings related to sexual assault in which a commissioner hears live testimony and makes factual findings as to whether the accused is, essentially, guilty or not guilty of allegations of criminal conduct? Sexual Assault Protection Order (SAPO) cases are similar to criminal cases in which similar factual allegations are charged. But unlike criminal cases, which are prosecuted by the state, SAPO hearings are prosecuted by the victim petitioner. SAPO charges are also by definition those cases where the state has declined to pursue criminal charges. This is such a case. The standard of proof is preponderance.¹

The second major issue involved in this appeal is whether

¹ If Washington law imposes a yoke that requires an accused vindicated in the first SAPO trial where live testimony is presented to the trier of fact to undergo a second trial or revision where a contrary result can be made, does it violate due process? Because Foster believes this case should be decided upon the standard for review, he does not address these concerns in this reply.

RCW 7.90.090 (4) is so vague as to its application to be void. Or, if the statute is sufficiently clear for it to be applied, how must it be applied in this case? Did Commissioner Verge breach the statute as Charbonneau has argued? How did Commissioner Verge's adjudication violate the strictures of the statute? Did Superior Court Judge Snyder err when he concluded Verge had breached the statute? If so, then how did Superior Court Judge Snyder apply the statute differently, and, presumably, correctly in the instant case? These are some of the questions that must be addressed to instruct the trial judges who preside over these cases how they are to consider evidence of voluntary intoxication when determining factual questions of whether a rape was committed. May the judges consider evidence of intoxication or not? And if they may, then to what extent? Lastly, if the statute was intended to control the factual decision-making of the trier of fact, does the statute violate the principle of separation of powers?

But this court does not have to reach this question because the standard for review should be by substantial evidence, and not the de novo review applied by the Superior Court. This court should reverse on this basis and remand for entry of the judgment of Commissioner.

2. Review of the factual decisions and resolution of SAPO hearing by Commissioners, who consider live testimony and make credibility findings, is limited to revision by the Superior Court on a substantial evidence standard, not *de novo*.

Respondent argues that this a case is controlled by State v. Ramer 151Wn2d 106, 86 P.3d 132 (2004), and that Ramer provides for the application of a *de novo* standard of review for SAPO cases like this where a Commissioner considers live testimony to come to a fact finding decision. Charbonneau cites the local Superior Court rule, which is simply the Superior Court's promulgation of a *de novo* standard of review on all revision decisions by the Superior Court. But a local rule inconsistent with case law is void Perez v. Garcia 148 Wa. App. 131 at 140, 198 P.3d 539 (2009).

In construing the significance of the Ramer case, it is important to remember that in that case, the Commissioner initially found that the juvenile had the capacity to commit rape, and the Superior Court reversed and found that the juvenile lacked the capacity to rape.

On the first level of appeal, the Court of Appeals reversed the Superior Court, finding that the juvenile lacked the capacity to commit the crime, and the court reinstated the Commissioner's

decision, finding that the juvenile had the capacity to commit the crime; the court remanded for trial on the merits.

The Washington Supreme Court reversed this decision of the Court of Appeals. Ultimately, the Supreme Court affirmed the decision of the Superior Court, finding that the state had not overcome the statutory presumption that children under the age of 12 years old lacked the capacity to commit crime.²

Ramer affirmed the finding of the Superior Court that the evidence did not support the Commissioner's conclusion that the juvenile had the capacity to commit rape.

The Supreme Court held that sufficient evidence supported the superior court's finding that State failed to establish by clear and convincing evidence that defendant had capacity to commit charged crime.

In short, the Supreme Court's decision in its *de novo* review in Ramer was one of law, not of fact. The court determined whether the evidence was sufficient to overcome the presumption that the 11-year-old Ramer lacked the capacity to commit the crime. The Supreme Court did not reverse a factual finding in its *de novo*

² RCW 9A.04.050 provides: "Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong."

review. The court simply decided the legal question - whether the evidence presented to the Commissioner in Ramer was sufficient, as a matter of law, to establish the state's claim that Ramer possessed the capacity to commit the crime of rape, notwithstanding the decision of the Superior Court.

In Ramer, the Supreme Court was doing what it frequently is called upon to do in its review of criminal cases – decide whether sufficient evidence was presented. As, for example, whether there was sufficient evidence presented to establish proof of the crime charged beyond a reasonable doubt. In re Martinez 171 Wn2d 354, 256 33d 277 (2011). Similarly, in Ramer, the Court looked to whether substantial evidence was presented by the state to overcome the statutory presumption that a child under the age of 12 lacks the capacity to commit a crime.

Ramer was fundamentally a review about the sufficiency of evidence, a legal issue. That is not the nature of the ruling revised by the Superior Court in this case. The Superior Court here made a review of fact, i.e. whether Foster raped Charbonneau.

Justice Madsen concurs in Ramer and makes the point that Ramer was not intended to change the scope of appellate review in

juvenile capacity appeals. Ramer is limited, in the view of appellant, to issues of juvenile capacity to commit criminal acts, which is a special area of criminal law. These determinations are questions of law.

Appellant's construction of the meaning and scope of Ramer is consistent with the Supreme Court's later ruling in In re Marriage of Langham, 153 Wn2d 553, 106 P.3d 212 (2005). In that case, the Court considered the question of the standard of review for dissolution decisions of the Commissioner upon revision by the Superior Court. The Supreme Court found *de novo* review was appropriate where documentary evidence was involved and the initial decision did not involve credibility determinations. The Court stated:

The parties dispute the appropriate standard of review. Velle argues it should be *de novo* since the record is entirely documentary evidence. Margo argues for the abuse of discretion standard normally used in property settlement cases... Since the parties do not dispute the underlying facts but only the conclusions drawn from the facts, the correct standard is *de novo* since the trial court commissioner relied solely on documentary evidence and credibility is not an issue.

Charbonneau has no answer for In re Marriage of Langham, 153 Wn2d 553, 106 P.3d 212 (2005), which came after Ramer and was a case specifically focused on the standard of review.

The focus of Ramer on the adequacy of the showing of a juvenile's capacity to commit crimes makes its distinguishable from the instant case.

Charbonneau has also cited In re Marriage of Dodd 120 Wa. App. 644, 86 P.3d 801(2004) as favorable to her position. Dodd was a case where a father sought modification of a child support order. The Commissioner hearing the case could not determine the father's income and entered a modification order imputing the father's income at certain amount, using a low estimated hourly wage. The mother sought revision of the order. The Superior Court entered an order in the mother's favor, using statutory guidelines and imputing the father's income at a higher amount than had the Commissioner. The Superior Court was affirmed on appeal.

The court in Dodd stated:

A revision court may, based upon an independent review of the record, re-determine both the facts and legal conclusions drawn from the facts. B.S.S. 56 Wash.App. at 171, 782 P.2d 1100. Thus, the superior court on revision may review factual determinations for substantial evidence, but is not limited to a substantial evidence inquiry under RCW 2.24.050. In

re Smith, 8 Wash.App. at 288–89, 505 P.2d 1295.
Under Smith, the superior court has full jurisdiction
over the case.

In re Marriage of Dodd 120 Wa. App. at 644.

Underpinning the decision in Dodd is In re Welfare of Smith
8 Wash. App. 285, 505 P.2d 1295 (1973), which had to do with the
scope of review by a Superior Court judge of a custody proceeding
before a commissioner; Smith held that it was appropriate for a
Superior Court to determine its own facts and conduct further
proceedings.

The Court of Appeals in Perez v. Garcia 148 Wn.App. 131,
198 P.2d 539 (2009) questioned the viability of In re Welfare of
Smith 8 Wash. App. 285, 505 P.2d 1295 (1973):

[Smith] indicate[s] that the superior court may conduct
further proceedings it deems necessary on revision.
While the cases Bazaldua cited have not been
expressly overruled, their holdings are outdated and
contrary to current Washington case law. Moody
specifically discusses Smith stating:

We recognize that the Court of Appeals'
opinion in In re Welfare of Smith 8 Wash. App.
285, 505 P.2d 1295 (1973) is somewhat
unclear in that it could be interpreted to allow a
superior court judge to conduct whatever
additional proceedings the judge believed
necessary to resolve the case on review... We
do not read Smith so broadly. The statute limits
review to the record of the case and the

findings of fact and conclusions of law entered by the court commissioner. RCW 2.24.050. In an appropriate case, the superior court judge may determine that remand to the commissioner for further proceedings is necessary. Generally, a superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to the evidence and issues presented to the commissioner. In cases such as this one, where the evidence before the commissioner did not include live testimony, then the superior court judge's review of the record is *de novo*.

Perez v. Garcia 148 Wn.App. 131, 198 P.2d 539 (2009), quoting In re the Marriage of Moody, 137 Wash.2d at 992–93, 976 P.2d 1240 (1999). (Internal citations omitted.)

In this case, Commissioner Verge made factual findings after presiding over a contested hearing in which both sides presented live and conflicting evidence. In terms of facts, it was essentially a one issue case - whether Olivia Charbonneau proved her allegation that Foster had raped her. The Superior Court then revised and reversed the Commissioner, making a contrary finding of fact.

Ramer is distinguishable – this is a not a case where the Supreme Court reversed a lower court's findings of fact.

Charbonneau does not address the significance of the holding in In re Marriage of Langham, 153 Wn2d 553, 106 P.3d 212 (2005) and the numerous cases since then that emphasize that *de*

novus review may apply in cases where the parties have presented no live testimony.

This case should be decided on a standard of review basis. Foster testified before Verge, the initial finder of fact; the standard of review by the Superior Court in its review of Verge's decision was substantial evidence. Because the Superior Court's judgment was based upon a *de novo* standard of review, it must be reversed. This case should be remanded to be enforced as decided by Commissioner Verge.

It is not necessary for the Court reach any other questions.

3. RCW 7.90.090 (4) is not relevant to the resolution of this case. The trier of fact decides the case based upon the law, including the law of evidence. The trier of fact is presumed to correctly apply the law to the case. RCW 7.90.090 (4) stands as a simple statement that access to the courts should not be impeded by the considerations listed therein. If the statute intrudes upon the rules provided for by law for the determination of questions of fact by the trier of fact, then the statutory directive is an unconstitutional constraint that violates the separation of powers doctrine.

RCW 7.90.090 (4) does not apply to fact finding hearings and its effect is simply a pronouncement of what already pertains. At best, the statute is a public statement of purpose that there be no discrimination against alleged victims of sexual assault based

upon the factors contained therein. The statute does not mean to modify or preempt any other rule of evidence. The trier of fact will continue to decide each and every contested factual controversy that comes before it by due and careful consideration of the applicable laws of evidence.

If the court considers, as argued by Charbonneau and accepted by the Superior Court, that RCW 7.90.090 (4) is applicable to guide the trier of fact's resolutions of questions of fact, it is necessary to define exactly how the statute is intended to affect the trier's resolution of the case.

What is the purpose of this statute? Does it apply in this case, and, if so, how?

Charbonneau and the Superior Court consider RCW 7.90.040 (4) to be relevant to the fact finder in his consideration of the evidence in this case. How the statute impacted the Superior Court's revision can be seen in two remarks made by the Superior Court:

It is uncontroverted that there was a substantial amount of alcohol consumed by the respondent at the time. I think the statute does specifically provide that, as I noted and I think I quoted before, denial of an order cannot be based in whole or in part on evidence that petitioner was intoxicated.

I think Commissioner Verge in his decision relied upon that, and he spoke to it many many instances and spoke to it in detail as to how he believed that it impacted the petitioner's ability to recall or her behavior or her responses to the events of the day. I think that's inappropriate under the context of the statute.

Report of Proceedings October 28, 2011, Page 19.

Shortly after making these remarks, the Superior Court opined:

I also would find that the evidence is pretty clear that she consumed a substantial amount of alcohol and therefore her behavior and her reactions at the time of the event when she was in the residence with the respondent, and possibly somewhat afterward, were probably colored by the fact that she was intoxicated. I would think that would affect her response and the way she would do what she would do. ... **I think by a preponderance of the evidence the petitioner has established that this was non consensual because not only of what she has said but because of the fact that she was intoxicated to the level that she was.** Page 20 Report of Proceedings October 28, 2011.

Foster has pondered the implications of RCW 7.90.090 (4) and cannot discern how the statute is to be applied in cases where the complaint of sexual assault is made in circumstances where one or both of the parties is voluntarily intoxicated. Foster asserts that is unconstitutional because it is void and not capable of objective application.

If RCW 7.90.090 is not void for vagueness, then it is unconstitutional as a violation of the doctrine of separation of powers. Recently, the Washington Supreme Court in State v. Gresham, 173 Wn 2d 405 269 P.3d 207 (2012), declared unconstitutional a state law that made relevant and admissible evidence of prior sexual misconduct for the purposes of showing the defendant's propensity to commit the crime. Because this propensity evidence conflicted with ER 404 (b) which made such prior bad acts not admissible to show propensity, the statute was declared unconstitutional:

Our separation of powers jurisprudence relating to legislative enactments alleged to conflict with court rules is well developed. “[T]he power to prescribe rules for procedure and practice” is an inherent power of the judicial branch, State v. Smith, 84 Wash.2d 498, 501, 527 P.2d 674 (1974), and flows from article IV, section 1 of the Washington Constitution, State v. Fields, 85 Wash.2d 126, 129, 530 P.2d 284 (1975)... The legislature may also adopt, by statute, rules governing court procedures. “If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both.” Putman v. Wenatchee Valley Med. Ctr., PS, 166 Wash.2d 974, 980, 216 P.3d 374 (2009). If the statute and the rule “cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.” *Id.*

RCW 10.58.090 cannot be harmonized with ER 404(b). As discussed, ER 404(b) is a categorical bar to introduction of evidence of prior misconduct for the

purpose of showing the defendant's character and action in conformity with that character. There are no exceptions to this rule. RCW 10.58.090(1) provides that evidence of sex offenses, which are undoubtedly "prior crimes, wrongs, or acts," is admissible "notwithstanding Evidence Rule 404(b)." That is, RCW 10.58.090 makes evidence of prior sex offenses admissible for the purpose of showing the defendant's character and action in conformity with that character. In other words, RCW 10.58.090 makes admissible evidence that ER 404(b) declares inadmissible. This is an irreconcilable conflict.

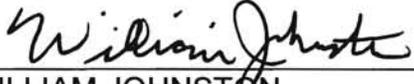
State v. Gresham 173 Wn2d at 428-429.

If RCW 7.90.090 (4) survives a vagueness analysis, it violates separation of powers under Gresham analysis.

CONCLUSION

This court should reverse and reinstate the decision of the Commissioner as supported by substantial evidence. If necessary, the court should declare RCW 7.90.090 (4) unconstitutional to the extent that it imposes constraints upon the normal rules of evidence that pertain in contested factual matters.

^{26th}
Dated this day of July, 2012



WILLIAM JOHNSTON
Attorney for Appellant TANNER FOSTER