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Nº. 34145-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Respondent,

v.

HARRY VERN FOX,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,

Cause No. 01-2-07150-1

The Honorable Sergio Armijo, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the State's Motion for Summary Judgment.
2. Amended RCW 71.09.090 is an unconstitutional attempt to legislatively overrule case law.
3. Amended RCW 71.09.090 is an unconstitutional infringement on the judicial process.
4. Amended RCW 71.09.090 violates equal protection and due process.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the May 2005 amendment to RCW 71.09.090 apply to Mr. Fox's case where the trial court had already granted him the right to a new trial under the previous version of the statute? (Assignment of Error No. 1)
2. Does the legislature have the authority to determine what evidence is sufficient for a detainee to show cause that he is no longer a sexually violent predator? (Assignments of Error Nos. 2, 3)
3. Does allowing actuarial risk assessment evidence at initial commitment hearings for sexually violent predators but not allowing it at show cause hearings violate equal protection and due process? (Assignment of Error No. 4)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On July 26, 2002, Mr. Fox stipulated that he was a sexually violent predator and was committed to the custody of the Department of Social and Health Services. CP 21-64.

On March 3, 2005, a show cause hearing was held to determine whether Mr. Fox should continue to be held as a sexually violent predator. RP 3-3-05, 2-24.¹ Mr. Fox argued that he was entitled to a full evidentiary hearing (a new commitment trial) under Chapter 71.09 RCW because he no longer met the criteria of a sexually violent predator. CP 74-108. Mr. Fox based this argument on statistical evidence contained in the report of Dr. Wollert that, due to his age, Mr. Fox had a statistical probability of committing another offense of less than 11%. CP 74-108.

The trial court granted Mr. Fox's Motion for New Trial and trial was set for October 3, 2005. CP 176-177.

On May 9, 2005, RCW 71.09.090 was amended to include, *inter alia*, the following language:

(2)(a)...If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed

¹ The volumes of the Report of Proceedings are not numbered continuously. Reference to the transcripts will be by date the hearing was held followed by the page numbers.

that:(i) He or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

(4)(a) 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 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.

(b) A new trial proceeding under subsection (3) of this section may be ordered, or held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding: (i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or (ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

(c) For purposes of this section, a change in a **single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section.** As used in this section, a **single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.**

On August 5, 2005, the State moved for Summary Judgment with regards to the pending trial on grounds that the only evidence which Mr. Fox had presented to establish that he no longer met the definition of a sexually violent predator was that he had moved into an age bracket with a very low statistical probability of likelihood of reoffending. CP 182-289. The State argued that the newly amended RCW 71.09.090 explicitly barred the use of age as the sole factor on which a new trial may be granted under RCW 71.09, and that the language in the amended RCW 71.09.090(4)(b) that, “[a] new trial proceeding under subsection (3) of this section may be ordered, or held” barred Mr. Fox’s October 3, 2005 trial because the trial had not yet been held. CP 182-289, RP 11-4-05, 3-4.

The trial court granted the State’s motion for summary judgment and held, “I’m going to have to agree with the motion for summary judgment and sign the order, and hopefully [Mr. Fox will] appeal this and somebody else can think about this a lot more.” RP 11-4-05, 20.

Notice of appeal was timely filed on December 1, 2005. CP 410.

D. ARGUMENT

1. **It was error for the trial court to grant the State's Motion for Summary Judgment when doing so deprived Mr. Fox of his substantive right to a new trial**

There is a strong presumption that statutes and rules apply prospectively only, unless (1) there is legislative intent to apply the law retroactively, or (2) the statute is remedial and retroactive application would further its remedial purpose. *Letourneau v. State, Dept. of Licensing*, 131 Wn.App 657, 128 P.3d 647, 651 (2006); *City of Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143 (1987).

When a statute or regulation is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive as curative. *State v. MacKenzie*, 114 Wn.App 687, 699, 60 P.3d 607 (2002), citing *In Re Personal Restraint of Matteson*, 142 Wn.2d 298, 308-09, 12 P.3d 585 (2000).

An amendment is remedial if it relates to a practice, procedure or remedies, and does not affect a substantive or vested right. *Letourneau*, 131 Wn.App 657, 128 P.3d at 651 (citing *MacKenzie*, 114 Wn.App. at 700, 60 P.3d 607).

When a retroactive application is not expressly provided for in a statute, generally it should not be judicially implied. *Miebach v. Colasurdo*, 102 Wn.2d 170, 180, 685 P.2d 1074 (1984).

Where a statute is couched in language expressed in present and future tenses rather than the past tense, the legislature is deemed to have intended the statute to apply prospectively only. *Johnston v. Beneficial Management Corp. of America*, 85 Wn.2d 637, 641-642, 538 P.2d 510 (1975).

Interpretation of a statute is reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

a. *There is no evidence that the legislature intended amended RCW 71.09.090 to apply retroactively.*

The Historical and Statutory Notes section added to RCW 71.09.090 states that by amending the statute, “the legislature intends to clarify the ‘so changed’ standard.” 2005 c 344 § 1. While the legislative intent section did state that the statute would “take effect immediately [May 9, 2005]” (2005 c 344 § 4), no language was included indicating that the statute was intended to be applied retroactively.

The State asserted below, and the trial court agreed that the amended statute applied to Mr. Fox based solely on the phrase “A new trial proceeding under subsection (3) of this section may be ordered, or held” contained in RCW 71.09.090(4)(b). The State argued that the words “or held” evidenced the legislatures intent to have the amended statute apply retroactively. The state was simply wrong. “Held,” which if

appearing alone would be a past tense verb, must be read in conjunction with “may be.” In this sentence, the verb is “may be...held.” This is language in the future tense, and therefore, under *Johnston*, the legislature is deemed to have intended the statute to apply prospectively only.

b. RCW 71.09.090 was not amended to clarify an internal inconsistency to help it conform to its original intent.

In the Historical and Statutory Notes section of amended RCW 71.09.090, the legislature wrote,

The legislature finds that the decisions in *In re Young*, 120 Wn.App 753, review denied, Wn.2d (2004) and *In re Ward*, Wn.App. (2005) illustrate an unintended consequence in chapter 71.09 RCW...Therefore, the legislature intends to clarify the ‘so changed’ standard.

Thus it is clear that the amendment was enacted not to clarify an internal inconsistency in the statute, but to correct an unintended interpretation of the statute which had developed in Washington courts.

c. The statute as applied to Mr. Fox is not remedial because it affects his substantive right to a jury trial.

Viewing all facts in the light most favorable to the party challenging the summary dismissal, a reviewing court reviews a trial court's grant of summary judgment de novo. *Heckle I*, 143 Wn.2d 824, 831-32, 24 P.3d 404, cert. denied 534 U.S. 997, 122 S.Ct. 467, 151 L.Ed.2d 383 (2001).

A substantive right is “a right that can be protected or enforced by law; a right of substance rather than form.” BLACK’S LAW DICTIONARY (7th ed., 1999), p. 1324. In contrast, a procedural right is “a right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right.” BLACK’S LAW DICTIONARY (7th ed., 1999), p. 1323.

Therefore, the right to a jury trial is a substantive right rather than a procedural right. The trial court’s order granting Mr. Fox’s Motion for New Trial created a substantive right to a jury trial.

While it is true that Mr. Fox would not have obtained a new trial under amended RCW 71.09.090, the fact remains that Mr. Fox was granted the right to a jury trial prior to the enactment of the amended statute. The amended statute can not be applied retroactively to Mr. Fox because doing so would affect Mr. Fox’s substantive right to a jury trial as granted by the court’s order.

The amended statute did not apply to Mr. Fox and the trial court erred in granting the Motion for Summary Judgment.

2. Amended RCW 71.09.090 is an unconstitutional infringement on the judicial process

Should this court find that amended RCW 71.09.090 applies to Mr. Fox, it is still an unconstitutional statute.

a. *Amended RCW 71.09.090 violates the Separation of Powers Doctrine by stripping the courts of the power to adjudicate*

All judicial power of the state has been vested in the Supreme Court and the various other courts designated in our state's constitution. Wash, Const. art IV, § 1; *State v. Fields*, 85 Wn.2d 126, 129, 530 P.2d 284 (1975). The Supreme Court thus has inherent constitutional authority to govern court procedures in addition to the statutory authority found in RCW 2.04.190 which states that the Supreme Court has statutory authority to prescribe the mode and manner of taking and obtaining evidence.

Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme. *See State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984).

It is clear under Washington law that the legislature cannot make or change judicial determinations:

While a court will not controvert legislative findings of fact, the legislature is precluded by the constitutional doctrine of separation of powers from making judicial determinations. Courts have generally recognized the distinction between legislative and judicial determinations and have carefully preserved judicial functions from legislative encroachment. For example, in *Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 222, 369 P.2d 605, 609 (1961), this court declared: 'The construction of the meaning and scope of a constitutional provision is exclusively a judicial function.' In *Plummer v. Gaines*, 70 Wn.2d 53, 58, 422 P.2d 17, 21 (1966), this court stated:

(T)he legislature may not determine what constitutes a 'general election' within the purview of a constitutional provision, for such a determination involves an interpretive process or function which, in the final legal analysis, under our system of government, is reposed in the judicial branch.

Courts from other jurisdictions have declared that the legislature cannot determine the existence of liability under insurance policies, *State Farm Mut. Auto. Ins. Co. v. Christensen*, 88 Nev. 160, 494 P.2d 552 (1972); cannot declare conclusively what constitutes 'adulterated food,' *State v. A.J. Bayless Mkts., Inc.*, 86 Ariz. 193, 342 P.2d 1088 (1959); cannot interpret provisions of a will, *Hartford v. Larrabee Fund Ass'n*, 161 Conn. 312, 288 A.2d 71 (1971); cannot determine whether a particular use of property is 'charitable,' *People ex rel. Nordlund v. Ass'n of the Winnebago Home for the Aged*, 40 Ill.2d 91, 237 N.E.2d 533 (1968); cannot determine what constitutes 'just compensation,' *State Plant Bd. v. Smith*, 110 So.2d 401 (Fla.1959); *Buffalo v. J. W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971); cannot determine legal liability in a tort case, *Koehler v. Massell*, 229 Ga. 359, 191 S.E.2d 830 (1972); and cannot determine who is entitled to office in a disputed election, *State ex rel. Worrell v. Carr*, 129 Ind. 44, 28 N.E. 88 (1891).

Tacoma v. O'Brien, 85 Wn.2d 266, 272-273, 534 P.2d 114 (1975).

In general, there are two broad approaches to conducting the risk assessments which are the most common form of evidence "admitted to aid in the prediction of future dangerousness: clinical judgment or actuarial assessment." *In re Thorell*, 149 Wn.2d 724, 753, 72 P.3d 708

(2003). The *Thorell* court described the difference between the two approaches as follows:

The clinical approach requires evaluators to consider a wide range of risk factors and then form an overall opinion concerning future dangerousness. The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense which may be adjusted (or not) by expert evaluators considering potentially important factors not included in the actuarial measure.

Actuarial approaches use statistical analysis to identify a number of risk factors that assist in the prediction of future dangerousness. Because actuarial models are based on statistical analysis of small sample sizes, they have a variety of potential predictive shortcomings...However, despite their potential statistical limitations, some experts have called for the complete rejection of clinical assessment in favor of purely actuarial assessment.

In re Thorell, 149 Wn.2d at 753-754 (citations omitted).

The *Thorell* court ultimately concluded that both the clinical and actuarial determinations of future dangerousness satisfied the *Frye* standard. *Thorell*, 149 Wn.2d at 756, 72 P.3d 708. The court further held that “actuarial assessments, which satisfy the requirements of ER 403, ER 702, and ER 703 are admissible and not profile evidence.” *Thorell*, 149 Wn.2d at 758, 72 P.3d 708. The standards of ER 702 and *Frye* have also been applied to an expert’s actuarial risk analysis at a show cause hearing. *See In re Young*, 120 Wn.App. 753, 761, 86 P.3d 810 (2004).

Amended RCW 71.09.090(4)(b) is an attempt by the legislature to usurp the right of the court to determine whether or not there is probable cause to conduct a full evidentiary trial with respect to the determination of continued dangerousness. Amended RCW 71.09.090(4)(c) provides, in pertinent part,

a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. **As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.**

There is no similar statutory provision for the limitation of the persuasive weight of evidence regarding this determination during the initial sexually violent predator commitment trial. Rather, these trials, like all other civil or criminal trials held in our state, are conducted under the Washington Rules of Evidence.

In *Ryan*, the defendant argued that the enactment of RCW 9A.44.120, a hearsay exception, violated the separation of powers doctrine in that the statute constituted a legislative invasion of the judicial province. *Ryan*, 103 Wn.2d at 179, 691 P.2d 197. The Washington Supreme Court disagreed because the Rules of Evidence specifically contemplated legislative enactments of hearsay exception. *Id.* That situation does not exist here. Amended RCW 71.09.090 is irreconcilably inconsistent with

all court rules and decisions (e.g., ER 702, *Frye*) governing the admissibility of evidence regarding current dangerousness, a bedrock principle underlying the sexually violent predator commitment statute and the focus of RCW 71.09.090 show cause hearings.

To mandate that the only evidence which may be persuasive to a fact finder in evaluating whether a person is still a sexually violent predator under RCW 71.09, specifically that he has either suffered some incapacitating malady or has successfully completed a treatment regime, infringes on the court's ability to apply the rules of evidence and make its own determination as to what constitutes dangerousness. It is the province of the courts to weigh evidence and apply court rules including the rules of evidence. In essence, amended RCW 71.09.090 strips the judiciary of its power to adjudicate and invades the province of the jury in weighing what admissible evidence may or may not be persuasive.

b. Amended RCW 71.09.090 violates due process and equal protection

Even if this court were to find that amended RCW 71.09.090 does not violate the separation of powers doctrine, the court should nonetheless find that it is unconstitutional because it violates due process and/or equal protection. As indicated above, “[c]ommitment for any reason constitutes

a significant deprivation of liberty triggering due process protection.”
Thorell, 149 Wn.2d at 731, 72 P.3d 708.

RCW 71.09.090 was amended to legislatively overrule *In re Young*, 120 Wn.App. 753, 86 P.3d 810, *review denied* 152 Wn.2d 1035 (2004) and *In re Ward*, 125 Wn.App. 381, 104 P.3d 747 (2005). The decisions in *Young* and *Ward* are based on the notion that continued and/or current dangerousness-an essential constitutional principle underlying the sexually violent predator commitment statute- is the focus of a show cause hearing held pursuant to RCW 71.09.090. The court in *Ward* based its decision on this principle, stating that “current dangerousness is a bedrock principle underlying the sexual violent predator commitment statute. The purpose of show cause hearings is to determine whether a detainee remains mentally ill and a danger to the public.” *Ward*, 125 Wn.App. at 386, 104 P.3d 747.

The decisions in both *Young* and *Ward* are firmly rooted in the concept that due process itself requires a new commitment trial if the committed person demonstrates that he is no longer a danger to the public. The court in *Ward* clearly stated that if a detainee provides new evidence establishing probable cause that he is not now a sexually violent predator, due process requires a new trial on this issue regardless of whether the evidence could also have challenged the basis of is original commitment.

Ward, 125 Wn.App. at 386, 104 P.3d 747. This echoed the *Young* court's statement that "because current risk assessment techniques suggest Young is not currently a SVP, denying him a hearing at this point raises due process concerns." *Young*, 12 Wn.App. at 763, 86 P.3d 810. The Washington Supreme Court noted the following with regard to due process concerns raised by civil commitment:

Freedom from bodily restraint has always been at the core of the liberty interest protected by the due process clause of the fourteenth amendment to the United States Constitution. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. However, the civil commitment of an SVP satisfies due process if the SVP statute couples proof of dangerousness with proof of an additional element, such as mental illness, because the additional element limits confinement to those who suffer from an impairment rendering them dangerous beyond their control.

Thorell, 149 Wn.2d at 731, 762 P.3d 708 (citations omitted).

The *Ward* and *Young* decisions make clear that if a sexually violent predator detainee presents prima facie evidence establishing that he is not a danger to society, due process requires that he receive a full trial on whether he must remain committed as a sexually violent predator. See *Ward*, 125 Wn.App at 389-90, 104 P.3d 747; see also *Young*, 120 Wn.App. at 763, 86 P.3d 810 ("Because current risk assessment techniques suggest Young is not currently an SVP, denying him a hearing at this point raises due process concerns.").

Mr. Fox presented prima facie evidence concerning his lack of dangerousness at the March hearing. Due process required, and the trial court ordered that Mr. Fox receive a full trial on his commitment status. Amended RCW 71.09.090 denies Mr. Fox his due process right to a full trial on whether he must remain committed as a sexually violent predator. Therefore, amended RCW 71.09.090 is unconstitutional.

Amended RCW 71.09.090 also violates equal protection because it treats pre-trial detainees different than post-trial committees without sufficient justification for doing so. It cannot be disputed that the type of evidence proffered by Mr. Fox at his show cause hearing would be admissible at an initial sexually violent predator commitment trial under RCW 71.09.050. Therefore, excluding this type of evidence at an RCW 71.09.090 show cause hearing constitutes an equal protection violation.

The commitment of sexually violent predators is predicated on current dangerousness. Amended RCW 71.09.090 arbitrarily excludes competent evidence on this factual issue after the initial commitment trial. Therefore, amended RCW 71.09.090 violates equal protection. *See Thorell*, 149 Wn.2d at 749, 762 P.3d 708 (“The burden rests with the party challenging the classification to show it is purely arbitrary.”) (citations omitted).

E. CONCLUSION

For the reasons stated above, this court should reverse the trial court's ruling dismissing Mr. Fox's case and remand for the jury trial that he was granted under the former version of Chapter 71.09 RCW.

Alternatively, this court should find that amended RCW 71.09.090 is unconstitutional and remand this case back to the trial court for the court ordered hearing under the former version of Chapter 71.09 RCW.

DATED this 30th day of June, 2006.

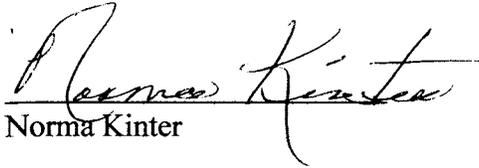
Respectfully submitted,

A handwritten signature in cursive script that reads "Sheri Arnold".

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on July 3, 2006, she delivered by U. S. Mail to: Malcolm Ross, Assistant Attorney General, 900 4th Avenue, Suite 2000, Seattle, Washington 98164-1012, and appellant, Harry V. Fox, Special Commitment Center # 490156, McNeil Island Corrections Center, Post Office Box 88600, Steilacoom, Washington 98388, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on July 3, 2006.


Norma Kinter

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