NO. 35927-8-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

CHRISTOPHER GAYLORD,

Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Gaylord Fails To Cite Any Authority Recognizing A Right To Shop For A Favorable Expert Opinion

Gaylord does not deny that he was expert shopping. He defends that practice and the trial court's order because they allegedly "keep the litigants equally situated[.]" Respondent's Brief at 7. He cites no authority supporting that clearly erroneous proposition. Overwhelming authority establishes that Gaylord does not have a right to a favorable expert opinion.

In defending the practice of expert shopping, Gaylord asserts that the possibility of indefinite confinement under RCW 71.09 requires that he be given "every opportunity" to obtain a favorable expert opinion. He cites no authority to support his argument:

> Can it be said that allowing Mr. Gaylord every opportunity to contest indefinite confinement is not "right and equitable under the circumstances and the law?" Is it "manifestly unreasonable" for [a] trial judge to seek a "just result" by attempting to keep the litigants equally situated? . . . A "no" answer to each query is not unreasonable.

Respondent's Brief at 7. Though Gaylord's rhetorical questions clothe expert shopping in the wardrobe of high ideals, the answers to them are clearly "yes." The trial court's order was neither equitable nor reasonable.

Its reasoning would result in Gaylord "undergoing a series of psychiatric examinations until a favorable psychiatric report was filed with the court." *U.S. v. Valtierra*, 467 F.2d 125, 126 (9th Cir. 1972) (citing *U.S. v Maret,* 433 F.2d 1064, 1068 (8th Cir. 1970)). Nor does Gaylord have the right to "effective assistance" from his chosen expert. There is no such right, even in criminal cases involving the death penalty. *Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990).[1]

The trial court's order permitted Gaylord to expert shop. There is no authority that supports it and overwhelming authority establishes that it was error. The order should be reversed.

B. The Criminal Law Is Illustrative Because Gaylord Asserts A Right That Even Death Penalty Defendants Do Not Have

Gaylord argues that *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed.2d 53 (1985), and other criminal cases have no bearing on this civil case. He misunderstands the State's arguments. Gaylord is asserting a right to a favorable expert opinion that even criminal defendants in capital cases do not have. Since criminal laws afford greater protections to defendants than RCW 71.09 affords to civil respondents, yet

[1] *See also Wilson v. Greene*, 155 F.2d 396, 401-02 (4th Cir. 1998); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990); *Burgess v. State*, 962 So.2d 272, 291 (Ala. App. 2005); *People v. Samayoa*, 15 Cal.4th 795, 837, 938 P.2d 2 (1997); *Schofield v. Holsey*, 642 S.E.2d 56, 61 (Ga. 2007); *Wilcher v. State*, 863 So.2d 776, 803 (Miss. 2003); *State v. Leonard*, 813 N.E.2d 50, 58 (Ohio App. 2004); *Alley v. State*, 882 S.W.2d 810, 814 (Tenn. App. 1994).

do not recognize a right to a favorable expert opinion, Gaylord has no such right in this civil case.

Gaylord correctly notes that the Legislature and Washington courts have refused to extend many criminal protections to SVP respondents. Respondent's Brief at 1-2. For example, SVP respondents have no right to remain silent, no right to a presumption that they are not SVPs and no right to additional peremptory challenges. *In re Twining*, 77 Wn. App. 882, 894-95, 894 P.2d 1331, *review denied,* 127 Wn.2d 1018, 904 P.2d 299 (1995) (citing RCW 71.09.060; *In re Detention of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993)).

Gaylord also correctly recognizes that such protections are not mandated because this is a civil case. Respondent's Brief at 1. But he fails to note the corollary: If criminal defendants in capital cases have no right to shop for a favorable expert opinion, there can be no such right in a civil case, particularly where the Legislature provided for one forensic expert at public expense.

Gaylord's assertion that he is due "every opportunity" to obtain a favorable expert opinion runs contrary to the Legislature's purpose in enacting RCW 71.09. The primary purpose of RCW 71.09 is to protect the public from mentally ill sex offenders. RCW 71.09.010; *In re Detention of McGary*, 128 Wn. App. 467, 474, 116 P.3d 415 (2005)

(citing *In re Detention of Thorell,* 149 Wn.2d 724, 750, 72 P.3d 708 (2003)). Gaylord's assertion of a right that even criminal defendants do not have is utterly inconsistent with the Legislature's civil purpose. The Legislature went beyond any constitutional right Gaylord may have by providing him the statutory right to *choose* a single forensic expert. He is due no more and the trial court erred.

C. The Trial Court Erred Under Any Standard That Is Applied

Gaylord argues that the trial court was not bound by administrative regulations because of the separation of powers doctrine. Here, however, the administrative regulation was consistent with the statute, and when the law is read as a whole, the trial court's violation of the former was a violation of the latter. In any event, the trial court's order was erroneous under any standard that can be applied, because no competent authority recognizes a right to shop for a favorable expert opinion.

The separation of powers doctrine appears in neither the state nor the federal constitutions. It is presumed from the division of government into different branches. *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). It does not demand that the branches be "hermetically sealed" from each other because they must "remain partially intertwined" to function properly. *Id.* at 135. The doctrine is "grounded in flexibility and practicality, and rarely will offer a definitive boundary

beyond which one branch may not tread." *Id.* (citing *Matter of Salary of Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976)).

The DSHS regulation authorizing reimbursement to counties for additional experts appointed for "good cause" does not raise a separation of powers issue because it is consistent with RCW 71.09. WAC 388-885-010(3) provides reimbursement for a "single examiner" to perform a forensic evaluation of whether the respondent meets the criteria for civil commitment, consistent with RCW 71.09.050(2). "Good cause" is not defined, but the difference between that standard and the abuse of discretion standard cannot be greater than the difference between dusk and twilight. *See Application of Sage*, 21 Wn. App. 803, 810-11, 586 P.2d 1201 (1978) (no precise definition of "good cause;" judge must make discretionary decision); *State v. Dearborn*, 125 Wn.2d 173, 179-81, 883 P.2d 303 (1994).

If there is a difference between "good cause" and the abuse of discretion standard, it has no effect here. When the trial court asked Gaylord's counsel what the "good cause" was to support his request, it was seeking tenable reasons for making the appointment. RP at 2. Because Gaylord was unable to provide a proper basis, there were neither tenable reasons nor "good cause" supporting the trial court's decision.

The regulation is thus consistent with the statute, and does not impermissibly encroach on the judicial function. Indeed, if Gaylord is correct that trial courts can authorize expert shopping, such unfettered discretion by the judicial branch would encroach on the administrative ability to control funding and costs.

Gaylord's other arguments have no merit. He argues that the record is insufficient for review because no formal findings or conclusions supporting the appointment were entered below. Respondent's Brief at 7. However, where there are no written findings to support a decision, a reviewing court examines a trial court's oral decision to determine the basis for the order. *In re LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986); *In re Detention of Stout*, 128 Wn. App. 21, 33 n.35, 114 P.3d 658 (2005) (reviewing court can look to oral decision where written decision does not specify standard of proof that was applied). Here, the record contains the trial court's oral decision, setting out its reasons for granting Gaylord's motion. RP at 7. The record is sufficient for review.

Gaylord also suggests that a reversal of the trial court's order "would do little more than invite the trial court to provide other grounds for a second such appointment." Respondent's Brief at 7. But where Gaylord himself is unable to articulate any other grounds supporting the trial court's order, it is highly improbable that the trial court would

commit such a clearly pretextual act. Gaylord's arguments should be rejected.

II. CONCLUSION

For the foregoing reasons, the trial court's order should be reversed.

RESPECTFULLY SUBMITTED this 31st day of October, 2007.

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: CHRISTOPHER GAYLORD, Respondent.	DECLARATION OF SERVICE

I, Robert Lyons, declare as follows:

On October 31, 2007, I deposited in the United States mail true and correct cop(ies) of Appellant's Reply Brief, postage affixed, addressed as follows:

John Cross
559 Bay Street
Port Orchard, WA 98366

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED October 31, 2007, at Seattle, Washington.

ROBERT LYONS

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