

NO. 35927-8-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

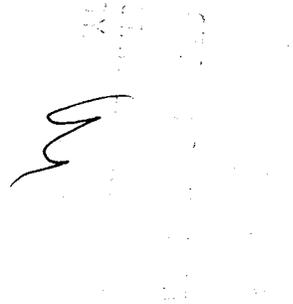
STATE OF WASHINGTON,

Appellant,

v.

CHRISTOPHER GAYLORD,

Respondent.

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RESPONDENT'S BRIEF

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I. COUNTERSTATEMENT OF ISSUE

1. The trial court did not commit an error of law where no applicable law vitiates the trial court's exercise of discretion.
2. The trial court did not abuse its discretion.

II. STATEMENT OF THE CASE

The State's recitation of facts covers the issues presented.

III. ARGUMENT

A. The trial court did not commit an error of law.

The State asserts that the trial court's order constitutes an error of law. The State relies on RCW 71.09.050(2), WAC 388-885-010 and Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) in support of that assertion. This assertion fails because Ake v. Oklahoma is neither applicable to the present case nor does the analysis therein warrant the result sought. The assertion fails because WAC 388-885-010 provides no binding authority to the trial court. And, the assertion fails because RCW 71.09.050(2) does not, as a matter of law, foreclose the exercise of judicial discretion.

1. Ake v. Oklahoma neither applies to the present case nor mandates reversal.

Ake, supra is a criminal case. The present case is a civil case pursuant under RCW 71.09. This obvious distinction makes a difference.

Assertions of criminal law jurisprudence by RCW 71.09 respondents have always failed. See Kansas v. Hendricks S21 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (19); Kansas v. Crane, U.S., S.Ct., L.Ed..2d (19); Seling v.

Young 531 U.S. 250, 121 S.Ct..727, 148 L.Ed.2d 734 (2000); In re Young, 122 Wn.2d 1, 857 P, 2d 989 (1993). RCW 71.09 respondents have but very narrow criminal law type rights granted by the statute: that proof be made beyond a reasonable doubt, that the matter should be tried to a jury, and the right to counsel. RCW 71.09.050. Otherwise, criminal law is inapplicable as such. Thus, since the Ake analysis applies by its terms to a different area of the law, it cannot provide the basis for an error of law in the present context. See Ake 470 U.S. at 87 (Chief Justice Burger concurring: “Nothing in the Court’s opinion reaches noncapital cases.”).

2. The reasoning of Ake does not establish an error of law.

Even if Ake applies, or has some persuasive impact, the case does not command reversal herein. In Ake, the Supreme Court was dealing with the trial court’s refusal to provide an independent expert at public expense in a criminal case that involved issues of Ake’s mental status at the time of the alleged offense. Sweeping aside Oklahoma’s fiscal concerns, the Court held that where sanity issues are “a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” Ake at 470 U.S.83 (emphasis added). This is the rule of Ake.

As with most rules flowing from the United States Constitution, the Supreme Court in Ake set a floor below which states may not go. The Court, as emphasized above, set the minimum requirement of Due Process. Nowhere in the decision does the Supreme Court limit the authority of the state or the discretion of trial court to provide more than Due Process requires. Clearly, if the Oklahoma trial court had said “yes” to Mr. Ake’s request, the Supreme Court’s analysis would be the same.

The state, however, wants this court to ignore the analysis and the core holding of the Ake court and focus instead on the Supreme Court's caveat. In dictum, the Court hastened to point out that its holding does not give carte blanche to defendants. Essentially, this dictum is consistent with the Supreme Court's setting of a minimum requirement only. As is normal, the Supreme Court left it to the states to implement this minimum requirement.

3. WAC 388-885-010 does not establish an error of law.

Pursuant to RCW 71.09.800 the Secretary of the Department of Social and Health Services is directed to adopt rules to administer the statute. WAC 388-885-010 is one such rule. That provision is part of "rules [that] establish the standards and procedures for reimbursing counties for the cost incurred during civil commitment trial, annual evaluation, and review processes and release procedures related to chapter 71.09 RCW." WAC 388-885-005. The rules under subsection 885 are payment provisions only. But the state herein seeks to elevate this administrative payment rule to the force of statutory provisions and, in so elevating, establish the trial court's supposed error of law. This reasoning has no merit.

First, it is manifest that the state has not asserted any authority for the proposition that a trial court is bound to follow an administrative agency's rules. Moreover, and likely because of the novelty of the proposition, Mr. Gaylord has found no case that clearly addresses this issue. But see City of Redmond v. C.P.S.G.M.H.B., 136 Wn.2d 38, 46 959 P.2d 1091 (1998)(seems to hold that courts are not so bound).

Second, an issue akin to standing arises from this record and the state's argument. That is, the Department of Social and Health Services

(DSHS) did not appear or argue in this case. Counsel for the state appears herein as the Petitioner pursuant to RCW 71.09. Counsel does not appear to represent DSHS. This record, therefore, does not contain the position of DSHS with regard to the interpretation or application of the rule.

Since it should be assumed that DSHS would obey an otherwise lawful court order, it should be assumed that DSHS would interpret its payment provision as including a provision for payment of any other expenses the court may order. A contrary interpretation directly raises the question of where DSHS is given power to disobey a court order. And, once again, there would be no such authority.

Thus, it is unclear whether the agency itself would (or could) support the assertion that the “good cause” piece of its payment rules bind the Superior Court on the issue of appointment of experts. Further, this novel proposition would run afoul of one of the most fundamental aspects of our constitutional system.

4. Binding a trial court to an administrative agencies rules violates separation of powers.

Although separation of powers is not expressly mandated by either the U.S. or Washington Constitutions, courts have long recognized it as integral to our constitutional system. *See, e.g. Trouby v. U.S.*, 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991); Salary of Juvenile Director, 87 Wn.2d 232, 552 P.2d 163 (1976). In J.W. Hampton Co.v U.S., 276 U.S. 394, 48 S.Ct. 348. 72 L.Ed. 624 (1924), the court wrote:

“[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislature power, the President or the state executive, the Governor, the executive power, and the courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its

legislative power and transfers it to the President, or the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.” I.d., at 406, 48 S.Ct., at 351.

This rule forecloses the notion that our states legislature could, even if it wanted to, empower DSHS, an executive branch agency, to create positive law that binds the courts. Such governmental action would cut to the core of our system of checks and balances. It would be unconstitutional as undermining the very structure of our constitutional system. WAC 388-885-010 provides no basis for finding that the trial court committed an error of law.

B. The trial court did not abuse its discretion.

The foregoing establishes that neither Ake v. Oklahoma nor WAC 388-885-010 provides a basis for finding that the trial court erroneously applied the law. It remains to be decided whether, in light of RCW 71.09.050 (2), the trial court’s order constituted an abuse of discretion.

Here, the state must overcome a very high standard:

Judicial discretion “means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.” An appellate court will find an abuse of discretion only “on a clear showing” that the court’s exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” A trial court’s discretionary 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.” A court’s exercise of discretion is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’” T.S. v Boy Scouts of America, 157 Wn.2d 416, 423-4, 138 P.3d 1053 (2006) (internal citations omitted).

Since Ake v. Oklahoma and WAC 388-885-010 do not control, the state is left with arguing from RCW 71.09.050 (2) that the trial court erred. The state’s argument relies on that statute’s phrase “an expert or professional person”. The state says that the singular article “an” solves this appeal (both as a matter of law and as an abuse of discretion). The statute, the argument goes, allows for one and just one expert. The problem with this argument is readily evident on the next page of Appellant’s own brief. At page 6, the state goes on to concede that the “an” provision does not in fact mean just one. The reference to the “good cause” requirement of the payment WAC aside, the state there lists circumstances in a 71.09 proceeding where more than one expert for the respondent would be reasonable and allowable. The mind of creative counsel could easily expand on Appellant’s list of exceptions. (What if upon meeting each other, it quickly becomes the case that the respondent and the evaluator simply hate one-another?)

It is in this context that the trial court is being challenged. At bottom, the proposition asserted is that the trial court abuses its discretion if the state doesn’t like its reasons for its order. Moreover, a problem attends the present case with regard to the trial court’s reasoning. Throughout its argument, the state complains that the trial court made no

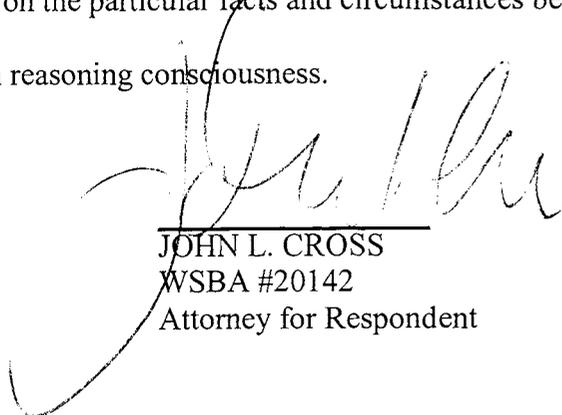
finding of “good cause” justifying its order. But, the Superior Court Civil Rules (CR) do not require findings of fact or conclusions of law for an order such as the one entered here. CR 52(5)(B); see also, CR 54(a)(2)(definition of “order”). Although CR 52(a)(3) does not require the state to propose findings for review, the sparse record herein begs clarification. The state neither sought to clarify the trial court’s rationale nor did it seek reconsideration. See CR 59(a)(7) and (8) (grounds for reconsideration include errors of law).

On the present record, little more can be said than that the trial court granted a motion and made remarks indicating an awareness of Mr. Gaylord’s plight. Formal findings or conclusions are not in the record and were not sought below. Possible reversal upon review would do little more than invite the trial court to provide other grounds for a second such order. See e.g., Miller v. FarmerBros. Co., 115 Wn.App.815. 64 P.3d 49 (2003).

Finally, it remains unclear why the trial court’s reasons as stated are insufficient. Can it be said that allowing Mr. Gaylord every opportunity to contest indefinite commitment is not “right and equitable under the circumstances and the law”? Is it “manifestly unreasonable” for trial judge to seek a “just result” by attempting to keep the litigants equally situated? Would “no reasonable person” adopt the view that the power of the state can overwhelm the position of a solitary sex offender? A “no” answer to each query is not unreasonable.

CONCLUSION

Careful analysis shows that the trial court made no error of law in this case. Similarly, the trial court's order was a sound and reasonable exercise of its discretion to assure that justice is done. On such an issue as this, the discretion of any trial court to control the litigation before it should be left undisturbed. No rule need be fashioned that attempts to solve all possible variants of the issue present. Trial courts should be left to decide such issues on the particular facts and circumstances before them armed with their own reasoning consciousness.



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WASHINGTON STATE COURT OF APPEALS

DIVISION II

In re the detention of) NO. 35927-8-II
)
 CHRISTOPHER GAYLORD) DECLARATION OF SERVICE BY MAIL
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RACHELLE DOYLE declares as follows:

On Thursday September 27, 2007, I deposited in the United States Mail first class postage prepaid, addressed as follows:

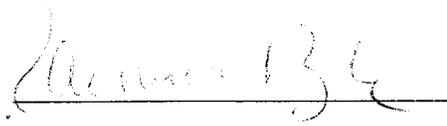
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Copies of the following documents: RESPONDENT'S BRIEF

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

DATED this 28th day of September, 2007



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