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DIVISION II
JUL -2 2008

NO. 36492-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

JAKE HAWKINS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

JOSHUA CHOATE, WSBA #30867
Assistant Attorney General
Attorneys for Respondent
(206) 389-3075

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I. ISSUES PRESENTED

RCW 71.09.040(4) mandates a pre-trial psychological evaluation of any person alleged to be a sexually violent predator (SVP). Specifically, once the probable cause determination is made, “the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator.” *Id.* “The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services.” *Id.* The issues presented on appeal are:

1. Did the trial court abuse its discretion by ordering Mr. Hawkins to submit to a sexual history polygraph examination as part of the statutorily mandated psychological evaluation?
2. Did the Department of Social and Health Services (DSHS) exceed its authority when it enacted WAC 388-880-034 which sets forth the responsibilities of the evaluator who is conducting the RCW 71.09.040(4) pretrial SVP psychological evaluation?

II. STATEMENT OF THE CASE

The State filed this SVP action on February 21, 2006, seeking the involuntary civil commitment of Mr. Hawkins as a sexually violent predator (SVP) pursuant to RCW 71.09. CP at 8-9. In support of its

initial petition, the State submitted a 51-page psychological evaluation of Mr. Hawkins conducted by Dr. Chris North, Ph.D.

Dr. North is a licensed psychologist who specializes in the evaluation of sex offenders. CP at 21. He has been involved in the evaluation of sex offenders since 1996. *Id.* Since that time, he has evaluated 500 sex offenders. *Id.*

Dr. North is familiar with SVP civil commitment statutes. *Id.* Dr. North has conducted approximately 500 SVP evaluations, including 15 in Washington. *Id.* He has been a member of the Joint Forensic Unit (JFU), the panel of experts selected to conduct SVP evaluations in Washington, since 2003. *Id.* He has testified as an expert witness in SVP matters approximately 100 times. *Id.* Dr. North's initial evaluation of Mr. Hawkins was based upon a records review and a January 7, 2005, clinical interview. *Id.*

The JFU, which began operation in 2002, is administered initially by the Department of Corrections (DOC), through whose End of Sentence Review Committee (ESRC) all potential SVP cases are screened. CP at 25. Pursuant to RCW 71.09.025(1)(b)(v), if the ESRC determines the offender appears to meet the definition of an SVP, the DOC assigns a member of the JFU to conduct an SVP evaluation of that offender. *Id.* In this case, that evaluator was Dr. North.

If the State subsequently files an SVP action against an offender, the evaluator who performed the pre-filing evaluation remains on the case. *Id.* Prior to trial, that evaluator conducts the evaluation mandated by RCW 71.09.040(4) on behalf of the Department of Social and Health Services (DSHS). *Id.*

In this case, it is Dr. North's professional opinion that his mandated evaluation of Mr. Hawkins should include a complete sexual history polygraph conducted by a qualified technician. CP at 22. The sexual history polygraph is designed to assist Dr. North in determining whether the offender meets the statutory criteria of an SVP, specifically: 1) that he currently suffers from a mental abnormality or personality disorder(s); 2) whether these cause him serious difficulty controlling his sexually violent behavior; and 3) whether these make him more likely than not to commit predatory acts of sexual violence if not confined in a secure facility. *Id.*; RCW 71.09.020(16).

In addition, it is Dr. North's professional opinion that this component of his evaluation is necessary in order to ensure it is as comprehensive as possible. CP at 22. Such is the case because a complete sexual history polygraph falls within the current standard of practice regarding the materials and information upon which an expert must rely

when evaluating a sex offender who has been referred for possible SVP civil commitment. *Id.*

After considering the evidence and arguments presented by the parties, the trial court entered an order compelling Mr. Hawkins to submit to a sexual history polygraph examination. CP at 6-7. Prior to administration of the exam, Mr. Hawkins sought discretionary review by this Court. CP at 3. That motion was denied by Commissioner Eric Schmidt on September 7, 2007. This Court has since granted Mr. Hawkins' motion to modify that ruling.

III. ARGUMENT

A. **The Trial Court's Order Compelling Mr. Hawkins to Submit to a Sexual History Polygraph Was Proper**

In a civil action, "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; **physical and mental examinations**; and requests for admission." CR 26(a) (emphasis added). "The rule is designed to permit a broad scope of discovery." *Ollie v. Highland School Dist. No. 203*, 50 Wn. App. 639, 642, 749 P.2d 757, 759 (1988) (citing *Barfield v. Seattle*, 100 Wn.2d 878, 883, 676 P.2d 438 (1984)). A trial

court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. *Clarke v. Office of Attorney Gen.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006) (citing *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 759, 125 P.3d 164 (2005), *review denied*, 157 Wn.2d 1025 (2006)), *review denied*, 160 Wn.2d 1006 (2007)).

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.” *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956). 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.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). 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.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). 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.” *Id.* (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

1. Controlling Authority Regarding the Statutorily Required Pretrial SVP Psychological Evaluation

When an offender is referred to the appropriate prosecuting authority as a potential SVP, the referring agency is required to provide a current mental health evaluation or mental health records review of the offender. RCW 71.09.025(1)(b)(v). The use in the statute of the terms “evaluation” and “records review” is a tacit acknowledgement that, prior to the initiation of formal commitment proceedings, the State has no ability to require an offender to participate in a mental health evaluation. If an offender refuses to participate in an evaluation, a records review will be conducted pursuant to RCW 71.09.025 and the results of that review will be used to aid the prosecutor in determining whether an SVP action should be initiated.

However, once an SVP action is filed and a court determines there is probable cause to believe the offender meets the definition of an SVP, “the judge *shall* direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation *shall* be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules

developed by the department of social and health services [DSHS].” RCW 71.09.040(4) (emphasis added).

DSHS has promulgated rules designed to effectuate the statute’s requirement that a comprehensive post-probable cause psychological evaluation be conducted by a qualified expert. *See generally*, WAC 388-880. The evaluation mandated by RCW 71.09.090(4) must be done by a “professionally qualified person.” WAC 388-880-010. A professionally qualified person includes a licensed psychologist who has expertise in conducting evaluations of sex offenders (including diagnosis and assessment of re-offense risk) and providing expert testimony relating to sex offenders. WAC 388-880-010, -033.

The WAC provisions also convey the expected components of the evaluation. One such component is “Medical and *physiological testing, including . . . polygraphy.*” WAC 388-880-034(2)(e) (emphasis added). Moreover, sex offenders threaten public safety and therefore have reduced privacy interests, discussing disclosure of personal information. *In re Det. of Campbell*, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999). If the SVP respondent “refuses to participate in examinations, forensic interviews, psychological testing or any other interviews necessary” as part of the RCW 71.09.040(4) evaluation, the State is expected to ask the court to compel the SVP respondent’s compliance. WAC 388-880-035.

In fact, not only does RCW 71.09.040(4) specifically provide that SVP respondents must submit to an evaluation after a court determines that there is probable cause to believe they are sexually violent predators, but RCW 71.09.070 provides that they must submit to subsequent examinations annually after having been committed.

2. The Trial Court Properly Ordered Mr. Hawkins to Participate in a Sexual History Polygraph Examination

Mr. Hawkins argues that the trial court had no authority to order his participation in a sexual history polygraph examination. However, a sexual history polygraph is envisioned by the WAC provisions drafted to fill out the RCW 71.09.040(4) demand of a comprehensive evaluation. *See* WAC 388-880-034(2)(e). In addition, as Dr. North noted in his declaration to the trial court, such polygraph examinations are part of the standard practice when conducting a forensic sex offender evaluations. CP at 22.

The use of a sexual history polygraph as part of a sex offender evaluation is endorsed by the Association for the Treatment of Sexual Abusers (ATSA). ATSA is an international organization consisting of mental health professionals who engage in evaluating and treating sex offenders. *See* <http://www.atsa.com>. ATSA has issued standards for evaluating sex offenders, which provide that an evaluation may include

physiological assessments, including a sexual history polygraph that has been conducted according to generally accepted standards. ATSA, *Ethical Standards and Principles for the Management of Sexual Abusers*, at 14, 36-38, and 52-56 (1997). The sexual history polygraph is “a thorough examination of an abuser’s lifetime sexual history. This examination is usually included as part of a comprehensive psychosexual evaluation.” *Id.* at 52.

The relevant WAC provisions, Dr. North, and professional standards all support the conclusion that such an examination is part of a comprehensive sex offender evaluation. For these reasons, ample authority permitted the trial court to order Mr. Hawkins to participate in a sexual history polygraph examination as part of Dr. North’s evaluation. Thus, the trial court did not err in issuing that order.

3. The Trial Court Did Not Err in Finding That the “Control Question Technique” Should Be Used During Mr. Hawkins Polygraph Examination

Mr. Hawkins also assigns error to the portion of the trial court’s order authorizing the “Control Question Technique” to be used during his polygraph examination. Through the declaration of Dr. Richard Wollert, Mr. Hawkins argued to the trial court that sexual history polygraph examinations employing the control question technique are unreliable. *See Appendix B to Motion for Discretionary Review.* However, before

ordering the polygraph exam, the trial court also had the opportunity to consider the declaration of Rick Minnich. Resp. Supp. CP at ___. That declaration was submitted by the State in support of its motion to compel the polygraph exam. Mr. Minnich is an experienced, certified polygraph examiner who has conducted approximately 15,000 polygraph examinations since 1992. *Id.* at 1. He is a member of professional associations specific to his field, and reviews research done on polygraph techniques as it becomes available. *Id.* at 2. He informed the trial court that the proposed “control question” technique is the most widely used polygraph technique, and that method has been validated by researchers in the field. *Id.* Due to the weight of authority supporting their use, Department of Corrections protocol *requires* the use of control questions when administering polygraph examinations of offenders under their supervision. *Id.* at 2-3.

Unlike Mr. Minnich, Dr. Wollert has never administered a polygraph exam and is not a polygraph examiner. Appellant’s Appendix B at 1. Although Dr. Wollert’s work with sex offenders may expose him to concepts relating to polygraph examination, his opinions are not rendered with the benefit of the training and experience with polygraph examinations had by Mr. Minnich. As such, it was reasonable for the trial court to conclude that, although Dr. Wollert and Mr. Minnich may

disagree, Mr. Minnich was better able to meaningfully comment on whether the use of a control question polygraph exam is appropriate in this case. Consequently, the trial court did not err when it authorized use of the Control Question Technique in this case.

B. The Department of Social and Health Services Did Not Exceed Its Authority When It Promulgated WAC 388-880-035

For the first time in his opening brief to this Court, Mr. Hawkins argues that DSHS exceeded its authority when it enacted WAC 388-880-035. For the reasons set forth below, his argument should be rejected.

1. Mr. Hawkins Should Not be Permitted to Argue Lack of Authority for the First Time on Appeal

RAP 2.5(a) states that the appellate court may refuse to review any claim of error that was not raised in the trial court. The rule does, however, specifically permit a party to raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. *Id.* Aside from these exceptions, the general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998);

State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995)). Ordinarily, the appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule reflects a policy of encouraging the efficient use of judicial resources. *Id.* Therefore, exceptions to the rule requiring objections at trial to preserve issues for appeal must be construed narrowly. *Kirkman*, 159 Wn.2d at 934-35 (*citing Scott*, 110 Wn.2d 682); *See also In re the Detention of Audett*, 158 Wn.2d 712, 724-727, 147 P.3d 982, 978-989 (2006) (“[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.”).

Here, Mr. Hawkins made no argument regarding the validity of WAC 388-880-034 to the trial court. Likewise, he failed to make the argument in the motion for discretionary review he filed with this Court. The issue he now raises was available to be argued to the trial court should Mr. Hawkins have chosen to do so. Since he elected not to argue to the trial court that WAC 388-880-034 was improperly adopted, this Court need not reach the merits of his claim at this time.

2. Mr. Hawkins Misreads Washington Administrative Code Language as Requiring That SVP Respondents Must Undergo Polygraph Testing

On its face, WAC 388-880-034 does not expressly or impliedly require that a polygraph examination be conducted during the course of a pretrial SVP evaluation. The WAC provision only requires that the mandated psychological evaluation be based on (1) examination of the resident, and (2) review of the following records, tests or reports relating to the person. The concept of “records, tests, or reports” is further defined in WAC 388-880-034(2)(e) to include, among other items, “Medical and physiological testing, including plethysmography and polygraphy.” While the challenged provision does require the evaluator to review any existing polygraph exam results that are available at the time of the evaluation, it is silent regarding whether a current polygraph exam should be conducted. Thus, the challenged WAC does not require that every person being evaluated be subjected to a polygraph test. In this case, the trial court determined the polygraph was necessary for the evaluation of Mr. Hawkins, but not because it concluded that WAC 388-880-034 mandates that a polygraph be done in every case, but based on the declaration of need submitted by the expert witness retained in the case.

Even if the provision is somehow read to require a polygraph examination be conducted, such a requirement would not be improper or

excessive in the context of pretrial SVP evaluations. Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority. *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (citing *Municipality of Metro. Seattle v. Pub. Employment Relations Comm'n.*, 118 Wn.2d 621, 826 P.2d 158 (1992)). Agencies also have implied authority to carry out their legislative mandated purposes. *Id.* at 125. When a power is granted to an agency, “everything lawful and necessary to the effectual execution of the power” is also granted by implication of law. *Id.* (quoting *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.*, 33 Wn.2d 448, 481 206 P.2d 456 (1949)). Implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. *Id.* (citing *Ortblad v. State*, 85 Wn.2d 109, 117, 530 P.2d 635 (1975); *Green River Comm'ty College v. Higher Educ. Personnel Bd.*, 95 Wn.2d 962, 633 P.2d 1324 (1981)).

Here, RCW 71.09.040(4) states that the sexual predator evaluation “shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the

Department of Social and Health Services.”¹ As noted above, a sexual history polygraph examination “is usually included as part of a comprehensive psychosexual evaluation.” ATSA, *Ethical Standards and Principles for the Management of Sexual Abusers*, at 52. The Legislature charged DSHS with the duty of overseeing these evaluations, and left that agency with the power to determine the means of how to conduct these examinations. This power to determine the specifics involved in conducting pretrial SVP evaluations is necessarily implied from the statutory delegation of authority given to DSHS by the Legislature. Given the importance of polygraph results in the field of psychological evaluations, the mere requirement that the evaluator review any pertinent polygraph information that may exist is appropriate. Because WAC 388-880-034 is a valid exercise of authority granted to DSHS by the Legislature, Mr. Hawkins’ claim fails, and his appeal should be denied.

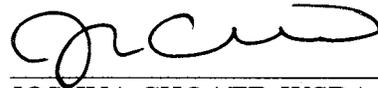
IV. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the trial court’s order compelling Mr. Hawkins’ participation in a

¹ In addition to failing to raise this challenge to the rule at the superior court, the challenge is defective because it implicates the rule adopted by DSHS, but had not joined DSHS as a party, nor properly attempted to review the rule and record under the provisions for addressing rule validity of the Administrative Procedures Act, RCW 34.50. See *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 204-05, 95 P.3d 337 (2004).

polygraph examination as part of the psychological evaluation mandated
by RCW 71.09.040(4).

RESPECTFULLY SUBMITTED this 2nd day of July, 2008.



JOSHUA CHOATE, WSBA #30867
Assistant Attorney General
Attorney for State of Washington
Office of the Attorney General
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104
(206) 389-3075

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DECLARATION OF
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I, Elizabeth Jackson, declare as follows:

On this 2nd day of July, I deposited in the United States mail a true and correct copy of Brief of Respondent, postage affixed, addressed as follows:

Joseph Enbody
PO Box 855
Centralia, WA 98531

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

DATED this 2nd day of July, 2008, at Seattle, Washington.

STATE OF WASHINGTON
BY
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COURT OF APPEALS
DIVISION II


ELIZABETH JACKSON

ORIGINAL