

NO 36600-2-II

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

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 JUN 16 PM 4:58

In re the Detention of:

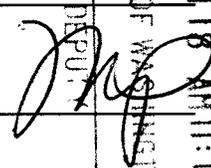
MICHAEL SEASE.

Appellant.

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

FILED  
COURT OF APPEALS  
DIVISION II

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON  
DEPUTY  


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A. ARGUMENT

Michael Sease appeals his commitment as a sexually violent (SVP) contending he was denied his right to a unanimous jury verdict. In addition, Mr. Sease contends the State failed to meet its burden of proving his likelihood to reoffend stemmed from a mental condition. Finally, he argues the assistant attorney general committed misconduct in closing argument in telling the jury they need not find Mr. Sease's likelihood to reoffend stemmed from a mental condition.

1. THE LACK OF A UNANIMITY INSTRUCTION DEPRIVED MR. SEASE OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT

Based on principles of due process as well as the state constitutional right to a unanimous jury trial, a defendant in a criminal case has a constitutional right to a conviction only by a jury which unanimously agrees that the crime charged has been committed beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); U.S. Const. amend. XIV; Const. art 1, § 22. Likewise, involuntary detention as an SVP is governed by the due process protections that apply in a criminal proceeding. See In re Detention of Young, 122 Wn.2d 1, 48, 857

P.2d 396 (1995) (where SVP statute indicates due process protections similar to criminal proceeding, criminal law standards apply); RCW 71.09.050 (granting accused SVP rights to attorney, expert witnesses, and 12 person jury); RCW 71.09.060 (requiring State prove SVP allegations beyond a reasonable doubt and jury verdict be unanimous). A unanimous jury must conclude that each element of the sexual predator commitment law is proven beyond a reasonable doubt. Id.; RCW 71.09.060(1).

In re the Detention of Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006), the Court concluded the unanimity requirements announced in State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), apply to SVP proceedings. The Court said "Given that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases." Halgren, 156 Wn.2d at 809. Petrich requires that where the state alleges a defendant has committed multiple acts, each of which could independently establish the charge, either the prosecutor must elect which act it is relying on or the jury must be instructed they must unanimously rely on a single act in assessing the defendant's guilt. Petrich, 101 Wn.2d at 572.

The State responds by fundamentally misapprehending the holding of Halgren.

In Halgren, the State offered evidence that Halgren suffered from one mental abnormality and one personality disorder. 156 Wn.2d at 716. Halgren contended jury unanimity was required on the question of “whether [he] had a mental a mental abnormality or a personality disorder.” Id. at 719-20. The Court agreed that “unanimity rules are applicable to SVP cases.” Id. at 720. However, Court concluded the terms “mental abnormality” and “personality disorder” in RCW 71.09.020(16) establish alternative means by which a person may be found a SVP. Halgren, 156 Wn.2d at 721. Thus, the Court concluded Petrich would not require reversal of Halgren’s commitment so long as both alternative means were supported by sufficient evidence. Id. The Court found they were.

In the present case, the State contends Halgren rejected application of an alternative acts analysis in SVP cases. Brief of Respondent at 15-16. As is clear, Halgren most certainly did not. Unlike the petitioner in Halgren, Mr. Sease does not contend the jury was required to unanimously agree that he suffered a “mental abnormality” as opposed to a “personality disorder.” In fact, the trial

court purposefully omitted the term “mental abnormality” from the instructions setting forth the elements in this case. CP 105-06 (Instruction 4 and 5). Instead, Mr. Sease contends that where the state offers multiple diagnosis to support its claim that a person suffers a personality disorder the unanimity requirement of Petrich, adopted in Halgren, required the jury unanimously agree as to which diagnosis made him an SVP.

The State, based upon its misreading of Halgren contends a jury need not unanimously agree on which act proves an element of an offense, unless the acts are incongruous to one another. Brief of Respondent at 18. But the unanimity requirements of Petrich, as applied in a criminal case, are not triggered by proof of inconsistent acts, but simply by proof of multiple acts. Indeed, Petrich itself involved proof of multiple consistent acts. See 101 Wn.2d at 568-69 (describing multiple acts of similar sexual abuse). Thus, the fact that the State’s alleged diagnoses are not mutually exclusive does not excuse the failure to ensure jury unanimity.

The State next claims that because the jury unanimously agreed Mr. Sease was a sexually violent predator, Mr. Sease has “failed to explain how, if [two jurors disagreed which disorder made him likely to reoffend] it would have resulted in a jury that [was not

unanimous]” Brief of Respondent at 19. Not only has Mr. Sease offered such an explanation, it is readily set forth in Petrich and its progeny.

Finally, the State claims there was no Petrich error because the jury was free to disregard the competing testimony of the Dr. Donaldson and instead agree with Dr. Doren’s diagnoses. Brief of Respondent at 20. That a juror could agree with one diagnosis over another, does not ensure the jury as whole unanimously agreed. The failure to give a unanimity instruction is not harmless if any rational juror could have a doubt as to whether each alternative separately established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; State v. King, 75 Wn.App. 899, 903, 878 P.2d 466 (1994). In the context of an SVP trial, the inquiry must be whether a reasonable juror could disagree with one or more of the alternative diagnoses offered by the State.

The failure to provide a unanimity instruction requires reversal of Mr. Sease’s commitment.

2. THE STATE DID NOT OFFER SUFFICIENT PROOF THAT MR. SEASE IS A SVP.

Because the State does not offer any meaningful response to Mr. Sease’s legal analysis of the due process requirements of

proof under RCW 71.09.050; RCW 71.09.060, Mr. Sease does not offer further argument on this point.

3. THE STATE'S IMPROPER CLOSING  
ARGUMENT REQUIRES REVERSAL

Because his argument is fully set forth in his original brief, Mr. Sease offers no additional argument on this point.

B. CONCLUSION

For the reasons above, the Court should reverse Mr. Sease's commitment.

Respectfully submitted this 16th day of June, 2008.

  
GREGORY C. LINK – 25228  
Washington Appellate Project – 91052  
Attorney for Appellant

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**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 16<sup>TH</sup> DAY OF JUNE, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF JUNE, 2008.

X \_\_\_\_\_ 

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