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DIVISION II

NO. 37140-5-II

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

IN RE THE DETENTION OF DOUGLAS ALSTEEN

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS ALSTEEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

 1. THE COURT’S REFUSAL TO LIMIT THE PREDICTION
 OF FUTURE DANGEROUSNESS TO A REASONABLY
 FORESEEABLE TIME PERIOD VIOLATED MR.
 ALSTEEN’S RIGHT TO DUE PROCESS OF LAW. 4

 a. RCW 71.09 infringes on a fundamental right and must
 pass strict scrutiny analysis..... 4

 b. RCW 71.09 fails strict scrutiny because it is not
 narrowly tailored to serve the compelling government
 interest of protecting the public from offenders who
 are presently dangerous. 5

 c. The State failed to prove Mr. Alsteen’s current
 dangerousness or to limit its prediction of future
 dangerousness..... 9

 2. THE TRIAL COURT COMMITTED PREJUDICIAL
 ERROR IN PROVIDING 18 JURY INSTRUCTIONS
 DESCRIBING THE PREDICATE CRIMES TO WHICH
 MR. ALSTEEN HAD STIPULATED..... 12

E. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 876 P.2d 435 (1994) 12

In re Detention of Henrickson, 140 Wn.2d 686, 2 P.3d 473 (2000). 8

In re Harris, 98 Wn.2d 276, 654 P.2d 109 (1982)..... 5, 7, 9

In re LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986) 9

In re the Detention of Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002) 5, 7

In re the Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989
(1993)..... 5, 6, 7, 8

Stanhope v. Strang, 140 Wash. 693, 250 P. 351 (1926)..... 13

State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970)..... 14

Washington Court of Appeals Decisions

Connor v. Skagit Corp., 30 Wn. App. 725, 638 P.2d 115 (1981).. 12,
13

In re Detention of Broten, 115 Wn.App. 252, 62 P.3d 514 (2003) ... 8

In re Detention of Paul Moore, 2007 Wash. App. LEXIS 3026 (Nov. 13, 2007), review granted, 2008 Wash. LEXIS 867 (Sept. 5, 2008) 6

United States Supreme Court Decisions

Humphrey v. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394
(1972)..... 5

Decisions of Other Jurisdictions

Hatcher v. Wachtel, 165 W.Va. 489, 269 S.E.2d 849 (W. Va. 1980) 9

People v. Martin, 107 Cal.App.3d 714, 165 Cal.Rptr. 773 (1980) ... 8

State v. Krol, 68 N.J. 236, 344 A.2d 289 (N.J. 1975) 9

Constitutional Provisions

U.S. Const. amend 14..... 1, 2, 5

Statutes

RCW 71.09.020..... 6, 7

RCW 71.09.030..... 7

A. ASSIGNMENTS OF ERROR

1. The Sexually Violent Predator Act ("SVPA") violates substantive due process under the Fourteenth Amendment because it does not require the State to prove that an individual is presently dangerous.

2. The trial court violated Mr. Alsteen's Fourteenth Amendment right to due process by refusing to require the State to prove Mr. Alsteen would commit a sexually violent offense within the reasonably foreseeable future.

3. The trial court committed prejudicial error by giving 18 jury instructions describing the predicate crimes to which Mr. Alsteen had already stipulated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Due Process Clause of the Fourteenth Amendment, the State is required to prove that a respondent is both mentally ill and currently dangerous before committing him. The SVPA does not require a showing of current dangerousness for individuals who are incarcerated on the date the State petitions for their commitment. Does the SVPA violate due process?

(Assignment of Error 1)

2. Under the Due Process Clause of the Fourteenth Amendment, the State is required to prove that a respondent is both mentally ill and currently dangerous before committing him. Did the trial court violate Mr. Alsteen's right to due process by refusing to require the State to prove that he was likely to commit a sexually violent offense within the reasonably foreseeable future? (Assignment of Error 2)

3. Although a trial court is afforded discretion as to the number and language of jury instructions, courts should avoid repetitive, cumulative instructions, which "have more tendency to confuse than to enlighten" and which place undue emphasis on one factor a jury is to consider. Did the trial court err in providing, over Mr. Alsteen's objections, 18 jury instructions describing predicate crimes to which Mr. Alsteen had already stipulated? (Assignment of Error 3)

C. STATEMENT OF THE CASE

Douglas Alsteen has been incarcerated for 18 years. CP 10. He was due to be released in 2005 after serving his sentence for attempted rape, but prior to his release the State filed a petition seeking his commitment as a sexually violent predator. CP 1-2.

The trial date was extended several times, and Mr. Alsteen's first attorney ultimately withdrew. 11/16/06 RP 3. A new attorney was appointed in January of 2007, and trial finally commenced in November of that year. 1/17/07 RP 3; 11/5/07 RP 8.

During pre-trial motions in limine, Mr. Alsteen requested that the trial court "limit prediction of Mr. Alsteen's likelihood of risk to a specific number of years," and "exclude testimony of his alleged risk beyond such time period." CP 130; 11/5/07 RP 61. Mr. Alsteen argued that such a limitation was necessary to satisfy the narrow-tailoring requirement of due process. CP 130. Mr. Alsteen further explained that the State's actuarial instruments do not properly predict dangerousness, because they fail to take into account principles of survival analysis. Id. The court ruled, "I'm not requiring that the State put a specific limit on it. ... I think the issue of recidivism over time is a matter for cross-examination." 11/5/07 RP 64.

Both parties presented evidence at trial, including the testimony of psychological experts. The State's expert, Dr. Brian Judd, diagnosed Mr. Alsteen with paraphilia not otherwise specified, non-consent, and opined that this paraphilia rendered Mr. Alsteen a sexually violent predator. 11/6/07 RP 124. Mr. Alsteen's

expert, Dr. Theodore Donaldson, disagreed and determined that there was insufficient evidence of paraphilia. 11/13/07 RP 66.

After both parties rested their cases, the State proposed jury instructions which included the definitions and to-convict instructions for Mr. Alsteen's predicate crimes. CP 158-202. Mr. Alsteen objected to instructions 13-18 and 20-31 because he had stipulated to having committed sex offenses; therefore, providing 18 jury instructions describing those prior offenses in detail was unduly prejudicial. 11/7/07 RP 80-81; 11/13/07 RP 160-61. The court overruled the objection, and included the instructions. 11/13/07 RP 161-62; CP 214-49.

The jury found Mr. Alsteen is a sexually violent predator, and the court ordered his commitment to the Special Commitment Center. CP 251-52. Mr. Alsteen timely appeals. CP 259-62.

D. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO LIMIT THE PREDICTION OF FUTURE DANGEROUSNESS TO A REASONABLY FORESEEABLE TIME PERIOD VIOLATED MR. ALSTEEN'S RIGHT TO DUE PROCESS OF LAW.

a. RCW 71.09 infringes on a fundamental right and must pass strict scrutiny analysis. The Fourteenth Amendment provides that no State "shall deprive any person of life, liberty, or property

without due process of law.” U.S. Const. amend 14. Involuntary civil commitment is a “massive curtailment of liberty.” In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). A law that abridges a fundamental right such as liberty must pass strict scrutiny; that is, it satisfies substantive due process only if it furthers a compelling state interest and is narrowly tailored to further that interest. In re the Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Therefore, in order to satisfy due process, the SVP commitment statute must be narrowly tailored to serve the compelling government interest of protecting the public from sex offenders. In re the Personal Restraint of Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) . The narrow-tailoring requirement is satisfied only if the State is required to prove that a respondent is both mentally ill and dangerous before committing him. Id at 37. The dangerousness must be current. Albrecht, 147 Wn.2d at 7.

b. RCW 71.09 fails strict scrutiny because it is not narrowly tailored to serve the compelling government interest of protecting the public from offenders who are presently dangerous. RCW 71.09 violates substantive due process because it does not require

a showing of current dangerousness.¹ It does not mandate any determination that the respondent is likely to commit a sexually violent offense within a certain amount of time; nor does it allow for consideration of any intervening events that might decrease the respondent's recidivism risk. The statute allows the State to make its showing of dangerousness through blanket assertions of the respondent's likelihood of re-offending at any point in his lifetime. As to an individual who is incarcerated when the petition for commitment is filed, the statute requires no showing of current dangerousness beyond the act that gave rise to the current incarceration.

RCW 71.09.020 purports to incorporate a dangerousness element by requiring that the individual is "likely to engage in predatory acts of sexual violence if not confined in a secure facility," which means that "[t]he person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7). But the Supreme Court in Young recognized that this language was insufficient to prove actual dangerousness, and imposed the

¹ This issue is pending in the Supreme Court. In re Detention of Paul Moore, 2007 Wash. App. LEXIS 3026 (Nov. 13, 2007), review granted, 2008 Wash. LEXIS 867 (Sept. 5, 2008).

additional requirement that, for respondents not incarcerated when the commitment petition is filed, the State must prove that the respondent committed a recent overt act. Young, 122 Wn.2d at 40-41. The Young Court held that “proof of a recent overt act is necessary to satisfy due process concerns when an individual has been released into the community.” Id. at 41 (relying on Harris, 98 Wn.2d at 284 (establishing the “recent overt act” requirement for the non-emergency involuntary commitment of mentally ill persons)).

The Legislature responded by amending the statute to conform to Young’s interpretation and clarify that the “recent overt act”² requirement applies only to a respondent who has been released from total confinement prior to the filing of the commitment petition. RCW 71.09.030(5). Subsequent cases have affirmed that “the recent overt act requirement directly and specifically speaks to a person’s dangerousness and thus satisfies the dangerousness element required by due process.” Albrecht, 147 Wn.2d at 11; see also In re Detention of Henrickson, 140 Wn.2d 686, 2 P.3d 473

² “Recent overt act” is defined in the statute as “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(1).

(2000); In re Detention of Broten, 115 Wn. App. 252, 62 P.3d 514 (2003).

However, for a respondent who is incarcerated on the date of filing, there is no equivalent requirement to show that individual's current dangerousness. As to these individuals, due process is not satisfied. The rationale for the distinction between the two classes is that requiring the State to show a recent overt act by an incarcerated person "would create a standard which would be impossible to meet." Young, 122 Wn.2d at 41. However, the State may not evade the strictures of due process simply because it is hard to meet them. While it is true that "due process does not require that the absurd be done before a compelling state interest can be vindicated," there are other ways to ensure due process. Id. (quoting People v. Martin, 107 Cal.App.3d 714, 725, 165 Cal.Rptr. 773 (1980)).

If it is impossible for the State to prove, through a recent overt act, that an incarcerated individual is currently dangerous, then it must be forced to refine its prediction of dangerousness to the foreseeable future. This approach has been adopted in other jurisdictions; for example, the New Jersey Supreme Court held:

Commitment requires that there be a substantial risk of dangerous conduct **within the reasonably foreseeable future**. . . . It is not sufficient that the state establish a possibility that defendant might commit some dangerous acts at some time in the indefinite future. The risk of danger, a product of the likelihood of such conduct and the degree of harm which may ensue, must be substantial within the reasonably foreseeable future.

State v. Krol, 68 N.J. 236, 344 A.2d 289, 302 (N.J. 1975) (emphasis added). The West Virginia Supreme Court quoted and endorsed the Krol “reasonably foreseeable future” standard in Hatcher v. Wachtel, 165 W.Va. 489, 269 S.E.2d 849, 852 (W. Va. 1980) (cited in Harris, 98 Wn.2d at 283). In non-SVP commitment cases, the Washington Supreme Court requires “a high probability of serious physical harm within the near future” in order to satisfy due process under the “gravely disabled” standard. In re LaBelle, 107 Wn.2d 196, 204, 728 P.2d 138 (1986). A similar rule must apply in the SVP context in order for the predator statute to pass constitutional muster.

c. The State failed to prove Mr. Alsteen’s current dangerousness or to limit its prediction of future dangerousness.

As noted above, in order to satisfy the constitutional requirement of current dangerousness, the State must be required to prove a future risk within a limited period of time. Mr. Alsteen asked the trial

court to require the State to limit its prediction of future dangerousness to a specific number of years. The court refused. This refusal constitutes reversible error.

The danger to fundamental liberty posed by this constitutional defect is shown by the State's strategy in this case. Since Mr. Alsteen was incarcerated on the date of filing, the State was not required to prove a recent overt act. The State did not prove Mr. Alsteen's current dangerousness or likelihood of re-offense within the foreseeable future, but instead only offered evidence of his past acts and vague, indefinite predictions about his future.

Dr. Judd testified as to Mr. Alsteen's risk of reoffending in the future in terms of percentages in 15 years, 10 years, and 5 years under the Static 99 tool, and 7-10 years under the Sex Offender Risk Assessment Guide ("SORAG"). 11/6/07 RP 103, 116. But he admitted that both tools were overbroad, because they predict "sexual recidivism" (Static 99) and "violent recidivism" (SORAG) instead of the much narrower "predatory acts of sexual violence." 11/6/07 RP 125, 142. The SORAG is further flawed in that it predicts mere charges, instead of actual convictions. 11/6/07 RP 115. And according to the Static 99, which is the "best tool"

available, people with Mr. Alsteen's profile were unlikely to recommit sexual offenses within 5 years or 10 years, and were only slightly more than 50% likely to recommit sexual offenses within 15 years. 11/6/07 RP 91, 103. Dr. Judd further admitted that given the error rates, the likelihood of reoffense within 15 years could be less than 50%. 11/6/07 RP 129.

Furthermore, as Mr. Alsteen explained in the trial court, actuarial instruments used by the State do not take into account the principles of survival analysis, an important statistical tool. CP 130-32. For example, assume an individual is deemed 33% likely to reoffend within five years, according to an actuarial prediction tool. Even if the recidivism continues within the group at the same rate, the individual members become less likely to reoffend with the passage of every year. If the rate of reoffense is constant, the individual must be presumed to be 6.5% likely to reoffend every year, or 1/5th of 33%. That means he is 93.5% unlikely to reoffend in his first year of freedom. The first year, once gone, can no longer figure in the risk analysis. In other words, he is likely to survive the first year, and after surviving it, would be only 26.5% likely to reoffend in the remaining four years of a five-year analysis. Claims of a high likelihood of recidivism over a period of many

years are therefore illusory. The longer the period considered for possible reoffense, the less reliable the prediction. As a practical matter, then, prediction over a long period of years is so unreliable as to violate the "narrow tailoring" requirement.

In sum, proof of current dangerousness is a critical component of a civil commitment and the procedures used in the case at bar contain no requirement of such proof. Accordingly, Mr. Alsteen's commitment violates his right to due process of law.

2. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PROVIDING 18 JURY INSTRUCTIONS DESCRIBING THE PREDICATE CRIMES TO WHICH MR. ALSTEEN HAD STIPULATED.

Although the number and specific language of jury instructions is a matter within the trial court's discretion, there is no need to provide "detailed augmenting instruction[s]" if fewer instructions "permit a party to argue that party's theory of the case, are not misleading, and when read as a whole properly inform the trier of fact on the applicable law." Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165, 876 P.2d 435 (1994). In fact, "repetitive and cumulative" instructions are disfavored. See Connor v. Skagit Corp., 30 Wn. App. 725, 734, 638 P.2d 115 (1981).

Our supreme court has cautioned:

Too many instructions are as dangerous as too few. When the court has once covered the law of the case in plain and simple language, the charge to the jury should be ended, for further instructions in different language have more tendency to confuse than to enlighten.

Stanhope v. Strang, 140 Wash. 693, 697, 250 P. 351 (1926);
accord Connor, 30 Wn. App. at 734.

Here, the trial court erred in giving 18 jury instructions describing crimes Mr. Alsteen committed in the past, to which he had already stipulated. Instruction number 4 sufficiently apprised the jury that the crimes of rape in the first degree, rape in the second degree by forcible compulsion, and assault with sexual motivation constitute sexually violent offenses for purposes of the statute. CP 220. Instruction number 9 informed them that if Mr. Alsteen had been convicted of any of these crimes, the first element of the sexually violent predator statute was satisfied. CP 225. Mr. Alsteen stipulated to having committed these crimes. CP 136, 235; 11/5/07 RP 8. The first element of the sexually violent predator allegation was not a contested issue. 11/5/07 RP 8. Thus, as Mr. Alsteen argued at trial, the inclusion of every to-convict and definitional instruction for his past crimes was highly cumulative and unduly prejudicial.

As in State v. Todd, the jury instructions here placed “undue emphasis upon one factor.” State v. Todd, 78 Wn.2d 362, 376, 474 P.2d 542 (1970). In Todd, that factor was the nature of the penalty the defendant would receive if the jury did not sentence him to death. The Court noted, “By instructing the jury concerning the possible minimum sentence which the defendant might serve, the court suggests to the jury that it should give great weight to that possibility in reaching its verdict.” Id. Similarly here, by including 18 instructions describing Mr. Alsteen’s prior crimes, the court suggested that the jury should give great weight to Mr. Alsteen’s past conduct – which is precisely the opposite of what the jury is required to determine. The issues before the jury were whether Mr. Alsteen had a mental abnormality, and if so, whether it made him likely to engage in predatory acts of sexual violence in the future if not confined. The inordinate focus of the jury instructions on Mr. Alsteen’s past offenses, to which he had stipulated, constitutes prejudicial error and requires reversal. See Todd, 131 Wn.2d at 377.

E. CONCLUSION

For the reasons set forth above, Mr. Alsteen respectfully requests that this Court reverse his commitment and remand for a new trial.

DATED this 19th day of November, 2008.

Respectfully submitted,


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