

F.B.F.
COURT OF APPEALS
DIVISION II

NO. 37140-5-II

09 MAR -9 AM 8:42

STATE OF WASHINGTON
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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 REPLY BRIEF

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR -5 PM 4:57

TABLE OF CONTENTS

A. ARGUMENT 1

 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..... 1

 2. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PROVIDING 18 JURY INSTRUCTIONS DESCRIBING THE PREDICATE CRIMES TO WHICH MR. ALSTEEN HAD STIPULATED. 5

B. CONCLUSION..... 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

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

In re Detention of Marshall, 156 Wn.2d 150, 125 P.3d 113 (2005) . 1

In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1983)..... 1

State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970)..... 6

Washington Court of Appeals Decisions

In re Detention of Paschke, 121 Wn. App. 614, 90 P.3d 74 (2008). 2

In re Detention of Paul Moore, 2007 Wash. App. LEXIS 3026 (Nov. 13, 2007), review granted, 2008 Wash. LEXIS 867 (Sept. 5, 2008) 1

State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001) 6

State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005) 6

United States Supreme Court Decisions

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)..... 3

Statutes

RCW 71.09.020..... 2

Other Authorities

A. Scherr, Daubert & Danger: The “Fit” of Expert Predictions in Civil Commitments, 55 Hastings L.J. 1 (2003) 3, 4

E. Beecher-Monas & E. Garcia-Rill, <u>The Impact of Behavioral Genetics on the Criminal Law: Genetic Predictions of Future Dangerousness: Is there a Blueprint for Violence?</u> , 69 Law & Contemp. Prob. 301 (2006)	3
M. Browne & R. Harrison-Spoerl, <u>Putting Expert Testimony in its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us</u> , 91 Marq. L. Rev. 1119 (2008)	2, 4
R. Simon, <u>The Future of the “Duty to Protect”: Scientific and Legal Perspective on Tarasoff’s Anniversary: the Myth of “Imminent” Violence in Psychiatry and the Law</u> , 75 U. Cin. L. Rev. 631 (2006)	4
Terence W. Campbell, <u>Assessing Sex Offenders, Problems and Pitfalls</u> , American Series in Behavioral Science and Law (Springfield: Charles C. Thomas) 2007	3

A. 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.

In his opening brief, Mr. Alsteen argued that the Sexually Violent Predator Act (RCW Ch. 71.09) violates due process because it does not limit the prediction of future dangerousness to a reasonably foreseeable time period. In response, the State argues that our supreme court already decided this question in In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1983). But as the State acknowledges, the court in Young addressed many other constitutional challenges to the commitment scheme, but did not discuss this issue at all. Rather, the supreme court is scheduled to address this issue in In re Detention of Paul Moore, 2007 Wash. App. LEXIS 3026 (Nov. 13, 2007), review granted, 2008 Wash. LEXIS 867 (Sept. 5, 2008). Accordingly, Mr. Alsteen has filed a motion to stay his appeal pending resolution of Moore.

The State is also wrong on the merits. An SVP commitment requires proof of present dangerousness as a matter of due process. In re Detention of Marshall, 156 Wn.2d 150, 157, 125 P.3d 113 (2005). "Current dangerousness is a bedrock principle

underlying the SVP commitment statute.” In re Detention of Paschke, 121 Wn. App. 614, 622, 90 P.3d 74 (2008) (citing In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002)).

Yet the SVP commitment statute does *not* expressly require the jury to find that the respondent is likely to commit sexually violent acts in the foreseeable future. Rather, the statute merely requires the State to establish a mental disorder which makes the person “likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(7). The statute is therefore unconstitutional on its face.

The statute is also unconstitutional as applied to Mr. Alsteen, because the State did not prove he was likely to commit acts of sexual violence in the foreseeable future. Although the State’s expert claimed Mr. Alsteen met the criteria for commitment under the Static-99 and SORAG tools, mental health professionals “vigorously” question the scientific ability to predict future dangerousness at all. See M. Browne & R. Harrison-Spoerl, Putting Expert Testimony in its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us, 91 Marq. L. Rev. 1119, 1121 & n.11 (2008) (cataloging sources of criticism); A. Scherr, Daubert & Danger: The “Fit” of Expert Predictions in Civil

Commitments, 55 Hastings L.J. 1, 30 (2003) (“Psychiatric predictions of future dangerousness *are not accurate*; [they are] wrong two times out of three” (quoting Barefoot v. Estelle, 463 U.S. 880, 928, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (Blackmun, J., dissenting; emphasis in original)). A leading authority, Terence Campbell, states that the predictive accuracy of the Static-99, the tool used in Mr. Alsteen’s case, “rarely exceeds chance.” Terence W. Campbell, Assessing Sex Offenders, Problems and Pitfalls, American Series in Behavioral Science and Law (Springfield: Charles C. Thomas) 2007, 127.18.

Clinical judgments are fraught with unreliability. E. Beecher-Monas & E. Garcia-Rill, The Impact of Behavioral Genetics on the Criminal Law: Genetic Predictions of Future Dangerousness: Is there a Blueprint for Violence?, 69 Law & Contemp. Prob. 301, 317 (2006) (“Future dangerousness testimony based on clinical judgment alone has been overwhelmingly castigated by the profession and so fails peer review, publication, and the general acceptance prongs of Daubert”).

Actuarial analysis has methodological limitations and questionable application to an individual. Id. at 320-21. Although more accurate than clinical predictions, actuarial predictions “are

still tenuous” and “at best,” they “correlate only moderately with violence and sexual recidivism.” Id. at 321.

A mixed clinical-actuarial approach is inherently premised on the clinician’s judgment and lacks demonstrated scientific reliability. There is “little evidence” supporting enhanced accuracy of “hybrid” approaches using clinical assessment together with actuarial results. Browne, 91 Marq. L. Rev. at 1199, n. 373; see also Scherr, 55 Hastings L.J. at 24 (“no consensus” about merits or appropriate combinations in mixing clinical and actuarial approach). “No evidence-based research supports the proposition that clinicians can accurately predict when, or even if, an individual will commit an act of violence toward oneself or others.” R. Simon, The Future of the “Duty to Protect”: Scientific and Legal Perspective on Tarasoff’s Anniversary: the Myth of “Imminent” Violence in Psychiatry and the Law, 75 U. Cin. L. Rev. 631 (2006).

As the State’s expert acknowledged, the actuarial tools it used 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.

Given the failure of the statute and the trial court to limit the jury’s finding of future dangerousness to a specific time period, Mr. Alsteen’s commitment order should be reversed, and his case remanded for a new trial.

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

In his opening brief, Mr. Alsteen also argued that the trial court erred in giving 18 jury instructions describing crimes Mr. Alsteen committed in the past, to which he had already stipulated. The emphasis on his past actions unduly prejudiced Mr. Alsteen.

In response, the State primarily relies on the Washington Pattern Instructions (WPICs). But the pattern instructions are not the law, and trial courts should diverge from the WPICs where necessary. State v. Freeburg, 105 Wn. App. 492, 507, 20 P.3d 984

(2001); see also State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005).

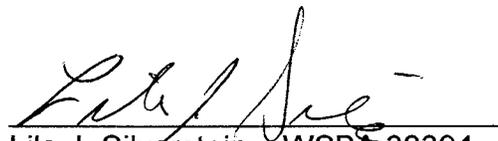
Here, by including 18 instructions describing Mr. Alsteen's prior crimes, the court suggested that the jury should give great weight to Mr. Alsteen's *past* conduct – which is precisely the opposite of what the jury is required to determine. The issues before the jury were whether Mr. Alsteen had a mental 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 State v. Todd, 78 Wn.2d 362, 377, 474 P.2d 542 (1970).

B. 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 5TH day of March, 2009.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lila J. Silverstein", is written over a horizontal line.

Lila J. Silverstein - WSBA 38394
Washington Appellate Project
Attorneys for Appellant

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
009 MAR -5 PM 4:57

IN RE THE DETENTION OF)

DOUGLAS ALSTEEN,)

APPELLANT.)

NO. 37140-5-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 5TH DAY OF MARCH, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** (FOR TRANSMITTAL TO COA - DIVISION THREE) AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JANA RANAE FRANKLIN) (X) U.S. MAIL
ATTORNEY AT LAW) () HAND DELIVERY
OFFICE OF THE ATTORNEY GENERAL) () _____
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104-3188

X] DOUGLAS ALSTEEN) (X) U.S. MAIL
SPECIAL COMMITMENT CENTER) () HAND DELIVERY
PO BOX 88600) () _____
STEILACOOM, WA 98388

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF MARCH, 2009.

X _____
gru

FILED
COURT OF APPEALS
DIVISION II
009 MAR -9 AM 0:43
STATE OF WASHINGTON
BY _____
DEPUTY

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711