

NO. 37352-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MATHEW JOHN JAGGER,

Petitioner.

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COURT OF APPEALS
DIVISION TWO
STATE OF WASHINGTON
BY _____ DEPT. CLERK

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

The Honorable Roseanne Buckner, Judge

AMENDED
OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mathew Jagger's motion to dismiss because the statute under which he was charged, RCW 9A.76.115, the sexually violent predator escape statute, is unconstitutional.

2. Mr. Jagger assigns error to conclusions of law II, III, IV, V, VI, VII, VIII, and IX of the written Findings of Fact and Conclusions of Law RE: Motion to Dismiss.¹

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is punishment for sexually violent predator (SVP) escape under RCW 9A.76.115, not merely punishment for "the discrete act of escaping," but further punishment for the prior sex offense underlying the SVP commitment instead, where a discrete act of escaping could not otherwise be punished as a class A felony and subject to indeterminate sentencing?

2. Can commitment as a sexually violent predator be civil rather than criminal, as it constitutionally must be, if such commitment is enforced by the threat that escape from a treatment facility will be punished as if it were a class A felony, with a mandatory minimum of 60 months and an indeterminate prison sentence?

¹ The written Findings of Fact and Conclusions of Law Re: Motion to Dismiss are attached to this brief and incorporated here by reference. They are in the Clerk's Papers at 41-46.

3. If enforcing commitment as a sexually violent predator by making escape from custody a class A felony subject to an indeterminate prison sentence, as if it were a sex offense, makes the SVP custody criminal rather than civil, does the SVP escape statute violate *ex post facto* prohibitions of the state and federal constitutions?,

4. If enforcing commitment as a sexually violent predator by making escape from such custody a class A subject to an indeterminate prison sentence, as if it were a sex offense, makes the SVP custody punitive rather than civil, does the sexually violent predator escape statute violate double jeopardy prohibitions of the state and federal constitutions?

5. Where escape of a patient involuntarily committed through a civil proceeding to a state hospital for the mentally ill or an institution for psychopaths is not a crime in Washington and the escapee is merely returned to the hospital or institution, does the punishment for SVP escape as a class A felony, with a minimum sentence of sixty months, and an indeterminate sentence as if it were a sex offense, establish that SVP confinement is clearly not civil in nature and the escape sentence is equally clearly impermissible additional punishment for the underlying sex offense of the SVP commitment?²

² RCW 9A.76.120 provides that a person who has been committed under RCW 10.77, as criminally insane, can be prosecuted for escape only for

6. Should the state's argument that punishing SVP escape and not escape from other civil commitments is justified on the grounds that a sexually violent predator has been found to be likely to reoffend be rejected where civil commitment under RCW 10.77.010 also requires a finding of a substantial danger to others or a "substantial likelihood" of committing further "criminal acts jeopardizing public safety"?

7. Should the state's argument that punishing SVP escape more harshly than any other escape is justified on the grounds that a sexually violent predator has been found likely to reoffend be rejected where persons convicted under the three strikes law are serving sentences of life without parole because they are likely to reoffend?

8. Is punishment for SVP escape with a minimum term of 60 months and an indeterminate sentence, as if it were a sex offense, so much more onerous than the sentences for escape while in custody for *any* other criminal conviction, with a maximum determinate sentence of 10 years as a class B felony, that it denies equal protection of law?

leaving the state without permission while on conditional release. Escape under RCW 9A.76.120 remains a class C felony. RCW 9A.76.120 does not, however, criminalize leaving a facility to which one has been civilly committed.

C. STATEMENT OF THE CASE

On July 21, 2006, Mathew Jagger was incarcerated at the Special Commitment Center on McNeil Island, Washington, following his March 15, 2006, commitment as a sexually violent predator. CP 1, 2, 5. He is currently charged under RCW 9A.76.115, with attempted sexually violent predator escape, for allegedly being found between the inner and outer perimeters at the Commitment Center. CP 5.

Mr. Jagger moved the trial court, the Honorable Roseanne Buckner, for dismissal of the charge on the grounds that the RCW 9A.76.115 is unconstitutional. CP 6-17. Judge Buckner denied the motion and entered Findings of Fact and Conclusions of Law concluding that RCW 9A.76.115 does not violate *ex post facto* or double jeopardy prohibitions nor violate equal protection guarantees, but certified to this Court that “the order [denying the motion to dismiss] involves a controlling question of law as to which there is substantial grounds for difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” RAP 2.3(4); RP 19-22; CP 40, 41-46.

On March 29, 2008, a Commissioner of this Court granted review. CP 49-50.

D. ARGUMENT

1. THE SEXUALLY VIOLENT PREDATOR ESCAPE STATUTE IS INCONSISTENT WITH THE CONSTITUTIONAL REQUIREMENT THAT COMMITMENT AS A SEXUALLY VIOLENT PREDATOR BE CIVIL.

Commitment of persons as sexually violent predators after they have fully served a prison term for the sex offense necessary to the commitment has been upheld as constitutional by the Washington Supreme Court and the United States Supreme Court only because it is deemed to be civil commitment and not further punishment for the prior conviction. In upholding the SVP statutes, these courts acknowledged that confinement under them must be civil rather than penal because persons committed under the SVP statute are not afforded the fundamental constitutional rights of those accused of a crime. For example, a person facing commitment under the SVP act is not entitled to confront the witnesses against him, In re Det. of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007), and a person who has been found incompetent to stand trial in a criminal case can be committed under the SVP statute, In re Det. of Greenwood, 130 Wn. App. 277, 122 P.3d 747 (2005).

Further, because commitment as a sexual predator under the procedures of RCW 71.09 requires proof of a prior conviction for a sexually

violent offense, if the conditions of confinement were punishment rather than for treatment, a finding that the person was a sexually violent predator would violate the prohibition against double jeopardy. RCW 71.09.030. If the commitment procedures resulted in criminal custody, it would represent a second prosecution and punishment for the same offense. Kansas v. Hendricks, 521 U.S. 346, 360-361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). For persons convicted prior to the SVP statute, if the statute were held to be criminal rather than civil, confinement would violate the *Ex Post Facto* Clause as new punishment for a crime already committed. Hendricks, 521 U.S. at 370-371. The SVP escape statute is unconstitutional under this authority because enforcing treatment with a threat that an attempt to escape will be punished as a class A felony, with a minimum term of 60 months and an indeterminate sentence, is inconsistent with civil commitment.

The Washington Supreme Court, in In re Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), upheld the Washington sexual predator commitment statute against constitutional challenges based on a determination that the statute was civil rather than criminal. The United States Supreme Court in Hendricks upheld the Kansas sexual predator commitment statutes on the same basis. Each court acknowledged that if the commitment were penal, the SVP statutes would unconstitutionally violate the prohibitions against double jeopardy and *ex post facto* laws.

In both Young and Hendricks, the courts recognized that even where the legislature or Congress has labeled a statute civil, it may be nonetheless held to be criminal where there is clear proof that the statutory scheme is so punitive in effect or purpose as to negate the civil label. Young, 122 Wn.2d at 32; Hendricks, 521 U. S. at 361.

In concluding that the Washington sexual predator statute was civil rather than criminal, the Washington Supreme Court relied on the facts (a) that the statute requires care and treatment, (b) that care was provided in a psychiatric facility run by DSHS rather than a facility run by the Department of Corrections and (c) that release is mandatory when the person is no longer dangerous. Young, at 35. The Young court noted that the statute was not concerned with criminal culpability, but was focused on treating the current mental abnormality; the statute was focused on treatment and incapacitation rather than retribution and deterrence. Young, at 36-39.

The United States Supreme Court engaged in a similar analysis in Hendricks, 521 U.S. at 361-363. In particular the Hendricks court noted that “the conditions surrounding the confinement do not suggest a punitive purpose on the State’s part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily-committed patients in state mental

institutions. . . . Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being 'punished.'" Hendricks, at 363.

Thus, the critical findings by the Supreme Courts of this State and the United States have been (a) that the sexual predators are in conditions similar to conditions of involuntarily-committed patients in mental institutions, (b) that their criminal culpability is not of concern, (c) that treatment and incapacitation are the goals and (d) that retribution and deterrence are not the goals.

Criminal sanctions for escaping from a sexual predator facility are inconsistent with the constitutional restrictions on a civil commitment statute: inconsistent with the goal of current treatment, inconsistent with less restrictive conditions than prison, and inconsistent with a lack of concern for criminal culpability. Punishing escape from a treatment facility after a SVP commitment as a class A felony with a minimum term of 60 months and an indeterminate sentence creates a prison-like condition. Such punishment for escape is focused on punishment rather than treatment. Instead of returning a person who escaped from SVP custody to continue treatment, the SVP escape statute transfers him to prison for at least five years, and potentially

for the rest of his life, where adequate treatment is unlikely.³ That the punishment is so harsh and extreme – greater than punishment for escape by someone serving life without parole under the three-strikes law or for aggravated murder – shows a strong concern for criminal culpability and certainly not a “lack of concern” for criminal culpability. It evidences a scheme to return persons to prison, potentially for the rest of their lives.

The Washington Supreme Court and the United States Supreme Courts upheld SVP commitment statutes because commitment under them was determined not to be penal. This does not mean that the legislature is therefore free to begin imposing clearly punitive conditions. The SVP escape statute is clearly punitive and inconsistent with civil commitment.

a. The sexual predator escape statute makes civil commitment as a sexual predator more akin to criminal custody than involuntary mental commitment.

The United States Supreme Court in Hendricks, in finding the Kansas sexual predator commitment statute to be civil in nature, gave great weight to the fact that the statute was more like the general involuntary mental commitment statute than like a criminal statute. Hendricks, at 363.

³ While RCW 72.09.335 requires the DOC to provide persons committed under RCW 9.94A.712 with the opportunity for treatment, treatment is not mandatory. Under RCW 9.95.090 (a), persons committed to prison under .712 are also required to “perform work or other programming as required by the department of corrections during their terms of confinement.” RCW 9.95.090(a) requires of “every able bodied offender . . . as many hours of faithful labor in each and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the institution in which he or she is confined.”

In Washington, escape of a patient who has been committed to a state hospital for the mentally ill or institution for psychopaths is not a crime, although a person who assists in such an escape can be charged with a class C felony. RCW 72.23.170. Criminal escape -- escape in the first, second and third degrees -- requires that the detention or custody from which the escape takes place be pursuant to a lawful arrest or court order in a *criminal* matter. RCW 9A.76.110; .120, .130; RCW 9A.76.010 (1), and (2).⁴

In contrast, RCW 9A.76.115 provides that a person is guilty of sexually violent predator escape if “(a) Having been found to be a sexually violent predator and confined to the special commitment center or another secure facility under court order, the person escapes from the secure facility.” “Sexually violent predator escape is a class A felony with a minimum sentence of sixty months”; it is also punished with an indeterminate sentence. RCW 9A.76.115.

Thus, SVP escape statute treats persons who escape from confinement as a sexually violent predator as a criminal and not as an involuntarily-committed person with a need for treatment. It is inconsistent with treating a person committed under the SVP escape statute similarly to a

⁴ Former RCW 9A.76.120, escape in the second degree, once provided that a person found to be a sexually violent predator who had been granted conditional release could be prosecuted for escape for leaving the state without authorization.

person civilly committed to a mental hospital for treatment.

Nonetheless, the state argues that it is permissible to treat persons committed under the SVP statute differently from other involuntarily-committed persons because those committed as sexually violent predators have been deemed to be likely to commit crimes in the future. CP 27, 29. This argument should be rejected.

First, the state's argument is not relevant to the question of whether SVP escape is unconstitutionally punitive. What was important to the United States Supreme Court in Hendricks court was that "an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily-committed patients in state mental institutions." Hendricks, at 363. Clearly, the SVP escape statute represents a more restrictive condition than the conditions of other involuntarily-committed patients.

Second, it simply is not accurate. RCW 10.77.010(4) provides:

A 'criminally insane' person means any person who has been acquitted of a crime charged by reason of insanity; and thereupon found to be a substantial danger to other persons or *to present a substantial likelihood of committing criminal acts jeopardizing public safety or security* unless kept under further control by the court or other persons or institutions.

(emphasis added).

The SVP escape statute is inconsistent with conditions imposed on involuntarily committed patients at mental hospitals; it makes SVP commitment consistent with prison conditions.

b. The sexually violent predator escape statute shifts the focus of the commitment to concern about criminal conduct and deterrence and away from treatment.

RCW 9A.76.115 effectively converts the detention pursuant to the sexual predator statute into a detention akin to a prison sentence rather than a detention equivalent to an involuntary mental commitment. If one is convicted of SVP escape, he is returned to prison and punished with potentially a life sentence. He faces a potential life sentence because, under RCW 9.95.420, he will not be released as long as the Indeterminate Review Board finds that he more than likely will engage in sex offenses on release. Since the person may not receive any treatment in prison, his confinement will likely go beyond the 60-month minimum and could continue up to a life sentence. RCW 9A.76.115, in fact, assures that the person who has been civilly committed may not be treated for at least five years, and perhaps never, and that he will instead be punished as if he had committed a sex offense. Such punishment cannot be consistent with the goals of treatment, least restrictive placement and release where possible.

Because escape is not a sex offense, the indeterminate sentence

provision of SVP escape as a sex offense can only be explained because commitment as a sexually violent predator requires a prior conviction for a sex offense. It constitutes further punishment for the underlying crime. Although under different statutes, the reasoning of the Minnesota court in State v. Piri, 204 NW2d 120 (Minn. 1973), makes this clear. The Piri court held that the trial court had no authority to impose a dangerous offender extended sentence for an escape conviction, because the dangerous offender enhancement related to the underlying crime. Similarly here, the sex offense designation must arise from the underlying conviction on which the SVP commitment was predicated because escape is not a sex offense.

Thus, the SVP escape statute, with its punishment provisions, is not only inconsistent with conditions of other involuntarily-committed patients and treatment goals, it is clearly focused on criminal culpability and further punishment based on the underlying crime of conviction. The United States Supreme Court and our Washington Supreme Court have held that such a focus is unconstitutional.

c. The Washington SVP escape statute is different than the statutes in other states in its severity and emphasis on the crime of conviction.

As of July 20, 2005, sixteen states had SVP statutes. Of those states, only California, Florida, Illinois, Iowa, Kansas, Missouri, Minnesota, Texas and Wisconsin criminalize escape from commitment. In those states which

because it constitutes further punishment for a prior conviction and is inconsistent with civil confinement for treatment is an issue of first impression in Washington. Further, no appellate court from another jurisdiction has squarely and fully addressed the impact of a judicial finding that the sexual predator commitment was civil in nature on an escape charge. The state cited a number of cases in the briefing for the trial court which hold that if a person serving a sentence in prison or jail is transferred to a hospital or mental facility, he or she can be prosecuted for escape from the hospital or mental treatment facility. These cases involve people who are serving a sentence after conviction for a crime or awaiting trial and who would be returned to prison or jail if released from the other treatment facility. They do not apply to a civil commitment after fully serving a sentence for the crime on which the civil commitment is predicated.⁵

⁵ E.g., Commonwealth v. Reed, 306 N.E.2d 816 (Massachusetts 1974) (the defendant was a prisoner placed in a hospital who was deemed to still be in the custody of the officer in charge of the prison from which he was transferred); Commonwealth v. Faust, 667 N.E.2d 863 (Mass. 1996) (prisoner escaped from a community release facility which was a branch of a corrections facility); Frazier v. United States, 339 F.2d 745 (D.C.Cir. 1964), cert. denied, 379 U.S. 948 (1964) (prisoner transferred from jail to a mental institution from which he escaped); Peper v. State, 768 P.2d 26 (Wyoming 1989) (escape from a residential community corrections program which was imposed as a condition of probation); State v. Knox, 250 N.W.2d 147 (Minnesota 1976) (prisoner escaped from the hospital to which he was transferred while serving a sentence). In one of the cited cases, People v. Ortega, 487 N.Y.S.2d 939 (New York 1985), the court dismissed the prosecution where the defendant had been involuntarily

In People v. Runge, 346 Ill. App.3d 500, 805 N. E. 2d 632, 639 (Ill. App. Ct.), appeal denied, 209 Ill. 2d 597, 813 N. Ed. 2d 277 (Ill. 2004), the court held that the SVP escape statute did not violate equal protection by criminalizing escape from custody by sexual predators and not other escapes from the department of health services. In reaching this conclusion, the Runge court held that persons committed under the SVP Act were not similarly situated to persons committed under the Sexually Dangerous Persons Act, because SVP inmates had been convicted of a crime where persons committed as Sexually Dangerous Persons had not been. Runge, 805 N.E.2d at 639. Thus, the Runge court expressly recognized that punishing a person for escape from confinement after SVP commitment was justified based on a prior conviction. The court did not address the double jeopardy implications of its holding.

Other states' appellate courts have held their sexual predator statutes are civil rather than criminal, even though the statutes include criminal escape convictions, but have done so without considering the impact of the escape statute on the civil nature of the confinement. See, In re Detention of Bradford, 712 N.W.2d 144, 148-149 (Iowa 2006) (setting forth that Florida,

committed, but in a non-secure facility, after being found not guilty by reason of insanity. The Ortega court held that the commitment was for rehabilitation and therefore a criminal sanction could not be imposed.

Missouri, Illinois, Texas and Alaska have criminal escape provisions for detained sexual predators). The Bradford court noted: “Although the specific issue raised here [whether the enactment of a SVP escape statute makes the SVP commitment criminal rather than civil] has apparently not been adjudicated in other states, many states have criminalized escape by sexually violent predators, yet their courts have held their sexually violent predator laws to be civil in nature.”

In Bradford, the Iowa court held that a provision making it a criminal offense to escape after being committed did not alter the civil nature of the underlying commitment. The Iowa court, without a significant analysis, held that the simple misdemeanor conviction for SVP escape was not punishment for being civilly confined, but for escaping, and that the escape provision protected the public. Bradford, at 148. The Bradford court did not consider the issue of whether the escape statute was constitutionally inconsistent with a civil sexual predator commitment process and did not look at the underlying factors set out by the United States Supreme Court which determine whether a statute is civil or criminal. The Bradford court also did not consider whether punishing SVP escape, not as a simple misdemeanor, but as a class A felony with a minimum 60-month and indeterminate sentence could be considered punishment for escape and not further punishment for the sex offense underlying the SVP commitment.

Of course, in Washington, if a person were punished only for “escape,” he could not be punished with more than a class B felony with a determinate sentence not greater than 10 years. Contrary to the finding of the trial court, the SVP escape statute simply does not punish only for the act of escape but must be further punishment for the prior sex offense conviction.

As set out above, the Supreme Courts of Washington and the United States have found the sexual predator commitment to be civil rather than criminal because (a) the sexual predators are kept in conditions similar to conditions of involuntarily- committed patients in mental institutions, (b) their criminal culpability is not of concern, (c) their treatment and incapacitation is the goal and (d) retribution and deterrence are not the goals. RCW 9A.76.115 alters each of these conditions. It makes SVP commitment dissimilar to other involuntary mental commitment. It focuses on criminal culpability by punishing the crime as a class A felony with an indeterminate sex offense sentence. Converting the confinement to a prison sentence through the escape statute is further inconsistent with treatment and replaces treatment with retribution and deterrence as goals. Most other states with SVP laws do not criminalize escape. Those which do have less severe sentences and do not single out escape from civil commitment for a more onerous sentence. Some do not differentiate between reasons for civil

commitment. Washington is unique in the severity of sentence and the focus on the prior crime of conviction. The Washington SVP escape statute most clearly establishes the intent to punish rather than treat, and a criminal rather than civil commitment.

2. TO CONVICT MR. JAGGER OF ESCAPE WOULD BE TO VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

If Mr. Jagger can be punished with criminal sanctions for attempting to escape from detention as a sexual predator, then he is effectively being punished a second time for a crime for which he had already been punished. The SVP escape statute makes the escape punishable as an indeterminate sex offense. This is based on the prior conviction as the actual escape has no element of sexual conduct. RCW 9A.76.115. In this direct way, Mr. Jagger is being punished again for his prior conviction, in violation of the state and federal prohibitions against double jeopardy. The punishment shows that the SVP escape statute is additional punishment for the prior sex offense.

Further, Mr. Jagger's prior criminal sentence for the underlying sex offense on which his civil commitment was predicated was enforced by a potential additional punishment for escape or attempted escape. Mr. Jagger served that sentence and could not be subject to additional punishment for escape had he not been committed as a sexual predator.

If there is any room for doubt that Mr. Jagger would in fact be

punished again for his prior sex offense, that doubt must be resolved when comparing his potential sentence with the sentences of all other persons convicted of escape from prison who face a maximum sentence of 120 months for conviction of a class B felony. If his escape charge goes forward, Mr. Jagger is denied his state and federal constitutional protections against double jeopardy.

The double jeopardy clauses of the state and federal constitutions protect against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

The protection against double jeopardy applies once an event happens that terminates jeopardy. Richardson v. United States, 468 U.S. 317, 325, 104 S. Ct. 3087, 82 L. Ed. 2d 242 (1984). Jeopardy attaches once a defendant is convicted of a crime and the defendant cannot be retried on that crime or another degree of that crime or alternative means of committing that crime. RCW 10.43.050, which codifies, in part, double jeopardy law in Washington, provides in relevant part that “[w]henver a defendant shall be acquitted *or convicted* upon an indictment or information charging a crime of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to

commit such a crime, or any degree thereof.” (emphasis added). See also, State v. Russell, 101 Wn.2d 249, 351-352, 678 P.2d 332 (1984) (the state may not retry a defendant on an alternative means of committing a crime).

Here, the SVP escape statute constitutes additional punishment for the same conviction. The prior conviction, which constitutes an element of being a sexually violent predator, exposed Mr. Jagger to custody which was enforced by escape penalties. He served that sentence prior to being committed as a sexual predator. Charging him with escape represents an unconstitutional second punishment for the prior offense. His escape conviction is treated like a sex offense. This is based on his prior conviction and constitutes a second punishment. For these reasons Mr. Jagger’s escape charge should be dismissed and the SVP escape statute declared unconstitutional.

3. TO CONVICT MR. JAGGER OF ESCAPE WOULD BE TO VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF LAW.

The Fourteenth Amendment provides that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.” Article 1, section 12 of the Washington Constitution states “no law shall be passed granting to any citizen, class of

citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

The equal protection clause and the privileges and immunities clause of Washington constitution are considered under the same analysis. State v. Shawn P., 122 Wn.2d 553, 559-560, 850 P.2d 1220 (1993). Both constitutional provisions require that similarly-situated persons be treated similarly. Shawn P., 122 Wn.2d at 560.

The standard of review – strict scrutiny, intermediate scrutiny or rational basis—depends on the nature of the interest affected or the characteristics of the class created by the statutes at issue. Shawn P., at 560; State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997). Personal liberty interests alone have been held not to justify strict scrutiny and the rational basis test has been applied to criminal sentencing. Garcia-Martinez, 88 Wn. App. at 327 (citing State v. McNeair, 88 Wn. App. 331, 944 P.2d 1099 (1997)); State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1998).

Under the rational basis test, the court determines (1) whether the legislation applies to all members within the designated class, (2) whether there are reasonable grounds to distinguish between those within and without the class, and (3) whether the classification has a rational relationship to the purpose of the legislation. Convention Center Coalition v. Seattle, 107

Wn.2d 370, 378-379, 730 P.2d 636 (1986).

If the class is all of those persons who can be charged with escaping confinement, the Washington escape statutes do not apply equally to all members within the class. Only persons charged with SVP escape must, or can, be sentenced to a class A felony with an indeterminate sentence. Thus, a person serving a sentence for a third-strike conviction, aggravated murder, multiple counts of violent offenses or of a violent sex offense can only receive a sentence of up to 120 months, while a person confined for treatment after having served his entire sentence shall receive an indeterminate life sentence with a mandatory minimum of 60 months. See State v. Hall, 104 Wn.2d 486, 706 P.2d 1074 (1985) (class was all persons escaping from work release where one statute governed any person on work release and another statute applied only to state prisoners on work release).

Even if the class is those persons who could be charged with SVP escape, there are no reasonable grounds for distinguishing those within this class from others who escape prison. All of the people who have been civilly committed under the SVP Act were confined in prison for the crime that formed the basis for their commitment. There is no rational basis for treating a person more severely after he has fully completed his sentence and is being civilly treated before his release.

Most importantly, the objective of the SVP law is not to punish, but

to treat. This, in fact, must be the objective of the legislation or it is unconstitutional. Such a non-punitive treatment goal is inconsistent with a harsher more onerous punishment for those confined for treatment than the punishment imposed on even the most serious criminal offenders. There is no rational relationship between harsher punishment and the rehabilitative goals of civil commitment. The escape conviction would interfere with treatment and be at odds with the goal of releasing the SVP patient to less restrictive alternative placement or the community. Accordingly, the SVP escape statute is an unconstitutional denial of the state and federal constitutional right to equal protection of law.

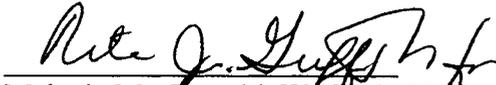
F. CONCLUSION

Appellant respectfully submits that the order of the trial court should be reversed and his case remanded for dismissal of the charge of sexually violent predator escape against him.

DATED this 16th day of April, 2008.


Rita J. Griffith, WSBA14360


Laura Carnell, WSBA 27860


Melanie MacDonald, WSBA16807



06-1-04063-7 29139737 FNFL 02-07-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-04063-7

vs.

MATHEW JOHN JAGGER,

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: MOTION TO DISMISS

Defendant.

THIS MATTER having come on before the Honorable Rosanne Buckner, Judge of the above entitled court, for a hearing on the defendant's motion to dismiss on the 10th day of January, 2008, the defendant having been present and represented by attorney MELANIE L. MACDONALD and LAURA S. CARNELL, and the State being represented by Deputy Prosecuting Attorney STEPHEN M. PENNER, and the court having heard the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

That on August 30, 2006, an Information was filed charging the defendant with ATTEMPTED ESCAPE OF A SEXUALLY VIOLENT PREDATOR, contrary to RCW 9A.28.020 and RCW 9A.76.115, and alleged to have been committed on July 21, 2006.

**POOR QUALITY
ORIGINAL**

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II.

That on November 6, 2007, the defendant filed a motion to dismiss the charge, arguing that RCW 9A.76.115 was unconstitutional.

III.

That on January 10, 2007, a hearing was held during which the Court heard argument from the defendant and the State regarding the defendant's motion to dismiss.

IV.

At the time of the alleged offense herein, July 21, 2006, the Sexually Violent Predator Escape statute, RCW 9A.76.115, stated in its entirety:

§ 9A.76.115. Sexually violent predator escape

(1) A person is guilty of sexually violent predator escape if:

(a) Having been found to be a sexually violent predator and confined to the special commitment center or another secure facility under court order, the person escapes from the secure facility;

(b) Having been found to be a sexually violent predator and being under an order of conditional release, the person leaves or remains absent from the state of Washington without prior court authorization; or

(c) Having been found to be a sexually violent predator and being under an order of conditional release, the person:

(i) Without authorization, leaves or remains absent from his or her residence, place of employment, educational institution, or authorized outing;

(ii) tampers with his or her electronic monitoring device or removes it without authorization; or

(iii) escapes from his or her escort.

(2) Sexually violent predator escape is a class A felony with a minimum sentence of sixty months, and shall be sentenced under RCW 9.94A.712.

V.

At the time of the alleged offense herein, July 21, 2006, the Escape in the First Degree statute, RCW 9A.76.110, stated in its entirety:

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§ 9A.76.110. Escape in the first degree

(1) A person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist.

(3) Escape in the first degree is a class B felony.

VI.

At the time of the alleged offense herein, July 21, 2006, the Escape in the Second Degree statute, RCW 9A.76.120, stated in its entirety:

§ 9A.76.120. Escape in the second degree

(1) A person is guilty of escape in the second degree if:

(a) He or she knowingly escapes from a detention facility; or

(b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody; or

(c) Having been committed under chapter 10.77 RCW for a sex, violent, or felony harassment offense and being under an order of conditional release, he or she knowingly leaves or remains absent from the state of Washington without prior court authorization.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist.

(3) Escape in the second degree is a class C felony.

VII.

At the time of the alleged offense herein, July 21, 2006, the Escape in the ~~Second~~^{Third} Degree statute, RCW 9A.76.130, stated in its entirety:

§ 9A.76.130. Escape in the third degree

(1) A person is guilty of escape in the third degree if he escapes from custody.

(2) Escape in the third degree is a gross misdemeanor.

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VIII.

At the time of the alleged offense herein, July 21, 2006, the sentencing statute governing the maximum penalty for Escape in the First, Second and Third Degree, RCW 9A.20.021, stated in its entirety:

§ 9A.20.021. Maximum sentences for crimes committed July 1, 1984, and after

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction of the parties and the subject matter.

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II.

That imposition of punishment under RCW 9A.76.115 punishes the discrete act of escaping from civil commitment as a sexually violent predator.

III.

That imposition of punishment under RCW 9A.76.115 does not punish a defendant for the earlier, predicate crimes which formed part of the basis for the civil commitment as a sexually violent predator.

IV.

That imposition of punishment, including criminal confinement, under RCW 9A.76.115 does not transform the underlying civil commitment into a criminal detention.

V.

That criminalizing the escape from civil commitment of persons committed for being sexually violent predators, while not criminalizing escape of other civilly committed persons, is rationally related to the legitimate state interest of protecting the public from those individuals judicially determined to be highly likely to commit future acts of sexual violence if not treated.

VI.

That therefore RCW 9A.76.115 does not violate the constitutional prohibition against *ex post facto* laws.

VII.

That therefore RCW 9A.76.115 does not violate the constitutional prohibition against double jeopardy.

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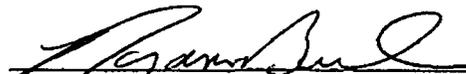
VIII.

That therefore RCW 9A.76.115 does not violate the constitutional requirement for equal protection of the laws.

IX.

That, accordingly, the defendant's motion to dismiss is denied.

DONE IN OPEN COURT this 7 day of February, 2008.


JUDGE

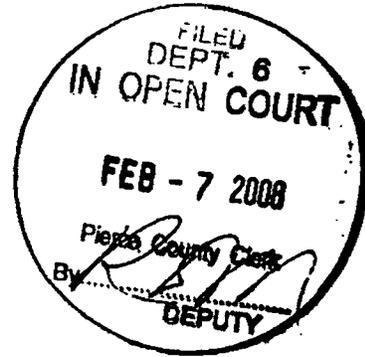
Presented by:


STEPHEN M. PENNER
Deputy Prosecuting Attorney
WSB # 25470

Approved as to Form:



Attorney for Defendant
WSB # 27860



Approved as to Form:



Attorney for Defendant
WSB # 16802

EP

