

NO. 38257-1-II

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

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STATE OF WASHINGTON  
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In re Detention of Darnell McGary

STATE OF WASHINGTON,

Respondent,

v.

DARNELL MCGARY

Appellant.

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

The Honorable Ronald E. Culpepper, Judge

BY: [Signature]  
JENNIFER J. SWEIGERT  
COURT REPORTER  
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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly weighed the evidence at the annual review hearing.

2. The trial court erred in denying appellant a new civil commitment trial.

3. The 2005 amendments to RCW 71.09.090 are unconstitutional to the extent they permit appellant's continued commitment without proof of paraphilia and deny him a meaningful opportunity to challenge that diagnosis.

Issues Pertaining to Assignments of Error

Under RCW 71.09.090, a committed person is entitled to a new trial if he shows probable cause he no longer meets the commitment criteria. The court rejected appellant Darnell McGary's request for a trial, finding he failed to establish probable cause.

1. In In re Detention of Elmore,<sup>1</sup> the Supreme Court held a show cause hearing under RCW 71.09.090 is not the proper forum to weigh evidence. The standard at the hearing is whether the facts, if believed, indicate the person no longer meets the commitment criteria. Did the trial court improperly weigh the evidence when it found appellant's experts were not persuasive?

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<sup>1</sup> In re Detention of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007).

2. Commitment requires proof of a “mental abnormality or personality disorder, which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” McGary presented a recent deposition by the editor of the Diagnostic and Statistical Manual (DSM)<sup>2</sup> pointing out an error that likely led to McGary being incorrectly diagnosed with paraphilia. McGary also presented a psychiatric evaluation maintaining his paraphilia diagnosis was either in error or had changed as a result of treatment. His schizophrenia has improved with medication. Has he shown probable cause that he no longer meets the commitment criteria?

3. The 2005 amendments to RCW 71.09.090 do not explicitly require a new trial upon evidence that McGary’s unlitigated, unproven, paraphilia diagnosis is incorrect. Does application of the statute violate McGary’s constitutional right to due process?

B. STATEMENT OF THE CASE

1. Procedural Facts

McGary stipulated to civil commitment at the Special Commitment Center (SCC) under chapter 71.09 RCW in 2004. CP 91. At his 2008 annual review hearing, the Pierce County Superior Court confirmed his

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<sup>2</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text revision 2000).

commitment and denied his motions for a new trial and to vacate his commitment. CP 497-98. This Court granted discretionary review.

2. Substantive Facts

In 2004, McGary stipulated to commitment on the grounds that his antisocial personality disorder (APD) and schizophrenia made him likely to reoffend sexually if not confined. CP 91. Since his commitment, he has at times participated in sex offender treatment and his schizophrenia has been controlled with medication. CP 158, 435. Since his commitment, he has also been diagnosed with paraphilia NOS rape/no consent. CP 145. His most recent annual evaluation recommending continued commitment relies in large part on the paraphilia diagnosis. CP 145.

At his 2008 show cause hearing, McGary presented evidence that he no longer suffers from paraphilia, if he ever did. CP 260-61, 441, 447. Dr. Theodore Donaldson's evaluation concluded McGary either was wrongly diagnosed with paraphilia or had changed as a result of remission or treatment. CP 441, 447. Dr. Michael First's deposition discussed a textual error in the DSM that could lead to erroneous paraphilia diagnoses based solely on behavior, rather than on the actual mental disorder characterized by recurring fantasies or urges. CP 260-61.

The trial court found McGary had presented “something to indicate that perhaps he doesn’t have the mental disorder at this time,” but the court nonetheless concluded it was “not enough to warrant an evidentiary hearing.” RP 26-27. The court’s written ruling stated it was “not persuaded” by Dr. Donaldson’s evaluations and the oral ruling explained Dr. First’s deposition was “not persuasive.” CP 497; RP 27. During argument, the court asked McGary’s counsel about Dr. Donaldson’s evaluation, saying, “Isn’t that fairly slim proof this is from the person who says he was misdiagnosed in the first place and never should have been there?” RP 29. Additional facts are contained in the Motion for Discretionary Review and Supporting Brief (MDR) and Motion to Modify Commissioner’s Ruling (MTM) and are incorporated herein by this reference. MDR 3-11; MTM 1-3.

C. ARGUMENT

1. THE COURT IMPROPERLY WEIGHED THE EVIDENCE WHEN IT FOUND MCGARY HAD SHOWN SOME EVIDENCE BUT “NOT ENOUGH TO WARRANT AN EVIDENTIARY HEARING.”

Persons committed under Chapter 71.09 RCW<sup>3</sup> have a right to petition the court for release on an annual basis. RCW 71.09.090. The court

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<sup>3</sup> The State may petition to have a person civilly committed indefinitely if the person is found to be a sexually violent predator. Chapter 71.09. RCW. A sexually violent predator is defined as

any person who has been convicted of or charged with a crime of

must then hold a show cause hearing to determine whether there is probable cause to believe the person no longer meets the commitment criteria. RCW 71.09.090. If probable cause exists, a new commitment trial must be held. RCW 71.09.090. A trial court's decision on probable cause at a show cause hearing is reviewed de novo. Elmore, 162 Wn.2d at 37 (citing In re Detention of Petersen, 145 Wn.2d 789, 799, 42 P.3d 952 (2002)).

The court "may not weigh the evidence" at a show cause hearing. Elmore, 162 Wn.2d at 37. Specifically, the court may not weigh experts' credibility or persuasiveness in the context of other expert opinions. Id.; In re Detention of Ward, 125 Wn. App. 381, 389, 104 P.3d 751 (2005). The standard is probable cause, and the trial court's minimal gate-keeping function is limited to determining whether an expert's conclusion is supported by sufficient facts. RCW 71.09.090; Elmore, 162 Wn.2d at 36-37; Ward, 125 Wn. App. at 387. The court should presume testimony on behalf of the committed person is true and determine only whether the evidence, "if believed," shows the person no longer meets commitment criteria. Elmore, 162 Wn.2d at 37.

In Petersen, the court reversed a probable cause ruling because the ruling was based on the lower court's assessment of the expert's

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sexual violence and who suffers from a mental abnormality or personality 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(16).

conclusions as “very guarded.” 145 Wn.2d at 803. The Washington Supreme Court found, “This rings of weighing the evidence, not simply determining if it exists.” 145 Wn.2d at 803.

The court’s findings in this case similarly ring of weighing the evidence. The written findings and conclusions specifically state that the “court was not persuaded by Dr. Donaldson’s initial report of February, 2007 or his subsequent report of April 1, 2008.” CP 497. In its oral ruling, the court stated, “The deposition of Dr. First, I really don’t find very persuasive.” RP 26-27. The court further opined the potential for misdiagnosis was “pretty speculative. Could there have been some mistake? Well, I don’t know. Possibly there could have been, but I’m certainly not convinced now that there was.” RP 27. During argument, the court asked McGary’s counsel about Dr. Donaldson’s evaluation, saying, “Isn’t that fairly slim proof this is from the person who says he was misdiagnosed in the first place and never should have been there?” RP 29. The trial court found McGary had presented “something to indicate that perhaps he doesn’t have the mental disorder at this time,” but the court nonetheless concluded it was “not enough to warrant an evidentiary hearing.” RP 26-27.

The court repeatedly used language indicating it was assessing Dr. Donaldson’s credibility and persuasiveness. RP 26-27, 29, 30; CP 497.

This is precisely the type of weighing that is not permitted in a probable cause determination. Elmore, 162 Wn.2d at 37; Ward, 125 Wn. App. at 389. As discussed below, McGary met his burden to show probable cause he no longer meets the commitment criteria. Therefore, McGary asks this Court to reverse the order on the show cause hearing and grant him a full commitment trial.

2. MCGARY SHOWED PROBABLE CAUSE HE NO LONGER MEETS THE COMMITMENT CRITERIA.

To be committed as a sexually violent predator, an individual must be shown to suffer from a mental abnormality or personality disorder that makes the person likely to commit acts of predatory sexual violence.

RCW 71.09.020(16). A new trial is required if there is probable cause that the person has so changed that he or she “no longer meets the definition of a sexually violent predator.” RCW 71.09.090(2)(c).

Probable cause of such change exists when evidence shows “a substantial change in the person’s physical or mental condition” since the person’s last commitment trial. RCW 71.09.090(4)(a). Changes in mental condition warrant a new trial when there is evidence of positive response to treatment indicating the person does not meet commitment criteria.

RCW 71.09.090(4)(b); In re Detention of Ambers, 160 Wn.2d 543, 158 P.3d 1144 (2007). McGary showed probable cause for a new trial because

he presented expert opinions that he no longer meets commitment criteria because 1) his mental health has improved in response to treatment including medication and 2) his paraphilia diagnosis is incorrect.

a. Since Commitment, McGary's Mental Health Has Improved With Medication and Treatment.

McGary stipulated to commitment for schizophrenia and antisocial personality disorder. CP 91. He has also been diagnosed with paraphilia NOS non-consent/rape, and his continued commitment rests largely on this diagnosis. CP 133, 138, 460. At the 2008 show cause hearing, McGary presented evidence these disorders no longer justify commitment.

A person may no longer be committable when his mental illness is controlled by medication. Petersen, 145 Wn.2d at 802. In Petersen, Bernard Thorell presented an expert opinion that his risk to reoffend was reduced by the substitution of a new drug into his treatment regime. Id. at 793. Nonetheless, the trial court concluded Thorell had not established probable cause to believe that he was not likely to reoffend. Id. at 794. The court reversed, holding Thorell presented prima facie evidence showing probable cause that continued detention was unlawful. Id. at 802. McGary's schizophrenia has also been controlled with medication. CP 435. At a minimum, this is evidence requiring a new trial on whether he continues to meet commitment criteria. Petersen, 145 Wn.2d at 802.

Similarly, Dr. Donaldson's evaluations show McGary's paraphilia has also changed, either due to treatment or remission so that he no longer meets the commitment criteria. CP 447. Dr. Donaldson's 2008 evaluation states, "it is my opinion that Mr. McGary no longer suffers from a paraphilic disorder (if he ever did) and that this change could be due to any number of conditions, including his early participation in treatment, including working on sexual autobiographies and relapse prevention plans." CP 447.

Evidence of change due to treatment is sufficient to trigger a new trial regardless of whether the evaluator also believes the original diagnosis was incorrect. Elmore, 162 Wn.2d at 37-38. At the show cause hearing in Elmore, Elmore presented Dr. Wollert's opinions that Elmore's condition had changed as a result of treatment and that Elmore never suffered from a disorder to begin with. Id. at 37-38. Nevertheless, the court concluded Elmore had established probable cause and remanded for a full evidentiary hearing. Id. at 38.

Under Elmore, it is irrelevant that Dr. Donaldson also believes McGary does not suffer from paraphilia. His opinion that McGary has improved in response to treatment and medication establishes probable cause and requires a new hearing.

b. McGary Does Not Meet the Commitment Criteria Because His Paraphilia Diagnosis Is in Error.

McGary also presented evidence his paraphilia diagnosis was incorrect and stemmed from an error in the DSM. CP 260-61. Dr. First is the editor of the most recent edition of the DSM. CP 197. He explained in his deposition that an inadvertent error crept into the 4<sup>th</sup> edition text revision. CP 259-60. That text now permits a paraphilia diagnosis based on fantasies, urges, “or behaviors.” CP 260. This is entirely inconsistent with the proper understanding of paraphilia as a deviant pattern of arousal. CP 260. Behavior such as rape may or may not be motivated by such a deviant pattern of arousal. CP 260. The mere fact of having committed rape is not sufficient to diagnose paraphilia. CP 259-61.

Commitment as a sexually violent predator merely on the basis of behavior (such as prior criminal convictions) would also violate constitutional due process because any convicted rapist would be committable as suffering from paraphilia. See Foucha v. Louisiana, 504 U.S. 71, 82-83, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (rejecting approach to civil commitment that would permit indefinite confinement “of any convicted criminal” after completion of a prison term).

The record shows this error occurred in McGary’s case and he was improperly diagnosed with paraphilia based solely on his behaviors. The

State's own evaluator, Dr. Allison, noted McGary has never admitted to any rape fantasies or uncontrollable urges. CP 145. Additionally, a plethysmograph test showed no arousal to rape stimuli. CP 145. Nevertheless, based on his convictions for three sexual assaults and some undisclosed evidence that the rapes were not entirely unplanned, Dr. Allison concluded McGary suffers from paraphilia. CP 145. McGary's prior State evaluator, Dr. Gollogly also diagnosed paraphilia based solely on McGary's past offenses and found it was the paraphilia that qualified him for commitment. CP 19-20.

Dr. First's deposition combined with the State's evaluation shows McGary was wrongly diagnosed with paraphilia. Dr. First's credibility is a question for the jury, not the probable cause court. Elmore, 162 Wn.2d at 37. Evidence that McGary's continued commitment is based on an incorrect diagnosis requires a new trial on whether he meets the commitment criteria.

c. McGary Does Not Meet the Commitment Criteria Based on the Remaining Diagnosis of Antisocial Personality Disorder.

The criteria for commitment require that the person to be committed "suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined." RCW 71.09.020(16). McGary stipulated that

his schizophrenia and antisocial personality disorder made him likely to reoffend sexually. CP 91. But there is no evidence that, once his schizophrenia is controlled through medication, the personality disorder alone would make him likely to reoffend sexually. According to Dr. Donaldson, APD alone does not make a person “likely to engage in predatory acts of sexual violence” because it is not specific to sexual behavior. CP 436. The State asserts his paraphilia meets this criterion, but the diagnosis has never been proved beyond a reasonable doubt and as discussed above, McGary has shown probable cause that the diagnosis is in error.

The standard at the show cause hearing is no more stringent or different than that at an original commitment proceeding; a full trial is required if the detainee shows probable cause that he no longer meets the commitment criteria. Ambers, 160 Wn.2d at 559. In the face of conflicting evidence on McGary’s diagnoses, his response to treatment, and his likeliness to reoffend, a new trial is required. Elmore, 162 Wn.2d at 37-38. McGary requests this Court reverse the trial court and remand for a full evidentiary hearing. Id. at 38-39.

3. THE 2005 AMENDMENTS TO RCW 71.09.090 ARE UNCONSTITUTIONAL TO THE EXTENT THEY AUTHORIZE MCGARY'S CONTINUED CONFINEMENT WITHOUT PROOF OF PARAPHILIA.

Under the current statute, the only evidence that triggers a new trial for a committed person is 1) permanent physiological change making the person incapable of sexually reoffending or 2) positive change in response to continuing treatment. RCW 71.09.090(4). Evidence of McGary's incorrect paraphilia diagnosis does not clearly fall into either of these categories. If this court concludes the statute does not permit a new trial on this basis, the statute is unconstitutional as applied to McGary. First, it permits the State to confine him without proving his mental abnormality by at least clear, cogent, and convincing evidence. Second, it denies him any meaningful opportunity to be heard.

a. Due Process Requires Clear, Cogent, and Convincing Evidence of a Mental Illness and a Meaningful Opportunity to Be Heard.

Both the Federal and Washington Constitutions provide that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Const. art. I, § 3; In re Detention of Davis, 109 Wn. App. 734, 743, 37 P.3d 325 (2002). Freedom from bodily restraint is an essential component of the liberty interest protected by the fourteenth amendment, and involuntary commitment triggers due process

protections. In re Detention of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003) (citing Foucha, 504 U.S. at 80).

Indefinite commitment under Chapter 71.09 RCW is only constitutional when it is necessary to further the compelling state interest of protecting society from an individual who is currently dangerous due to a mental abnormality. In re Detention of Marshall, 156 Wn.2d 150, 157, 125 P.3d 111 (2005); In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002); In re Pers. Restraint of Young, 122 Wn.2d 1, 26, 857 P. 2d 989 (1993). Thus, the very purpose of the annual review is to ensure that infringement of a committed person's fundamental liberty interest is narrowly tailored to comport with constitutional requirements. See Foucha, 504 U.S. at 80 (holding continued confinement of an insanity acquittee was impermissible absent clear and convincing evidence of both "current mental illness and dangerousness"). Due process requires commitment be based on "medical justification." Foucha, 504 U.S. at 88 (O'Connor, J., concurring in part and concurring in judgment); Kansas v. Hendricks, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Courts have found Washington's statute is narrowly tailored, as required by constitutional due process, because it requires proof beyond a reasonable doubt of a mental abnormality rendering the person dangerous beyond his or her control. Thorell, 149 Wn.2d at 731 –32 (quoting

Hendricks, 521 U.S. at 358). The opportunity for periodic review of these findings is also crucial to their constitutionality. Young, 122 Wn.2d at 39. At a minimum, due process requires proof of the commitment criteria by clear, cogent, and convincing evidence and a meaningful opportunity to be heard. Foucha, 504 U.S. at 75-76; Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

b. As Applied, the Statute Permits Indefinite Confinement Without Clear, Cogent and Convincing Evidence of Mental Abnormality.

At the show cause hearing, the State need only show a prima facie case that the committed person continues to have a mental abnormality making him or her likely to reoffend. RCW 71.09.090(2)(c). The statute contemplates this abnormality has already been proven beyond a reasonable doubt in the original commitment trial. RCW 71.09.070; RCW 71.09.020(16). Additionally, the Legislature has deemed these types of mental abnormalities to be particularly intractable. RCW 71.09.010; Laws of 2005, ch. 344, § 1. Therefore, the bases on which the committed person can obtain a new trial are limited.

The 2005 amendments prevent re-litigation of the original basis for commitment by restricting the type of changes that trigger a new trial. Laws of 2005, ch. 344, § 1. Specifically, the Legislature rejected the idea that “new diagnostic practices can be the basis for change under RCW

71.09.090.” Id. (rejecting holding in Ward, 125 Wn. App. 381).

Therefore, so long as the State presents a prima facie case, the committed person may only attack his commitment by showing permanent physiological inability to reoffend or positive change in response to treatment. RCW 71.09.090(4).

McGary’s case confounds the expectations of the drafters and results in an impossible predicament for McGary. McGary originally stipulated he met the commitment criteria based on schizophrenia and APD. CP 91. But then McGary was additionally diagnosed with paraphilia. This illness was neither stipulated to, nor proven beyond a reasonable doubt. Nor was the link between his paraphilia and his likeliness to reoffend ever proven. This predicament violates due process because it allows the State to confine McGary indefinitely on the basis of his paraphilia diagnosis without clear, cogent, and convincing evidence. Foucha, 504 U.S. at 75-76.

c. The Statute Unconstitutionally Permits McGary’s Indefinite Confinement Without a Meaningful Opportunity to Be Heard.

Additionally, McGary is denied a meaningful opportunity to be heard because under a strict interpretation of the current statute, McGary can never challenge this unproven diagnosis or its impact on his likelihood

to reoffend. RCW 71.09.090. He is limited to showing positive response to treatment for an illness he has never been shown to have.

Once the original basis for commitment no longer exists, a committed person “is entitled to constitutionally adequate procedures to establish the grounds for his confinement.” Foucha, 504 U.S. at 79. Adequate procedure involves, at a minimum, a meaningful opportunity to be heard. Mathews, 424 U.S. at 333-34. Due to the restrictions on the type of evidence that triggers a new trial, the show cause hearing is not “constitutionally adequate procedures.” Foucha, 504 U.S. at 79.

When the original basis for commitment no longer exists, the State must prove a new basis for commitment. See Foucha, 504 U.S. at 80. Foucha was originally committed after being acquitted of burglary and illegal discharge of a firearm by reason of insanity. Foucha, 504 U.S. at 73-74. Four years later, a panel of his doctors found Foucha was no longer mentally ill, but they would not certify he was not presently dangerous. Id. at 74-75. The Louisiana court ordered Foucha returned to the mental institution. Id. at 75. The Supreme Court held Louisiana could not continue to confine Foucha because the original insanity no longer existed and the State had not proven both mental illness and dangerousness by clear, cogent, and convincing evidence. Id. at 80.

As in Foucha, the original basis for McGary's commitment no longer exists because his schizophrenia has improved. The added paraphilia diagnosis has never been shown by any standard of proof. Thus, to comply with due process, the statute must require a full hearing when continued commitment is based, in whole or in part, on a new diagnosis that was not litigated in the original commitment proceeding. If not, the State could simply change McGary's diagnosis every time he shows positive changes in response to treatment.

When there is evidence the person does not meet the statutory criteria, continued commitment violates due process unless there is a new determination that the commitment criteria are met beyond a reasonable doubt. RCW 71.09.060(1); RCW 71.09.090(2)(c); see Foucha, 504 U.S. at 77-80 (discussing due process requirements for continued involuntary commitment). "The State must go through the exercise of pleading and proving its case before committing a man, even a bad man, to total confinement for what is likely to be the rest of his life." Marshall, 156 Wn.2d at 166 (Chambers, J., dissenting). McGary presented evidence his unproven paraphilia diagnosis, on which his continued commitment is largely based, is in error. By failing to require a new trial upon such evidence, RCW 71.09.090, as amended in 2005, is unconstitutional insofar

as it authorizes continued commitment based on an unproven mental illness with no meaningful opportunity to challenge that finding.

- d. Alternatively, this Court Should Construe the Statute as Requiring a New Trial in McGary's Case to Comport with Due Process.

Alternatively, this court should construe RCW 71.09.090 as calling for a new trial in this case. Due process concerns require courts to construe laws limiting liberty interests to render them constitutional. Young, 122 Wn.2d at 41; In re Detention of Smith, 130 Wn. App. 104, 112, 122 P.3d 736 (2005). In Young, the court reversed the commitment of an individual who had been living in the community for four months prior to filing of the commitment petition. 122 Wn.2d at 42. The court construed the statute as requiring allegation and proof of a “recent overt act” to show dangerousness because such a showing was required to comport with substantive due process concerns. Id. at 41.

RCW 71.09.090 should similarly be construed as requiring a new trial in McGary's case. Because the statute does not contemplate the standard for challenging a diagnosis that occurred after stipulation to commitment on a different basis, the statute is ambiguous. This court should construe RCW 71.09.090 as requiring a full trial under these circumstances. Cf. Young, 122 Wn.2d at 41-42.

D. CONCLUSION

For the foregoing reasons and for the reasons contained in McGary's Motion for Discretionary Review and Motion to Modify, this Court should reverse the orders affirming McGary's commitment and remand for a new commitment trial.

DATED this 2d day of June, 2009.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Jennifer J. Sweigert", is written over a horizontal line.

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