

No. 42335-9-II

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

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IN RE: DETENTION OF LENIER RENE AYERS

STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

LENIER RENE AYERS,

Appellant.

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

The Honorable John F. Nichols

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE ASSIGNMENTS OF ERROR IN THE  
OPENING BRIEF COMPLY WITH THE  
RULES OF APPELLATE PROCEDURE

The State contends the trial court's four "factual findings" made in support of its order denying the CR 60(b) motion are verities on appeal because Mr. Ayers did not separately assign error to them. SRB at 15-16. To the contrary, the trial court's four bases for denying the motion are not findings of fact and therefore Mr. Ayers was not required to assign error to them individually.

The trial court denied the CR 60(b) motion for the following asserted reasons:

1) It was not brought within a reasonable time; 2) it does not present extraordinary circumstances; and 3) it fails on its merits because the issue it raises (validity of the respondent's diagnosis) was also raised at trial and the Court considered that issue when deciding the case. The court further finds that Respondent's trial counsel was not ineffective for failing to request a Frye hearing.

CP 461. These are not factual findings but conclusions of law. Mr. Ayers was not required to assign error to them.

RAP 10.3(a)(4) provides the opening brief of appellant must contain: "A separate concise statement of each error a party contends

was made by the trial court together with the issues pertaining to the assignments of error.” Also, RAP 10.3(g) provides:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Thus, the rule requires the appellant to assign error to each challenged factual finding, not each conclusion of law. The appellant need not assign error to the trial court’s specific conclusions of law if the appellant did assign error generally to the trial court’s ultimate legal conclusion and the thrust of the briefing articulated the challenge to that ultimate legal conclusion. Johnson v. County of Kittitas, 103 Wn. App. 212, 216, 11 P.3d 862 (2000).

Here, Mr. Ayers assigned error to the trial court’s ultimate legal conclusion that the CR 60(b) motion should be denied, as well as its legal conclusions that his diagnoses did not violate due process, that he was not entitled to a Frye hearing, and that he received effective assistance of counsel. AOB at 2. Further, the briefing articulates the reasons for Mr. Ayers’ challenge to the trial court’s legal conclusions. The assignments of error comply with RAP 10.3.

Moreover, RAP 1.2(a) provides that the Rules of Appellate Procedure “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands.” As argued in the opening brief, proceedings under CR 60(b) are equitable in nature and the court should exercise its authority liberally to preserve substantial rights and do justice between the parties. Mr. Ayers’ substantial interest in his liberty is at stake. This Court should reject the State’s attempt to have the appeal disposed of on such a minor procedural ground.

2. THIS COURT SHOULD ADDRESS THE  
MERITS OF MR. AYERS’ CR 60(b) MOTION

The State contends this Court should not address the merits of Mr. Ayers’ CR 60(b) motion because it was not brought within a “reasonable time.” The State acknowledges that “reasonable time” is not defined in the case law. As stated, CR 60(b) proceedings are equitable in nature and this Court should apply the rule liberally to preserve Mr. Ayers’ substantial right to his liberty. Recent developments in the law make clear that collateral proceedings, rather than the annual review process, are the only avenue for RCW 71.09

detainees to challenge their commitment orders on the basis of additional scientific evidence. Given the circumstances of this case, Mr. Ayers brought his motion within a reasonable time and this Court should address the merits of it.

In State v. McCuiston, \_\_ Wn.2d \_\_, 2012 WL 1570021, at \*8 n.6 (No. 81644-1, May 3, 2012), the Washington Supreme Court made clear that, if developments in scientific research call into question the correctness of a court's initial determination that a person is a "sexually violent predator," the detainee may challenge the commitment order only through a collateral attack and not through the annual review procedure. In order to obtain relief through the annual review procedure, the detainee must show he has undergone a physiological change or a change in mental condition due to treatment. Id. at \*11.

As stated in the opening brief, constitutional due process requires the State demonstrate a person is both mentally ill and currently dangerous to justify ongoing civil detention. Scientific developments, or developments in the case law, occurring after the initial commitment trial may call into question the determination that a person is either mentally ill or dangerous. Civil detainees under

chapter 71.09 RCW must have an avenue to present such material to the court. CR 60(b) presents one such avenue.

In addition, Mr. Ayers brought his motion within a “reasonable time.” He brought the motion less than one year after his commitment order was final. It is reasonable, and conserves judicial resources, to allow a detainee first to pursue a direct appeal before bringing a collateral attack. The direct appeal itself may result in reversal of the commitment order. Although consideration of the CR 60(b) motion has been delayed because this Court reversed and remanded the trial court’s initial order denying the motion, that should not be held against Mr. Ayers. Mr. Ayers filed all pleadings in the trial court *pro se*. The issues he raised in the initial motion are the same as those at issue in this appeal. What is a “reasonable time” should be measured from the date he filed his original *pro se* motion.

In sum, Mr. Ayers’ substantial liberty is at stake and he has limited avenues available to challenge his detention based on developments in the case law and scientific research. This Court should hold his motion was filed within a “reasonable time” and reach the merits of the motion.

3. MR. AYERS' INVOLUNTARY  
COMMITMENT BASED ON THE  
DIAGNOSES OF PARAPHILIA NOS  
(HEBEPHILIA) AND ANTISOCIAL  
PERSONALITY DISORDER VIOLATES  
DUE PROCESS

The State contends the diagnosis of paraphilia NOS (hebephilia) is valid because it is contained in the DSM under the catchall diagnosis of paraphilia NOS. SRB at 7. Yet the State also acknowledges that, by definition, paraphilias involve deviant arousal. SRB at 7. The State does not address Mr. Ayers' argument that hebephilia cannot fall under the catchall category of paraphilia NOS because it does not involve deviant arousal. A sexual attraction to pubescent teens cannot be considered "deviant."

The State also contends that, in arguing the diagnosis has not gained general acceptance in the medical community, Mr. Ayers relies only on "dissenting voices." SRB at 30. The State downplays the degree and extent of the disagreement about the diagnosis among medical practitioners, as set forth in the opening brief.

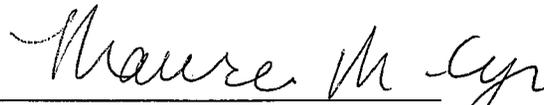
The State recognizes the Washington Supreme Court's decision in State v. Greene, 139 Wn.2d 64, 984 P.2d 1024 (1999), but argues it does not apply because in chapter 71.09 RCW proceedings the State needs to prove only that the person suffers from a "mental

abnormality.” The State argues “mental abnormality” need not fit within the definitions employed by the medical community. SRB at 34. But in finding that Mr. Ayers had a “mental abnormality,” the trial court relied heavily on the testimony of the State’s psychiatrist expert, who diagnosed Mr. Ayers with paraphilia NOS (hebephilia). If the diagnosis is not valid or reliable, the expert’s testimony is called into question. Thus, Greene applies.

B. CONCLUSION

For the reasons given above and in the opening brief, Mr. Ayers's civil commitment rests on diagnoses that are either not generally accepted within the psychiatric community or are too broad and imprecise. Also, trial counsel was ineffective for failing to request the diagnoses be subject to a Frye hearing or to argue they were objectionable under ER 702. For these reasons, the trial court's order denying the motion to vacate judgment must be reversed and the matter remanded for a new trial.

Respectfully submitted this 21st day of May 2012.



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IN RE THE DETENTION OF	)	
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APPELLANT.	)	

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I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 21<sup>ST</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF MAY, 2012.

X \_\_\_\_\_ 

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