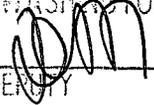


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DIVISION II

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STATE OF WASHINGTON

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No. 32972-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

State of Washington, Respondent

vs.

Sheldon Martin, Appellant

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred in denying Mr. Martin's motion to dismiss by order entered on October 29, 2004.

Issues Pertaining to Assignments of Error

1. Whether the State of Washington may institute a civil commitment proceeding under RCW 71.09 in a county in which the Respondent has never been charged with or convicted of any offense.

B. Statement of Case

On March 4, 2003, the State of Washington filed a petition in Thurston County Superior Court seeking to commit Mr. Sheldon Martin as a sexually violent predator (SVP) pursuant to Washington's SVP law, chapter 71.09 RCW. CP at 3-5. At the time the petition was filed, Mr. Martin was finishing his 30-month sentence for a 1992 Clark County, WA conviction for Burglary in the Second Degree with sexual motivation and Indecent Exposure. CP at 4-5, 84. This 30-month sentence was run consecutively to Mr. Martin's 1992 Multnomah County, OR convictions for Kidnapping in the Second Degree and Attempted Sexual Abuse in the First Degree. CP at 4-5, 111-114.

The Clark County crimes were committed first in time in relation to the Oregon offenses; however, while awaiting sentencing on the Clark County crimes, Mr. Martin committed the Oregon offenses. RP at 5, 8 (October 29, 2004.) He was then convicted of and sentenced for the Oregon offenses after which he was extradited back to Clark County where he was sentenced for the Clark County crimes. Id.

On October 6, 2004, Mr. Martin filed a motion to dismiss the petition against him, framing the question presented as follows: "whether the State of Washington may institute a civil commitment proceeding under RCW 71.09 in a county in which the Respondent has never been

charged with or convicted of any offense (and whose predicate sexually violent offenses are solely out-of-state offenses.)” CP at 69, 74. Mr. Martin argued that “[t]he petition against him must be dismissed because the State ha[d] not observed the statutory requirements listed in chapter 71.09 RCW[.]” CP at 74. Mr. Martin principally relied on RCW 71.09.030 in support of his argument that the petition should be dismissed. RP at 5.

The State responded on October 13, 2004 stating, *inter alia*, the following:

The offense, which was the basis for Mr. Martin’s incarceration at the time the Petition against him was filed, occurred in Clark County. However, that offense, Burglary in the Second Degree with Sexual Motivation, is not classified as a sexually violent offense under the definition provided in RCW 71.09.020(15). The portion of RCW 71.09.030 as set forth above refers to the sexually violent offense as the offense for which “the person was convicted or charged”. It is to the prosecuting attorney of the county where the sexually violent offense occurred, then, that the matter is to be referred for filing.

Where the sexually violent offense is from another state, RCW 71.09.030 provides little guidance as the appropriate venue; the statute does not set forth a procedural remedy for this anomaly. The definition of a sexually violent offense, RCW 71.09.020(15), however, clearly allows the use of out-of-state convictions as predicate sexually violent offenses. Therefore, as Thurston County is the seat of state government and the county wherein the Office of Attorney General has its primary place of business, Thurston County is an appropriate county to hear and decide this Petition, both on the basis of subject matter jurisdiction and venue. The legislature gave the Attorney General the authority in RCW 71.09.030 to file a sexually violent predator petition, done here at the request of the Thurston County Prosecuting Attorney. (CP at 90-91) (emphasis added).

The motion was heard on October 29, 2004. RP at 1 (October 29, 2004.) The Court made an oral ruling on the matter denying Mr. Martin's motion to dismiss. RP at 18-24. Specifically, the Court declared the following:

The issue then becomes whether, by filing here in Thurston County, the Attorney General has made a mistake the magnitude of which deprives this court of jurisdiction. I cannot conclude that such would be the case. This court does have jurisdiction, if it is appropriate, upon receipt of a request from the Thurston County Prosecutor for the Attorney General to file this petition here in Thurston County because the Respondent was convicted of a sexually violent offense in a jurisdiction outside of the State of Washington.

I am aware that it is the policy of the Attorney General to file all such cases here in Thurston County. I presume there is some mechanism, perhaps not through the Attorney General's Office, but perhaps through some review board that causes the Thurston County Prosecutor to be notified of the potential release of a person potentially subject to this statute and that the prosecutor then makes a request of the Attorney General. That appears to be what happened here, and from my experience, it appears to be the standard practice.

In any event, the statute does not limit the authority of a Prosecutor to make such a request of the Attorney General to only those prosecutions where the sexually violent offense was committed. If the law was such, then in the case of this respondent and in the case of any respondent who is convicted of a sexually violent offense in a jurisdiction other than Washington, there would be no prosecutor who could make such a request of an attorney general. And as a consequence, the provisions for addressing sexually violent offenders who have committed their offenses outside the state of Washington that are included in Chapter 71.09 would have no effect at all. A construction of Section .030 that would result in that result is a construction that results in an absurd result, because it is clearly not the will

expressed by the Legislature. Accordingly, I decline to adopt that construction of it and instead conclude that any prosecutor can make such a request for this type of case. The Thurston County Prosecutor has done so in this case, and jurisdiction and venue are proper here, and the motion is denied. (RP at 22-24) (emphasis added).

On February 22, 2005, Mr. Martin's case was called for a bench trial. RP at 4 (February 22, 2005). In lieu of proceeding with the trial, Mr. Martin stipulated to civil commitment under chapter 71.09 RCW. CP at 100-106. Mr. Martin's stipulation, however, provided the right to appeal the trial court's denial of his motion to dismiss. CP at 101-102; RP at 16-17. This timely appeal followed. CP at 155-157.

C. Argument

1. **Standard of Review**

Statutory interpretation is a question of law, which this Court reviews *de novo*. See *LRS Electric Controls v. Hamre Const.*, 153 Wn.2d 731, 738 (2005).

2. **The State of Washington may not institute a civil commitment proceeding under RCW 71.09 in a county in which the Respondent has never been charged with or convicted of any offense**

This case involves an issue of first impression, *e.g.*, whether the State of Washington may institute a civil commitment proceeding under

RCW 71.09 in a county in which the Respondent has never been charged with or convicted of *any* offense.

To resolve this issue, the Court must interpret the statutes governing RCW 71.09 civil commitment proceedings. "Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words." *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004).

The statute at issue, RCW 71.09.030, provides that:

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to *RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW **10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation. (Emphasis added).

This statute mandates that an SVP petition must be filed in a county where the Respondent was convicted or charged. The reference to the “attorney general if requested by the prosecuting attorney” clearly indicates that the attorney general may file an SVP petition at the request of “the prosecuting attorney of the county where the person was convicted or charged” *in* the county where the person convicted or charged. Any other reading of the SVP law would lead to absurd results and “forum shopping” by the attorney general. And while it is true that the State of Washington may always be sued in Thurston County (*see* RCW 4.92.010(5)), it does not follow from this or any other authority that the State of Washington may institute civil commitment proceedings against an individual in Thurston County.

Washington’s civil commitment scheme is clear on its face. The prosecuting attorney of the county where the person was charged receives a referral from the “agency with jurisdiction” (i.e. the Washington State Department of Corrections), and determines whether or not to file a petition alleging that the person is a sexually violent predator. *See* RCW 71.09.025. The prosecuting attorney of the county where the person was charged may either (a) file a petition alleging that the person is a “sexually violent predator” or (b) request that the attorney general file the petition. *See* RCW 71.09.030.

Mr. Martin's "sexually violent offense" under RCW 71.09.020(15), Attempted Sexual Abuse in the First Degree, is from Multnomah County, OR. Therefore, there is absolutely no basis for filing an SVP petition against Mr. Martin in Thurston County, WA. Indeed, it appears that the "End of Sentence Review Committee," the agency charged with reviewing all registerable sex offenders prior to their release to determine their potential for civil commitment under RCW 71.09 as a sexually violent predator¹, recognized this fact when it declared that it would refer the case to the Clark County Prosecutor's Office, which charged Mr. Martin with Burglary in the Second Degree with sexual motivation. See CP at 78-79.²

In sum, Washington's civil commitment scheme is clear on its face. Under RCW 71.09.030, an SVP petition must be filed in a county where the Respondent was convicted or charged. Because the SVP petition against Mr. Martin was not filed in a county where he was convicted or charged, it must be dismissed.

¹ *See Six-Year Follow-Up of Released Sex Offenders Recommended for Commitment Under Washington's Sexually Violent Predator Law, Where No Petition Was Filed*, at 19, Cheryl Milloy, Ph.D., Washington State Institute for Public Policy (December 2003) <available at www.wsipp.wa.gov/rptfiles/SVPFinal.pdf>.

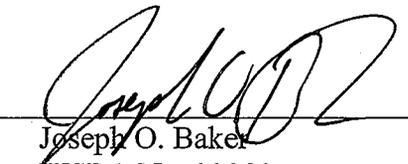
² At first glance, Burglary in the Second Degree with sexual motivation may sound like a sexually violent offense; however, as the State conceded in its response in the trial court, "that offense, Burglary in the Second Degree with Sexual Motivation, is not classified as a sexually violent offense under the definition provided in RCW 71.09.020(15)." CP at 90.

D. Conclusion

For all the foregoing reasons, Mr. Martin respectfully requests that this Court reverse decision of the trial court denying his motion to dismiss.

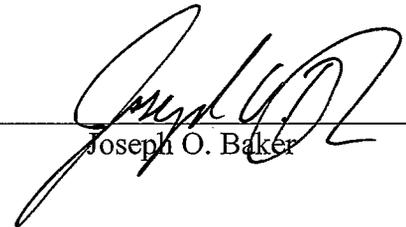
RESPECTFULLY SUBMITTED this 10th day of August, 2005.

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Certificate

I, Joseph O. Baker, certify that I mailed a copy of the foregoing brief to Melanie Tratnik and Sheldon Martin, postage prepaid, on August 10, 2005.


Joseph O. Baker

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