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No. 80570-9

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF

John L. Strand,

Appellant/Petitioner.

Clallam County Superior Court

Cause No. 05-2-00129-4

The Honorable Judge George L. Wood

Appellant/Petitioner's Supplemental Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Dr. Kathleen Longwell evaluated John Strand "pursuant to RCW 71.09" before he was released from prison. RP (1-31-06) 127; CP 104. At the time of the evaluation, the state had neither filed a Petition for Involuntary Commitment as a Sexually Violent Predator, nor had it obtained a judicial determination of probable cause under RCW 71.09.040. CP 11-12, 104-139. Mr. Strand raised no objection to the procedure at the trial court.

During the evaluation interview, Mr. Strand made numerous admissions relating to uncharged incidents of sexual misconduct. CP 104-139. While Mr. Strand did not admit to the sexual acts, he did acknowledge that he was the person at issue in the various allegations and gave additional information about his actions. CP 104-139. Dr. Longwell relied upon these and other statements in concluding Mr. Strand qualified as a sexually violent predator. CP 90-139.

On February 7, 2005, the state filed a Petition alleging that Mr. Strand was a sexually violent predator. CP 11-12. An attorney was appointed to represent Mr. Strand.¹ CP 89.

¹ Substitute counsel was appointed on March 4, 2005. RP (3-4-05) 6.

At trial, the state sought to admit as substantive evidence allegations of prior uncharged misconduct. Mr. Strand objected because these incidents were not sufficiently tied to him. RP (1-30-06) 13-14, 24-25, 84; CP 50-63. The judge overruled the objections and admitted the evidence of prior misconduct as substantive evidence, relying upon Mr. Strand's admissions (to Dr. Longwell and in a later deposition) to establish that Mr. Strand was the person at issue in the alleged prior misconduct. RP (1-30-06) 27-30, 84-85. No finding was made with respect to the voluntariness of these statements. RP (1-30-06) 27-30, 84-85.

Dr. Longwell testified that Mr. Strand felt no remorse about his actions and was not troubled by the consequences of his behavior. She opined that he was likely to reoffend in a sexually violent manner. RP (1-31-06) 180-181, 190; RP (2-1-06) 47, 55. She acknowledged that she considered Mr. Strand's statements in reaching her conclusions. RP (1-31-06) 162.

Mr. Strand was found to be a sexually violent predator, and he appealed. CP 6. The Court of Appeals affirmed the trial court's order committing him as a sexually violent predator.

ARGUMENT

I. THE STATE ACTED OUTSIDE THE EXCLUSIVE PROCEDURES OF RCW 71.09 BY EVALUATING MR. STRAND AS A SEXUALLY VIOLENT PREDATOR WITHOUT A JUDICIAL FINDING OF PROBABLE CAUSE.

- A. RCW 71.09.040 provides the exclusive means by which the state may obtain a sexually violent predator evaluation.

This Court strictly construes the provisions of RCW 71.09, because that statute curtails civil liberties. *In re Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951 (2008). Civil incarceration achieved by means other than strict compliance with the procedures set forth in RCW 71.09 deprives a person of liberty without due process of law, in violation of the federal and state constitutions. *Martin*, at 11-12; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3.

RCW 71.09.040 provides the exclusive means for evaluating a person for commitment as a sexually violent predator. *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). Under the statute, an evaluation is appropriate “only after probable cause has been determined... The legislature expressly provided procedures for special mental health evaluations in the SVP statute and did not intend to allow for additional [evaluations].” *In re Detention of Meints*, 123 Wn. App. 99 at 103-104, 96 P.3d 1004 (2004). Accordingly, “the mental examination by the State’s

experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4).” *In re Detention of Williams*, at 491. See also *In re Audett*, 158 Wn.2d 712 at 718-719, 147 P.3d 982 (2006) (“Given the express provisions for various mental examinations occurring both prior to and after trial, . . . additional mental examinations prior to trial that [are] not provided for in the statute [are] inconsistent with the statutory scheme.”)

B. By acting outside RCW 71.09.040, the state violated Mr. Strand’s right to due process.

The state did not follow the procedures set forth in RCW 71.09.040. Instead, it subjected Mr. Strand to a sexually violent predator evaluation without first obtaining a judicial determination of probable cause. CP 90-117; RP (5/16/05) 4-8. Because the state ignored the procedures established by the legislature in RCW 71.09, it deprived Mr. Strand of his fundamental right to liberty without due process of law. *Martin, supra*, at 11-12. See also, e.g., *Ross v. Alabama*, 15 F. Supp. 2d 1173 at 1185 (M.D. Ala. 1998) (“[W]here a comprehensive child welfare statute creates a legitimate and sufficiently vested claim of entitlement, children may state a procedural due process claim based upon a deprivation of a liberty interest when officials fail to follow the law’s mandates”); *Carter v. Salina*, 773 F.2d 251 at 254 (10th Cir. 1985) (in

zoning cases, “municipalities and other political subdivisions must scrupulously comply with statutory requirements, including notice and hearing, in order to provide due process of law”); *Government of Canal Zone v. Brooks*, 427 F.2d 346 at 347 (5th Cir. 1970) (“[I]t is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it.”)

1. The error is a manifest error affecting Mr. Strand’s constitutional right to due process

Where no objection is made below, this Court may review any manifest error affecting a constitutional right. RAP 2.5(a)(3). A constitutional error is “manifest” if it has practical and identifiable consequences. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005). The state’s failure to follow procedures required by RCW 71.09 raises a manifest error affecting Mr. Strand’s constitutional rights, and thus review is appropriate under RAP 2.5(a)(3).

The failure to follow statutory procedure violates due process under the state and federal constitutions.² *Martin, supra*, at 11-12. This

² The Court of Appeals failed to recognize any constitutional dimension to Mr. Strand’s argument, and refused to review the error. *In re Detention of Strand*, 139 Wn. App. 904 at 910, 162 P.3d 1195 (2007). This was incorrect: the state’s violation of RCW

error is “manifest” because it had practical and identifiable consequences. First, had the state complied with RCW 71.09, it would have filed its petition and proceeded to a probable cause hearing without Mr. Strand’s participation in Dr. Longwell’s SVP evaluation. The Department would not have been able to establish probable cause, in part because the state lacked evidence linking Mr. Strand to the uncharged misconduct he discussed with Dr. Longwell during the improper pre-filing evaluation. In the absence of a probable cause finding, the trial court would not have ordered an evaluation under RCW 71.09.040, and the case would not have proceeded to trial.

Second, had the court found probable cause and ordered an evaluation, Mr. Strand would have had the opportunity to consult with counsel and have his attorney present during the evaluation. RCW 71.09.050(1); *In re Detention of Kistenmacher*, 63 Wn.2d 166, 178 P.3d 949 (2008). Although Mr. Strand did not have a general right to remain silent during the evaluation, competent counsel would have advised him to exercise his right to remain silent with respect to alleged uncharged

71.09.040’s mandatory procedures presents a manifest error affecting Mr. Strand’s constitutional right to due process. *Martin, supra*.

misconduct, and Mr. Strand would not have made admissions regarding such alleged misconduct to Dr. Longwell. Having chosen to remain silent regarding alleged uncharged misconduct during his evaluation, he would also have exercised the privilege during his subsequent deposition and in his trial testimony.³

Without his statements, the state would have been unable to link the alleged uncharged misconduct to Mr. Strand, and the uncharged misconduct would not have been admitted for the jury's consideration at his trial. Dr. Longwell would not have been able to rely on the uncharged allegations in forming her opinion, and may not have been able to testify that Mr. Strand was a sexually violent predator.

The state's violation of Mr. Strand's due process rights had practical and identifiable effects in the trial court, both at the probable cause stage and at the trial stage. Because the issue is a manifest error affecting a constitutional right, the error was not waived by trial counsel's failure to object to the use of the pre-filing evaluation at Mr. Strand's trial. RAP 2.5(a)(3). Furthermore, even if this case does not raise a manifest

³ His attorney's decision to allow him to respond to questions about the uncharged misconduct, and to admit that he was the person accused, was undoubtedly influenced by the fact that he had already made similar admissions to Dr. Longwell. Otherwise, counsel was not providing effective assistance, as argued to the Court of Appeals. See Appellant's Opening Brief to the Court of Appeals, pp. 24-26.

error affecting constitutional rights, this Court should exercise its discretion and reach the merits rather than relying on the doctrine of waiver. *See* RAP 2.5(a).

2. Reversal is required because the error prejudiced Mr. Strand.

Constitutional error is presumed to be prejudicial; the state bears the burden of proving beyond a reasonable doubt that such error was harmless. *City of Bellevue v. Lorang*, 140 Wn.2d 19 at 32, 992 P.2d 496 (2000), *quoting State v. Smith*, 131 Wn.2d 258 at 263-64, 930 P.2d 917 (1997). Before finding constitutional error harmless, this Court must determine that it is trivial, or formal, or merely academic, that it was not prejudicial to the substantial rights of the party assigning error, and that it in no way affected the outcome of the case. *Lorang*, at 32. In this case, the state cannot make the required showing, and this Court cannot find the error harmless.

First, as noted above, the case may not have proceeded beyond the probable cause stage if the state had followed the statutory procedure outlined in RCW 71.09.040. By violating Mr. Strand's constitutional right to due process, the state obtained and presented additional information to the court that would not have been available had it followed the procedure adopted by the legislature.

Second, without Mr. Strand's admissions, Dr. Longwell might not have found that he qualified as a sexually violent predator. In the alternative, if she did conclude that he met the criteria, her opinion would have been founded on less information and would have been less persuasive to the jury. Mr. Strand's expert testified that he did not meet the criteria; this opinion may have prevailed had the state followed the statutory procedure. Thus, the state cannot prove (beyond a reasonable doubt) that the Department's violation of Mr. Strand's due process rights in no way affected the outcome of the case. *Lorang, supra*.

Third, the jury would not have heard about the alleged uncharged misconduct. April Winstead, Sandra Banks, Amy Maestas and Monica Kelly, all of whom were unable to identify Mr. Strand, would not have been permitted to testify in the absence of evidence linking their allegations to Mr. Strand. RP (1/31/06) 27-87. The state cannot establish beyond a reasonable doubt that the violation had no effect on the case.

The Department's decision to ignore the procedures set forth in RCW 71.09 prejudiced Mr. Strand. Because the error was not harmless, the trial court's order committing Mr. Strand as a sexually violent predator must be vacated.

- C. A sexually violent predator evaluation is not the same as the “mental health evaluation” referred to in RCW 71.09.025.

The state’s pre-filing evaluation cannot be justified under RCW 71.09.025(1)(b)(v). That subsection requires the referring agency to provide the prosecutor with “[a] current mental health evaluation or mental health records review.” First, a broad interpretation of the phrase “mental health evaluation” is inappropriate, because this Court construes the SVP statute strictly. *Martin, supra*.⁴ The language at issue (“current mental health evaluation or mental health records review”) should not be construed to include a sexually violent predator evaluation of the type contemplated in RCW 71.09.040.

Second, where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463 at 475-476, 98 P.3d 795 (2004). Accordingly, this Court must presume the legislature intended the phrase “mental health evaluation” to mean something other than the “evaluation as to whether the person is a sexually violent predator” provided for in RCW 71.09.040. *Costich, supra; see also In re Det. of Williams, supra*.

⁴ “To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.” *Martin*, at 11, *internal quotation marks and citations omitted*.

Third, RCW 71.09.025 does not direct the referring agency to evaluate the offender, and does not require the offender to submit to an evaluation. Applying the maxim *expressio unius est exclusio alterius* and this Court's duty to strictly construe statutes curtailing civil liberties, the "mental health evaluation" in RCW 71.09.025(1)(b)(v) must be a pre-existing psychological assessment, not an in-depth evaluation directed at the SVP criteria and prepared in anticipation of litigation under RCW 71.09.⁵ See *Martin*, at 9.

For all these reasons, the state's pre-filing evaluation of Mr. Strand cannot be considered a simple "mental health evaluation" under RCW 71.09.025. The state's failure to abide by the requirements of RCW 71.09 requires reversal of the order committing Mr. Strand as a sexually violent predator.

⁵ Where the agency lacks a pre-existing evaluation that qualifies as "current," it must instead submit a current review of the offender's records. RCW 71.09.025.

II. THE TRIAL COURT SHOULD HAVE DETERMINED WHETHER MR. STRAND'S STATEMENTS WERE VOLUNTARY BEFORE ADMITTING THEM AT HIS SEXUALLY VIOLENT PREDATOR JURY TRIAL.

- A. Trial courts must hold a pretrial voluntariness hearing before admitting statements of an alleged Sexually Violent Predator at a jury trial.

Due process prohibits the use of involuntary statements in civil proceedings. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *Bong Youn Choy v. Barber*, 279 F.2d 642 at 646 (9th Cir. 1960); *United States v. Alderete-Deras*, 743 F.2d 645 at 647 (9th Cir. 1984). The jury adjudicating a case may not make the voluntariness determination; instead the trial court must employ a procedure that is "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Jackson v. Denno*, 378 U.S. 368 at 391, 84 S.Ct. 1774, 12 L.Ed. 908 (1964).

Washington's Sexually Violent Predator statute does not include any mechanism for determining the voluntariness of a respondent's statements. Instead, such statements are routinely admitted into evidence without any examination of whether they are voluntary or involuntary. That is what occurred here. RP (1/30/06) 7-86; RP (1/31/06) 7-193; RP (2/1/06) 7-138; CP 18-38. This Court should establish a rule requiring trial courts hearing SVP cases to hold pretrial voluntariness hearings, and

should remand Mr. Strand's case to the trial court for a voluntariness hearing. *Jackson v. Denno, supra.*

B. Any statements compelled by threat of contempt must be excluded at trial.

As noted above, due process prohibits the use of involuntary statements in civil proceedings. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *Bong Youn Choy v. Barber, supra; United States v. Alderete-Deras, supra.* Statements given under threat of the state's contempt power are involuntary: "In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt." *New Jersey v. Portash*, 440 U.S. 450 at 459, 99 S. Ct. 1292, 59 L. Ed. 2d 501 (1979). Persons facing commitment pursuant to RCW 71.09 may be compelled to participate in evaluations and depositions, upon threat of contempt. *In re Det. of Young*, ___ Wn.2d ___, ___ P.3d ___ (2008).

Accordingly, any statements given by Mr. Strand under threat of contempt are involuntary, and may not be used in any proceeding, whether civil or criminal. *New Jersey v. Portash, supra.* When the trial court conducts a voluntariness hearing, it must exclude any statements made under threat of the state's contempt power. *New Jersey v. Portash, supra.*

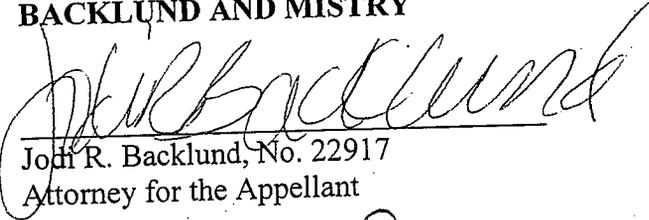
CONCLUSION

The state violated Mr. Strand's constitutional right to due process by subjecting him to a sexually violent predator evaluation prior to filing a Petition and prior to a judicial determination of probable cause. In addition, the trial court admitted Mr. Strand's statements into evidence without any determination of whether or not they were involuntary.

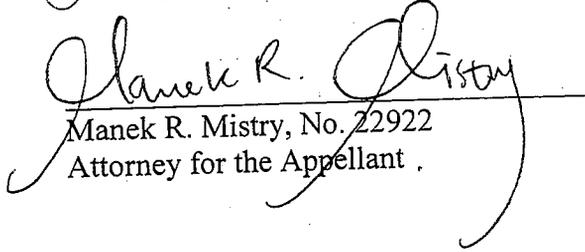
For these reasons, the trial court's Order committing Mr. Strand as a sexually violent predator must be vacated, and the case remanded to the trial court for a new trial. Upon retrial, the court may not admit Dr. Longwell's evaluation or any evidence derived therefrom, including Mr. Strand's deposition and trial testimony relating to alleged uncharged misconduct.

Respectfully submitted on July 14, 2008.

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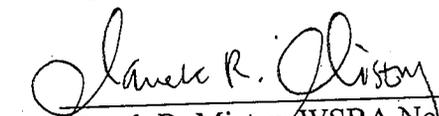
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