

Supreme Court No. 91385-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF JOHN C. ANDERSON

STATE OF WASHINGTON, Respondent,

v.

JOHN C. ANDERSON,

Petitioner

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SUPPLEMENTAL BRIEF OF PETITIONER

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I. ISSUES FOR REVIEW

- A. Whether RCW 71.09.030(1) authorizes a petition seeking civil commitment as a sexually violent predator of a person who was adjudicated as having committed a sexually violent offense as a juvenile and subsequently released from total confinement.
- B. Whether Mr. Anderson's noncriminal consensual sexual relationships with fellow patients at Western State Hospital, were recent overt acts for purposes of establishing he is a sexually violent predator.

II. LEGAL AUTHORITIES AND ARGUMENT

- A. This Court Can Exercise Broad Discretion Under RAP 1.2 To Review The Lack Of Statutory Authority To Subject Mr. Anderson To An RCW 71.09 Petition Even If The Assignment of Error Was Mislabeled.

As presented in Mr. Anderson's petition for review, at trial and on appeal the argument was made that Mr. Anderson is not within any class of individuals subject to RCW 71.09 and the trial court exceeded its statutory authority when it denied the motion to dismiss the State's petition.

The assigned error, labeled as lack of "subject matter jurisdiction", did not properly summarize the authorities and

argument presented at trial, or in the appellate brief, response, and reply. In its opinion, the Court of Appeals reviewed the label but not the authorities and argument, concluding the incorrect label and the law of the case precluded review of the briefed legal issue.

The Rules of Appellate Procedure authorize the reviewing Court to focus on the merits. RAP 1.2(a) provides:

These rules 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, subject to the restrictions in rule 18.8(b)¹.

The goal of any appeal is “to promote justice and facilitate the decision of cases on the merits.” To that end, a reviewing Court is further authorized to dispose of cases based on issues, which were not raised in the briefs of the parties, but rather, raised by the Court. RAP 12.1; *State v. Aho*, 137 Wn.2d 736, 740, 975 P.2d 512 (1999). As this Court reasoned in *Martin*, “[T]his argument about subject matter jurisdiction and venue obfuscates the real question before us, which is to determine whom the statute authorizes to file the petition, not where the petition is filed.” *In re Det. of Martin*, 163 Wn.2d 501, 515, 182 P.3d 951 (2008).

¹ RAP 18.8(b) addresses time limitations for filing a notice of appeal, notice for discretionary review, motion for discretionary review, petition for review, or motion for reconsideration.

In light of the substantial curtailment of liberty that accompanies a civil commitment, whether Mr. Anderson is subject to RCW 71.09 requires the protection of due process. *State v. Beaver*, 184 Wn.App. 235, 336 P.3d 654, 660 (2014)(internal citations omitted). This Court is well within its authority to consider the arguments and authorities in the filings and not stop at the label. Review will promote justice and facilitate the decision of this and future cases on the merits.

B. RCW 71.09 Does Not Authorize A Petition Seeking Civil Commitment Of A Person In Mr. Anderson's Position.

The Washington State Legislature has set forth the processes that are necessary to file an RCW 71.09 petition on commitment-eligible sex offenders. In doing so, it, along with the Courts, has had to balance the danger of over-confinement with the possibility of releasing sex offenders whose likelihood of engaging in repeat acts of predatory sexual violence is high.

RCW 71.09 permits a civil commitment petition to be filed on five enumerated classes of individuals who are categorized as a small but extremely dangerous group of sexually violent predators for whom the treatment provided under RCW 71.05 is inadequate.

At issue here are the limitations defining 3 classes of persons subject to RCW 71.09: (a) A person who has been convicted of a sexually violent offense who is about to be released from total confinement; (b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement; (e) a person who at any time previously has been convicted of a sexually violent offense and has since been released from confinement and committed a recent overt act

The statute does not authorize a petition on an individual who was found to have committed a sexually violent offense as a juvenile but has since been released from total confinement. Because statutes that involve a deprivation must be strictly construed, a court must first look to the plain language. *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

This Court recognized in *Martin*, the maxim *expresso unius est exclusio alterius* and the duty to strictly construe statutes curtailing civil liberties meant the statutory authority under RCW 71.09 to file a petition by a specific prosecutor to the exclusion of all other prosecutors was exactly what the Legislature intended. *In Re Det. of Martin*, 163 Wn.2d at 510. The Court does not have the authority to rewrite a statute, even if it believes the legislature

intended something else but failed to adequately express it. *Id.* at 509.

The same reasoning applies here: the legislature drew an exclusive distinction within the statute itself, between individuals who had been convicted and those who had been found to have committed a sexually violent offense. Where the meaning is plain on its face, the court must give effect to that plain meaning. *City of Spokane, v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006).

Even if, as Mr. Anderson contends, the statute is plain on its face, this Court has also held that the plain meaning of a statute may be determined by looking not only to the text but also, the context and statutory scheme as a whole. *State v. Hurst*, 173 Wn.2d 597, 604, 269 P.3d 1023 (2012). Accordingly, it must be noted that under RCW 13.04.240 no order of a court adjudging a child a juvenile offender is to be deemed a conviction of a crime with certain exceptions related to RCW 9.94A.128² and for

² Under RCW 9A.44.128 conviction means any adult conviction or juvenile adjudication for a sex offense or kidnapping offense for purposes of sex offender registration, notification to the community on release, and background check information by the Washington State Patrol.

purposes of adult sentencing under RCW 9.94A³. This juvenile statute language clearly intersects with RCW 71.09.030(1)(b).

Of great significance is that the juvenile statutes have contemplated and expressly provided the procedure for a juvenile found to have committed a sexually violent offense who has been released from total confinement. RCW 13.40.210(4)(b).

For each juvenile committed to JRA custody, a release date must set. RCW 13.40.210(1). The law provides that when a juvenile is released, he may be required to comply with a parole program. RCW 13.40.210(3)(a). The statute includes 12 possible parole conditions that are designed to facilitate reintegration into the community, ranging from requiring community restitution to remaining within particular geographic boundaries, to requiring the highest risk juvenile offenders who are paroled to participate in an intensive supervision program. RCW 13.40.210(3)(b).

In the specific instance where a juvenile has been sentenced for a sexually violent offense, the period of parole *must* be at least 24 months and *may be up to 36 months* if the additional period is necessary and appropriate in the interests of public safety or to meet the ongoing needs of the juvenile. RCW

³ RCW 13.04.011

13.40.210(3)(a)(1).(emphasis added). The statute authorizes the department to modify parole for any violations, allowing a wide range of graduated sanctions or interventions, culminating in a return to total confinement for up to 24 weeks. RCW

13.40.210(4)(b).

The 24 weeks is only to be imposed when other graduated sanctions or interventions “have not been effective or the behavior is so egregious it warrants the use of the higher level intervention and the violation: (i) is a known pattern of behavior consistent with a previous sex offense that puts the youth at high risk for reoffending sexually; (ii) consists of sexual behavior that is determined to be predatory as defined in RCW 71.09.020, or (iii) requires a review under RCW 71.09, due to a recent overt act.”

RCW 13.40.210(4)(b).

The statutory scheme for a juvenile sentenced for a violent sex offense contemplates the imposition of total confinement for up to another six months where the violation is commensurate with jeopardy to public safety. In other words, the legislature has considered and provided for the conditions under which a juvenile may be referred for an RCW 71.09 petition and it always involves total confinement. This is entirely consistent with the authorizing

language of RCW 71.09.030(1)(b) and gives effect to all the language in the statute.

Moreover, where RCW 71.09 and the juvenile statutes intersect reflects an understanding that juveniles are fundamentally different than adults in their developmental, motivational and behavioral maturity.⁴ Research shows that for the majority of juveniles who commit a sexual offense, sex offender treatment is effective, with only 9-15% sexually reoffending in spite of treatment. James R. Worling, et.al, *20 Year Prospective Follow-Up Study of Special Treatment for Adolescents Who Offended Sexually*. 28 Behav.Sci.L. 46, 53 (2010); Chi Meng Chu & Stuart D. M.Thomas. *Adolescent Sexual Offenders: The Relationship Between Typology and Recidivism*,. 22 Sexual Abuse 218, 210 (2010)(citing Ian A. Nisbet, et. al. *A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Sex Offenders*. 16 Sexual Abuse; A Journal of Research and Treatment, 223 (2004); Luanda A. Rasmussen. *Factors Related to Recidivism Among Juvenile Sexual Offenders*. 11 Sexual Abuse 69, 69 (1999)).

⁴ www.smart.gov/SOMAPI/sec2/ch5_treatment.html. October 2014 Research findings from the U.S. Department of Justice, Office of Justice Programs, Office Of Sex Offender Sentencing, Monitoring, Apprehending, Registering And Tracking.

In balancing the danger of over-commitment, the Legislative scheme should and does anticipate that treatment, supervision, and reintegration into the community provide positive effects for juveniles who have been sentenced for a sexually violent offense. The Legislature has balanced that danger with preventing jeopardy to public safety by providing (under RCW 13.40.210) the mechanism of imposition of total re-confinement of a person who has been released, with the hope of either providing more treatment or referring on for an RCW 71.09 petition.

However, what the Legislature did not anticipate and does not provide for is filing of a petition on an adult over 12 years after he had been sentenced for committing a sexually violent offense and 10 years after he had been released from total confinement. If the Legislature had so intended, it could have easily added the word "committed" to RCW 71.09.030(e), rather than the explicit word "convicted" .

Because a statute that involves a deprivation of liberty is to be strictly construed, even if this Court were to reason that RCW 71.09.030 has an omission of a potential class of individuals, the Court may not correct it unless the entire statute is rendered absurd or meaningless. *In re. Det. of Hawkins*, 169 Wn.2d at 801; *State v.*

Delgado, 148 Wn.2d 723, 730-31, 63 P.3d 792 (2003). Here, any perceived omission does not undermine the effectiveness of the entire statute and at most, it may have kept a purpose of the statute from being comprehensively effectuated. *In re. Det. of Martin*, 163 Wn.2d at 512-13. As the Court held in *Weaver*, "To commit, at least where commitment may last for years, is substantive...it is a long-term deprivation of liberty that must be effected with a method approved by the legislative representatives of the people". *In re Weaver*, 84 Wn.App. 290, 295, 929 P.2d 445 (1996).

Mr. Anderson was found to have committed a sexually violent offense as a juvenile. He was not convicted of a sexually violent offense. He was released from total confinement. He is not within a class of individuals subject to petition under RCW 71.09.030(b) or (e).

C. The Consensual Noncriminal Sexual Relationships In This Case Do Not Qualify As Recent Overt Acts.

As presented in Mr. Anderson's petition for review, in its unpublished opinion, the Court of Appeals citing the law of the case doctrine, declined to "revisit whether Anderson's sexual contacts constitute a recent overt act as a matter of law" addressing only an insufficiency of the evidence argument. *In re Det. of Anderson*, 185

Wn.App. 1036 (2015). Mr. Anderson contends this was error. This Court held the findings regarding a recent overt act could be challenged at the new trial, and only that the acts *could* constitute recent overt acts.

By law, a “recent overt act” is defined as “any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors. RCW 71.09.020(12).

Here, there was no evidence of any act or threat that caused harm of a sexually violent nature during the period in which Mr. Anderson was at WSH. There is no evidence or allegation there was any threat of harm of a sexually violent nature that would create a reasonable apprehension of harm in the minds of those who knew Mr. Anderson. That leaves one option: could the act of participating in consensual sexual relationships with four fellow patients create a reasonable apprehension of sexually violent harm in the minds of those who knew Mr. Anderson?

Mr. Anderson was a voluntary patient at WSH for approximately 10 years. As testified to at trial, not only does every

person who is committed to WSH maintain their civil rights, they are not to be presumed incompetent as a consequence of receiving voluntary or involuntary treatment for a mental disorder. RCW 71.05.360(1)(b); .380.

The hospital staff was responsible to prevent sexual exploitation, provide knowledge and means to prevent STDs, assist patients to acquire skills to make reasoned judgments regarding their sexual behavior, and to provide a safe environment to discuss sexual behavior. (RP 464;786). Further, where a developmentally challenged individual engaged in sex with another patient and there was concern regarding capacity to consent, not only was the staff psychiatrist to be informed, but policy required an incident report to be filed. (RP 796). The psychiatrist was responsible to determine whether individuals had capacity to consent to sexual activity- and if there was a complaint or an incident amounting to a sexual assault, as mandatory reporters, staff were obligated to notify law enforcement. (RP 794-96).

While WSH staff counseled Mr. Anderson and his partners to end the relationships, there was never a question that the relationships were anything but consensual. These individuals, like Mr. Anderson were on the sex offender unit. Shortly after his

arrival, a fellow patient, 17 years Mr. Anderson's senior, who had believably boasted he had had sex with everyone on the unit, began a relationship with Mr. Anderson. A few years later, another patient, who was promiscuous, very large and "kind of a bully" also had sexual relations with Mr. Anderson. A year later, the third individual who was described as a promiscuous hypersexual individual had sexual relations with Mr. Anderson. And the last relationship, which began in 1992/93 and lasted to 1999 was with an individual who had had sexual relationships with everyone in the unit. (RP 466; 469;470;630;828).

Apparently, preventing sexual relations between individuals in the unit was not a pressing issue for staff, which is understandable if there was no concern that they evidenced part of an offense cycle or raised apprehension of sexually violent harm. Moreover, not only was WSH aware of the sexual relationships occurring on the unit, it permitted them: staff even passed out condoms to patients, including Mr. Anderson. (RP 469;793;797).

Whether an individual's actions constitute a recent overt act is a mixed question of law and fact. *In re Det. Marshall*, 156 Wn.2d at 158. Under *Marshall*, the history and diagnosis must bear a reasonable link to the alleged recent overt acts for the purposes of

determining sexually violent predator status. *In re Det. of Marshall*, 156 Wn.2d at 158. Washington case law is replete with examples of recent overt acts: *In re Marshall*, 156 Wn.2d 150, 125 P.3d 111(2005); *In re Det. of Broten*, 130 Wn.App. 326, 122 P.3d 942 (2005); *In re Det. of Robinson*, 135 Wn.App. 722, 146 P.3d. 451 (2006); *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003); *In re Det. of Froats*, 134 Wn.App. 420, 140 P.3d 622 (2006). In each case, the conduct at issue related directly to the individuals diagnosis and pattern of inappropriate and sexually abusive behavior.

Here, Mr. Anderson's history and diagnosis indicates that as a teen, he had a pattern of committing sexually abusive behavior on very young children. During the 145 leaves Mr. Anderson took from WSH and was out in the community, there was not a single indication of any sexual impropriety or hint of sexually violent behavior. Moreover, the relationships with fellow patients inside WSH were consensual sexual relationships with adult men with no hint of sexually violent harm, and no reasonable relationship to his history. Further, the relationships do not create any reasonable apprehension of sexually violent harm. The acts, as alleged, do not qualify as recent overt acts.

Mr. Anderson incorporates the facts and authorities presented in his previous filings.

III. CONCLUSION

For the foregoing reasons, Mr. Anderson respectfully requests this Court to find that RCW 71.09.030 does not provide statutory authority for a petition to be filed on him, and to reverse his commitment. In the alternative, he asks this Court to find that the alleged recent overt acts do not qualify as recent or overt act and reverse his commitment.

Dated this 12th day of August 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, declare that on August 12, 2015, I sent via electronic mail a true and correct copy of Petitioner's Supplemental Brief to the following:

EMAIL: CRJSVPef@atg.wa.gov

Malcolm Ross

Washington State Attorney General's Office.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of August, 2015 at Graham, WA.

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Thank you,
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