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No. 65436-5-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE DETENTION OF EDDIE WILLIAMS

STATE OF WASHINGTON,

Respondent,

v.

EDDIE WILLIAMS,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT.

1. THE STATE'S DESIRE FOR A CURRENT, INVASIVE MENTAL EXAMINATION DOES NOT REPLACE THE NEED FOR STATUTORY AUTHORITY

a. Statutes authorizing invasive compelled examinations are strictly construed under Supreme Court precedent. The prosecution pontificates at length about its desire for a current mental examination and the reasons it prefers one. Yet the court's authority to order such an examination is not predicated on desire, but strictly grounded in statute.

As discussed in Williams' Opening Brief, our Supreme Court has explained that when examining the State's authority to compel people facing RCW 71.09 civil commitments to submit to invasive examinations, "we must narrowly construe the present statute," RCW 71.09.040. In re Det. of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010); see In re Det. of Martin, 163 Wn.2d 501, 508, 182 P.3d 951 (2008) ("we strictly construe statutes curtailing civil liberties to their terms"). This rule is based on the "massive curtailment of liberty at stake" in a civil commitment proceeding. Id. (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). The prosecution never acknowledges this

binding principle and predicates its response on encouraging an expansive and highly deferential reading of the statutes at issue.

The prosecution contends that RCW 71.09.800 delegates the Department of Social and Health Services (DSHS) broad authority to dictate the terms of pretrial commitment discovery tools. Response Brief, at 26. But RCW 71.09.800 says no such thing. It provides, in full:

The secretary shall adopt rules under the administrative procedure act, chapter 34.05 RCW, for the oversight and operation of the program established pursuant to this chapter. Such rules shall include provisions for an annual inspection of the special commitment center and requirements for treatment plans and the retention of records.

RCW 71.09.800. Like other statutes involving the deprivation of liberty, it must be strictly construed. Hawkins, 169 Wn.2d at 801. It is a general statute, directing DSHS to implement the basics of the civil commitment program. It does not supersede the specific scheme under which the court may order invasive multi-day mental examinations. It does not undermine the statutory scheme and or remove the requirement that the court narrowly construe the language used in the individually applicable statutes and give meaning to the different language in various statutes that expressly

authorize current mental examinations under the same chapter, as discussed in Williams' Opening Brief, at 8-14.

Nor does RCW 71.09.040(4) give the State the blank slate for obtaining mental examinations that it claims. Response Brief, at 26. RCW 71.09.040(4) directs DSHS to develop rules regarding the professional qualifications of the examiner for the single "evaluation" permitted by statute pretrial. If it vested broad authority in DSHS to demand multiple examinations, the outcome of In re Det. of Williams, 147 Wn.2d 476, 490, 55 P.3d 597 (2002), would have been different.

As the Supreme Court has explained, Williams holds that "[a]lthough the overall purpose of chapter 71.09 RCW is to identify sexually violent predators and to make sure such persons receive treatment, the procedures for doing so have been set for by the legislature with specificity." In re Det. of Audett, 158 Wn.2d 712, 722, 147 P.3d 982 (2006). This specificity demands strict construction of the terms of the statute, not a broad deference to DSHS's desires.

b. Williams preserved his objection. The State's analysis of the adequacy of Williams' objection also runs far afield of the applicable law. On the one hand, it lambasts Williams for

delaying his trial by seeking discretionary review of whether he may be compelled to submit to another mental examination, but then it asserts he cannot preserve any objections to pretrial rulings unless he seeks discretionary review. Resp. Brf. at 23-24. The State's argument demanding interlocutory appeals at every turn is based entirely on federal cases and it concedes as much. Id. The absence of any state court authority requiring interlocutory appeals demonstrates the irrelevance of these assertions in this case.

The State also predicates its argument on a misunderstanding of the basic rules of preservation. It complains that arguments made by Williams and his attorney in the superior courts – arguments made to the trial judge – do not count as preserving an argument for appeal, but it cites cases involving arguments raised the first time at oral argument during the appeal. Resp. Brf. at 19. In an appeal, courts may, in their discretion, decline to address issues raised for the first time at oral argument because oral argument serves a different purpose and occurs at a different stage of proceedings, leaving the opponent without the ability to respond and the Court of Appeals without citations to authority on which to measure the claim. See State v. Olsen, 126 Wn.2d 315, 319-22, 893 P.2d 629 (1995). In an appeal, court rules

demand that issues be assigned error in an opening brief and legal as well as factual authority be put forth in the written pleadings. See RAP 10.1 (setting forth briefing requirements), *et seq*; RAP 11.4 (conduct of oral argument on appeal). But even these rules are subject to the Court of Appeals' broader discretion to decide issues on their merits in the interest of justice rather than insist on overly technical application of the rules. Olsen, 126 Wn.2d at 322-23; RAP 1.2(a). Trial court proceedings are not bound by these appellate procedural rules, and in fact, appeals routinely involve claims raised by way of oral argument before the trial judge.

The State turns on its head the basic rule that “the losing party to a pretrial evidentiary ruling ‘is deemed to have a standing objection where a judge has made a final ruling on the motion, [u]nless the trial court indicates that further objections at trial are required when making its ruling.’” State v. Fisher, 165 Wn.2d 727, 748 n.4, 202 P.3d 937 (2009) (quoting *inter alia*, State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) and State v. Koloske, 100 Wn.2d 889, 895, 676 P.2d 456 (1984)). Instead, that State erroneously cites Powell for the opposite proposition. Resp. Brf. at 19.

The State also misrepresents the dynamics of the issue in In re Det. of Audett, 158 Wn.2d 712, 147 P.3d 982 (2006). In Audett, the State had two experts ready and available to testify. Id. at 716. Both had evaluated and examined Audett, but expert Rawling's evaluation rested on a recently ordered CR 35 examination, which had been ordered over Audett's objection, and the other expert Thomas's evaluation was properly obtained under RCW 71.09.040(4). Audett moved to exclude only Thomas's evaluation, arguing that it was cumulative and unduly prejudicial to let both experts testify for the State. Id. at 716-17.

While his appeal was pending, the Supreme Court ruled in Williams that the trial court may not order another mental examination under CR 35. Accordingly, in his reply brief Audett argued for the first time that the State's trial testimony rested on the improperly ordered examination. Id. The Court of Appeals agreed and reversed his commitment. But the Supreme Court viewed the issue differently. It was loathe to reverse Audett's commitment when he himself had insisted that the State base its case on the CR 35 examination and it was his request that the State not be allowed to offer testimony from the other expert who was ready and available to testify and whose knowledge was not predicated on the

improperly ordered examination. Thus, the court found that because Audett insisted that cumulative expert testimony not be offered, and he moved to exclude only the non-CR 35 expert, rather than the CR 35 expert, he waived his objection.

The court recounted the State's preservation theories in its opinion but the holding hinged on Audett's request that the court bar the State from offering testimony of the witness whose mental examination was legitimately obtained. *Id.* at 724-26. The court reasoned that Audett waived his objection by encouraging the State to present testimony from the expert whose evaluation rested on the now-improperly ordered CR 35 examination. *Id.* at 725. This holding has no application in the case at bar.

c. Changes in the statute after Williams' trial are not dispositive. The State offers a new statute as evidence of its authority to demand a mental examination when it desires one to better prove its case. It contends that the statute that took effect July 13, 2010 should apply, even though the verdict was entered in Williams' case on May 19, 2010. Resp. Brf. at 33. It cites a California case as authority for this *nunc pro tunc* application of a statute, but that case and the scheme in which it arose is far afield

from the issues and statutory rules that apply here. Resp. Brf. at 34, citing Albertson v. Superior Court, 23 P.3d 611 (Cal. 2001).¹

More significantly, RCW 71.09.050(1) does not say what the State seems to believe it says. The prosecution claims the statute entitles the State to an evaluation by an expert of its choosing. But the statute does not entitle the State to anything other than reimbursement from DSHS. The actual language is, “The department is responsible for the cost of one expert or professional person to conduct an evaluation on the prosecuting agency's behalf.”

The decision in Williams, 147 Wn.2d at 490-91, did not rest on cost reimbursement. It rested on the language of RCW 71.09.040(4), which then and now entitle the State to “an evaluation,” not multiple evaluations. It rested on the comparison between RCW 71.09.040(4) and RCW 71.09.090, which explicitly grants the State “a right . . . to have the committed person evaluated by experts chosen by the state” before a re-commitment trial occurs. Id. RCW 71.09.050(1) simply requires DSHS to

¹ The California scheme authorized commitment for only two years at a time. Albertson, 23 P.3d at 615 n.6. The new statute enacted in California explicitly and unambiguously authorized an updated evaluation. Id. at 616-17. It bears no resemblance to the amendment to RCW 71.09.050(1), which contains

reimburse for one evaluation, a fiscal issue that applies to the single evaluation permitted under RCW 71.09.040(4), not a right to invasive mental examinations beyond that already permitted by statute.

In sum, as explained in Williams' Opening Brief, the State's efforts to demand that Williams submit to multiple intrusive mental examinations when not unambiguously authorized by statute violated his right to privacy and due process of law and is contrary to the strictly scrutinized scheme set forth by statute.

2. THE *FRYE* HEARING REQUEST WAS PROPERLY PRESENTED TO THE TRIAL COURT AND SHOULD HAVE BEEN GRANTED

a. Williams gave the trial court the citations and materials underlying its *Frye* argument, contrary to the State's specious claim. The State nonsensically asserts that Williams did not present his *Frye* argument in the trial court. Yet in a pleading that is almost 150 pages long, Williams explained his objection to Dr. Wheeler's "paraphilia not otherwise specified" diagnosis and cited articles supporting his position. CP 212-353. To further assist the court, he attached relevant articles. The State

no such language, as discussed *infra*.

baselessly claims that Williams is improperly inserting factual materials that require RAP 9.1 authorization, and fails to acknowledge the de novo review standard that applies. Resp. Brf. at 37-38.

b. Frye rulings are evaluated de novo on appeal.

This Court reviews de novo whether the trial court incorrectly refused to hold a Frye hearing. State v. Gore, 143 Wn.2d 288, 304, 21 P.3d 262 (2001); In re Det. of Berry, 160 Wn.App. 374, 378, 248 P.2d 592 (2011). The appellate court makes a “searching review” that may include scientific literature and secondary sources beyond those presented to the trial court. Gore, 143 Wn.2d at 304 (quoting State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996)).

Williams offered the trial court lengthy briefing, and he adds a few additional authorities in his Opening Brief. These materials are appropriately part of the searching review required.

In Berry, this court ruled that no Frye hearing was required regarding an expert's diagnosis of paraphilia NOS. Williams respectfully asks the court reject that analysis in the case at bar. For the reasons explained in his Opening Brief, the diagnosis lacks

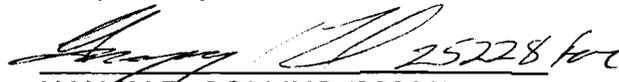
scientific reliability and validity, and is not generally accepted in the scientific community. Under a Frye analysis, it should be excluded.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Williams respectfully requests this Court remand his case for further proceedings.

DATED this 14 day of October 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy P. Collins", with a date "25228 for" written to the right of the signature.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

IN RE THE DETENTION OF)
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)
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 APPELLANT.)
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF OCTOBER, 2011, 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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SVP UNIT () _____
KING COUNTY ADMINISTRATION BLDG.
500 FOURTH AVENUE, 9TH FLR
SEATTLE, WA 98104

[X] EDDIE WILLIAMS (X) U.S. MAIL
SPECIAL COMMITMENT CENTER () HAND DELIVERY
PO BOX 881000 () _____
STEILACOOM, WA 98388

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF OCTOBER, 2011.

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