

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

**DIVISION II**

In re Detention of

LENIER RENE AYERS,

Appellant.

In re Personal Restraint Petition  
Of

LENIER RENE AYERS,

Petitioner.

No. 37822-1-II

Consolidated with:

No. 37747-1-II

UNPUBLISHED OPINION

Bridgewater, J. — Lenier Rene Ayers appeals from the denial of his CR 60(b) motion for a new trial or unconditional release from confinement. We hold that the State is entitled to notice and an opportunity to present evidence at a CR 60(b) hearing and remand for that hearing. In a consolidated personal restraint petition (PRP), Ayers alleges numerous errors that are without

merit; we deny his PRP.

## FACTS

Lenier Ayers suffers from paraphilia, not otherwise specified (NOS), sexual attraction to adolescents (hebephilia), and antisocial personality disorder.<sup>1</sup> In 2005, the trial court civilly committed Ayers as a sexually violent predator (SVP) under chapter 71.09 RCW. Ayers appealed to this court, arguing that (1) the State violated his due process rights and right to confront witnesses when it played a videotaped deposition; (2) the State failed to prove a recent overt act; (3) the trial court erred by focusing on the victim's subjective perspective in finding a recent overt act; and (4) the State failed to prove that he suffered from antisocial personality disorder because it presented no evidence that the disorder started before Ayers turned 15 years old. This court affirmed his commitment in an unpublished opinion. *In re Det. of Ayers*, noted at 135 Wn. App. 1040, 2006 WL 3201051, at \*1, *review denied*, 161 Wn.2d 1027 (2007). We issued a mandate on November 7, 2007.

On February 11, 2008, Ayers filed a pro se CR 60(b) motion for relief from judgment. Ayers argued that he was entitled to a new trial or unconditional release because his diagnosis of paraphilia, NOS, hebephilia, was invalid and did not conform to accepted scientific standards as required by ER 702 and 703 and *Frye*.<sup>2</sup> Ayers argued that new, unspecified data from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000); new published materials; and other experts' reports showed a lack of consensus in the

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<sup>1</sup> The trial court also found that Ayers suffers from bipolar disorder and polysubstance dependence, but those conditions are not at issue for the purposes of this appeal.

<sup>2</sup> *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

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scientific community about his paraphilia, NOS, hebephilia diagnosis. Ayers contended that this evidence entitled him to release under chapter 71.09 RCW because he had demonstrated that he did not meet the initial commitment criteria.

On May 16, 2008, in a letter to Ayers, the trial court stated:

As I can best understand you are requesting a new trial, which was already denied and which was the subject of an appeal to the Court of Appeals. You are also claiming newly discovered evidence and due process violations. Such motions must be part of a new appeal as it is this court's position that these issues have been addressed. Consequently, your latest "Petition" will be forwarded to the Court of Appeals for disposition.

II CP at 225. Ayers appealed to this court on May 29, 2008. On June 11, 2008, the trial court entered an order denying Ayers's motion for new trial.<sup>3</sup> Ayers also filed a pro se PRP, which we consolidated with Ayers's direct appeal.

## ANALYSIS

### DIRECT APPEAL

The State argues that we cannot review the claims Ayers raises from the denial of his CR 60(b) motion because he never served the State and it did not have an opportunity to participate. We agree. When a party seeks relief under CR 60(b), the adverse party must be given notice and an opportunity to appear and show cause why the requested relief should not be granted. CR 60(e)(2), (3); *In re Marriage of Mahalingam*, 21 Wn. App. 228, 231, 584 P.2d 971 (1978). The "motion, affidavit, and the order to show cause shall be served upon all parties affected in the

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<sup>3</sup> The May 16, 2008 letter is apparently the order from which Ayers seeks review as it is attached to the document treated as his notice of appeal. But neither party cites to the order from which Ayers seeks review. It is unclear how the June 11, 2008 order relates to Ayers's appeal as he includes no transcript of the June 11, 2008 hearing and neither party adequately explains the procedural history of the case.

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same manner as in the case of summons in a civil action.” CR 60(e)(3).

Ayers did not include an affidavit of service with his CR 60(b) motion and the State did not sign the trial court’s order denying Ayers’s motion, suggesting that it was not at the hearing. There is no proof that Ayers served the State, and thus he did not meet CR 60(e)’s notice and service requirements before the trial court denied his CR 60(b) motion.

Failure to strictly follow the service requirements of CR 60(e) does not raise a jurisdictional issue where the opposing party had a meaningful opportunity to be heard, adequate notice, and was not prejudiced. *Lindgren v. Lindgren*, 58 Wn. App. 588, 594, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991). Ayers offered no reason why he failed to properly serve the State nor does he claim that service was impossible. The State had no meaningful opportunity to be heard or adequate time to prepare. The State could not create a record below or present evidence in response to Ayers’s claims. On appeal, we have only Ayers’s evidence to review and no articles or scientific evidence that may rebut Ayers’s claim that hebephilia is not a valid diagnosis. This one-sided record prejudiced the State. Ayers’s deviation from procedure is prejudicial. *Lindgren*, 58 Wn. App. at 594.

Under *Lindgren*, Ayers’s failure and the resulting prejudice may be jurisdictional. The State argues that the proper remedy is remand to the trial court for a hearing and an opportunity to create a record. We favor the State’s notion that a hearing should be held because the trial court signed an order denying Ayers’s CR 60(b) motion without notice to the State and did not hold a hearing. Accordingly, because of this procedural defect, we cannot address Ayers’s claims at this time.

PRP

A PRP is not a substitute for an appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). A personal restraint petitioner must prove a constitutional error that results either in actual prejudice or nonconstitutional error that results in a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and state the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

When reviewing a PRP, we have three options: (1) deny the petition if the petitioner fails to make a prima facie showing of constitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but we cannot determine the merits of his contentions solely from the record; and (3) grant the personal restraint petition without further hearing if the petitioner demonstrated actual prejudicial error. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). We deny Ayers's petition.<sup>4</sup>

I. Motion for New Counsel

Ayers contends that the trial court violated his First and Fourteenth Amendment rights by refusing to "respond" to his motion for appointment of new counsel. PRP at 3, 6. The trial court did respond to Ayers's motion. The trial court denied his motion for new counsel, and Ayers sought discretionary review from that decision, which we denied. *See Ruling Denying Discretionary Review*, No. 39129-5-II.

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<sup>4</sup> Because we remand so the State may be provided with notice and a CR 60(b) hearing, this court does not reach Ayers's CR 60(b) arguments in his PRP.

## II. Ineffective Assistance of Counsel

Ayers next alleges that he received ineffective assistance of counsel during his initial commitment hearing. On direct review, an appellant must show deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A PRP petitioner claiming ineffective assistance of trial counsel must demonstrate that he was actually and substantially prejudiced by his trial counsel's representation. *In re Pers. Restraint of Davis*, 151 Wn. App. 331, 338, 211 P.3d 1055 (2009).

Specifically, Ayers argues that the trial court's "obstinacy" has forced several of his attorneys to lose interest in properly representing him. PRP at 6. Ayers claims that the trial court's repeated denials of his motions<sup>5</sup> have made attorneys hesitant to put forth a diligent effort in representing him and, thus, violated his Sixth Amendment right to effective counsel. But the trial court's actions cannot provide a basis for a petitioner's ineffective assistance of counsel claim as the trial court is not Ayers's counsel. In addition, Ayers fails to specify how his trial counsel's conduct was deficient because he does not identify the allegedly deficient acts. Ayers does not set forth any facts beyond a generic allegation of bias and poor motivation. This is not sufficient. RAP 16.7(a)(2)(i).

Ayers also contends that he received ineffective assistance of counsel at his initial commitment hearing because his trial counsel failed to call unspecified witnesses. Ayers's claim fails because he did not set forth the facts or evidence to support this allegation. RAP 16.7(a)(2)(i).

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<sup>5</sup> Ayers references a motion he allegedly filed on March 26, 2007. This motion is not in the record before us.

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Ayers argues that he received ineffective assistance of counsel at his initial commitment hearing when his trial counsel did not object to a witness testifying by video deposition. Counsel's failure to move to suppress evidence is not per se deficient representation. *McFarland*, 127 Wn.2d at 336. The petitioner must show in the record the absence of counsel's legitimate strategic or tactical reasons supporting his or her reasons for the challenged conduct. *McFarland*, 127 Wn.2d at 336. Ayers's trial counsel strongly objected to the trial court permitting the video deposition, but the trial court denied that motion. When the State introduced the video deposition during Ayers's commitment hearing, Ayers's trial counsel was able to introduce evidence that significantly undermined the witness's credibility, including evidence of drug use and memory problems. This was a legitimate tactical reason for not objecting to the video deposition testimony.

### III. Constitutional Criminal Rights in Civil Commitment Setting

Ayers next argues that (1) at his initial civil commitment hearing he was denied his Sixth Amendment right to confront witnesses, (2) his civil commitment violated double jeopardy, and (3) a pretrial evaluation violated his Fifth Amendment right against self-incrimination. The Sixth Amendment right to confront witnesses does not apply in SVP proceedings. *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Because Washington's SVP statute is civil, not criminal, double jeopardy is not violated, *Kansas v. Hendricks*, 521 U.S. 346, 369, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), and a respondent has no protection against self-incrimination. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 50-52, 857 P.2d 989 (1993), *superseded by statute on other grounds as recognized by In re Det. of Ross*, 102 Wn. App. 108, 6 P.3d 625 (2000).

#### IV. Alleged Judicial Bias

Ayers further argues that the trial court judge denied his motions because the judge is biased against him because he filed complaints against the judge. To support his claim, Ayers cites a letter from the Commission on Judicial Conduct (Commission) in which the Commission found no violation of the Code of Judicial Conduct. Ayers failed to cite any facts that demonstrate judicial bias. RAP 16.7(a)(2)(i). The letter from the Commission supports a finding of no bias, rather than Ayers's claimed bias.

#### V. Medical Treatment at Special Commitment Center

Next, Ayers argues that staff at the Special Commitment Center (SCC) violated his Eighth Amendment rights by denying him treatment for hepatitis C.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishments. Deliberate indifference to prisoners' serious medical needs violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). This is true whether prison doctors manifested indifference in their response to the prisoner's needs or by prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. *Estelle*, 429 U.S. at 104-05. It does not follow, however, that every claim by a prisoner that he has not received adequate medical treatment demonstrates an Eighth Amendment violation. *Estelle*, 429 U.S. at 105. In order to state a cognizable Eighth Amendment claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle*, 429 U.S. at 106. An inadvertent failure to provide adequate medical care does not violate the Eighth Amendment.

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*Estelle*, 429 U.S. at 105-06.

Ayers cites to grievances he filed on April 19, 2004 and April 6, 2006, in which he alleged that SCC staff failed to complete a round of interferon injections required to suppress his hepatitis C virus. Ayers contends that Caucasian residents at the SCC have received this treatment but that he does not because he is African-American. A petitioner may not support his PRP claims based solely on self-serving affidavits. *In re Pers. Restraint of Reise*, 146 Wn. App. 772, 789, 192 P.3d 949 (2008). Ayers did not include affidavits from any doctors stating that the treatment he seeks is medically necessary. He also did not include any affidavits from other individuals stating that he is not receiving the treatment sought.

While Ayers's argument fails now, his allegations, if true, are disturbing and would warrant further consideration in the future if accompanied by proper documentation. It is "just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle*, 429 U.S. at 104 (quoting *Spicer v. Williamson*, 191 N.C. 487, 132 S.E. 291, 293 (1926)). Ayers remains entitled to treatment for medical conditions regardless of his status as an SVP.

## VI. Universal Declaration of Human Rights

Ayers also alleges several violations of various articles of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) (Declaration). The Declaration does not impose obligations as a matter of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-35, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (citing John P. Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in *The*

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International Protection of Human Rights 39, 50 (E. Luard ed., 1967) (quoting Eleanor Roosevelt calling the Declaration “a statement of principles . . . setting up a common standard of achievement for all peoples and all nations” and “not a treaty or international agreement . . . impos[ing] legal obligations”). Ayers’s arguments under the Declaration fail.

#### VII. Naked Castings into the Constitutional Sea

Ayers further argues that, for unspecified reasons, chapter 71.09 RCW deprives him of his Fourteenth Amendment rights to due process and equal protection of the laws. Naked castings into the constitutional sea are insufficient to command judicial consideration and discussion. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

#### VIII. Speedy Trial

Ayers argues that his Sixth Amendment rights to a speedy trial were violated through multiple continuances in advance of his initial civil commitment hearing. Ayers does not identify what continuances he objects to, how many continuances were granted, or why the trial court granted the continuances. He has not provided the facts on which his claim is based. RAP 16.7(a)(2)(i).

#### IX. ER 702 Objection Waived

Ayers next contends that his paraphilia, NOS, hebephilia diagnosis violates ER 702 “due to it’s [sic] subjectivity and complete lack of expert consensus.” PRP at 10. Ayers did not raise an ER 702 challenge to his diagnosis at his initial commitment hearing. We will only consider an error not raised below if it is of constitutional magnitude. RAP 2.5(a)(3). The erroneous admission of expert testimony under ER 702 is not of constitutional magnitude. *State v. Wilber*,

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55 Wn. App. 294, 299, 777 P.2d 36 (1989) (citing *State v. Huynh*, 49 Wn. App. 192, 198, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988)). Ayers's argument fails.

#### X. PRP Addendum

In an addendum to his PRP, Ayers cites to an e-mail that he says demonstrates the way the SCC and the Department of Social and Health Services have improperly facilitated the indefinite civil commitment of SVPs. The e-mail he cites was written by an Iowa employee expressing frustration over the revolving-door policy created by the release of SVPs in that state. This does not show constitutional error that resulted in prejudice or nonconstitutional error that resulted in a miscarriage of justice.<sup>6</sup> *In re Cook*, 114 Wn.2d at 813.

#### XI. SCC Hiring Decisions

Ayers also assigns error to the SCC's hiring of "sex offenders as well as numerous other rejected undesirables." PRP Addendum at 3. Ayers particularly takes issue with the SCC's hiring of a psychiatrist once disciplined for having a romantic relationship with a client. Ayers fails to demonstrate how this makes his restraint unlawful. RAP 16.7(a)(2)(iii); *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 699-700, 9 P.3d 206 (2000). To the extent that Ayers challenges the quality of treatment he could receive from this staff member, he failed to show evidence that his treatment suffered under this doctor's care. RAP 16.7(a)(2)(i).

Ayers failed to demonstrate constitutional error that resulted in actual prejudice or nonconstitutional error that resulted in manifest injustice. We deny Ayers's petition.

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<sup>6</sup> Ayers also cites without explanation or argument several United States Supreme Court, federal, and California cases. Bare allegations unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain a petitioner's burden of proof. *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 699-700, 9 P.3d 206 (2000).

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In conclusion, we remand for a hearing on Ayer's CR60(b) motion and we deny Ayers's PRP.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Bridgewater, J.

We concur:

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Armstrong, J.

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Penoyar, A.C.J.