IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of Eddie Leon Williams, Jr.	)	No. 65436-5-I
STATE OF WASHINGTON, Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
EDDIE LEON WILLIAMS, JR. Appellant.	)	FILED: May 14, 2012

Becker, J. — Eddie Williams appeals an order of commitment entered under RCW 71.09.060 (sexually violent predators) after a trial by jury. Williams contends the trial court erred by entering a pretrial order that compelled him to personally submit to a clinical interview by the State's expert Dr. J. Robert Wheeler under RCW 71.09.040(4). He also contends the court erred by refusing his motion for a Frye[1] hearing on the admissibility of Dr. Wheeler's diagnosis of "paraphilia not otherwise specified (nonconsenting persons)." Both allegations of error are controlled by recent decisions rejecting the positions taken by Williams. We affirm.

[1] Frye v. United States, 54 App. D.C. 46, 47, 293 F. 1013 (1923).

FACTS

Williams was convicted of second degree rape in 1985. He later pleaded guilty to a charge of third degree assault. During his incarceration for assault, he participated in a clinical interview with Dr. Iris Rucker, a Department of Corrections psychologist. Dr. Rucker concluded that Williams met the statutory definition of a "sexually violent predator"[2] and recommended that he be considered for civil commitment. A second psychologist, Dr. Leslie Rawlings, carried out a records review and came to the same conclusion.

On January 25, 1999, the State filed a petition to commit Williams as a sexually violent predator under RCW 71.09.030. After a hearing on the State's petition on February 9, 1999, the trial court entered a finding of probable cause for commitment. Williams was remanded into the custody of the Department of Social and Health Services at the Special Commitment Center in Steilacoom for a mental evaluation under RCW 71.09.040(4) and to await trial.

Although the statute provides for a commitment trial 45 days from the filing of the petition, the trial in this case was ultimately delayed for over 10 years due to lengthy interlocutory appeals, Williams' refusal to undergo a video deposition, and various continuances.

A significant delay occurred pending the State's appeal of an order

[2] "'Sexually violent predator' means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Former RCW 71.09.020(1) (1995).

entered in August 1999. The State moved to compel a mental examination under CR 35. The trial court found that a compelled psychiatric and psychological examination was not warranted by the provisions of chapter 71.09 RCW, and Williams was not obliged to submit to such an examination against his will. The Supreme Court ultimately ruled, narrowly, that "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 Det. of Eddie Leon Williams, Jr., 147 Wn.2d 476, 491, 55 P.3d 597 (2002). The civil commitment scheme set forth in chapter 71.09 RCW is a "special proceeding," and the "general civil rule" of CR 35 is "inconsistent" with that special statutory framework. Williams, 147 Wn.2d at 488, 490-91. The court did rule that Williams was required to undergo a videotaped deposition by the State.

Pending this appeal and afterwards, Williams remained confined at the Special Commitment Center. He continued to refuse all attempts by the State to interview him personally. In 2000 and 2003, State psychologists performed records reviews after Williams refused to be examined.

After additional continuances were granted, the parties obtained a trial date of May 2009. On March 13, 2009, the State filed a motion to compel Williams to submit to and participate in a forensic interview. Williams challenged the motion, arguing that under the court's August 1999 order, it was already "law of the case" that he did not need to submit to a mental examination. And in any event, Williams argued, the

State already had access to 10 years' worth of observation and progress notes based on "continuous observation" of Williams by counselors at the Special Commitment Center, and it had also recently obtained a videotaped deposition of Williams that lasted a full day.

The court heard oral argument and granted the State's motion on March 20, 2009. The court ordered Williams to submit to a "clinical/forensic interview" by Dr. J. Robert Wheeler, a clinical psychologist and certified sex offender treatment provider. The court based its order on the following findings:

1. Respondent's mental condition is in controversy in this action.
2. Dr. Wheeler is a licensed psychologist in the State of Washington who specializes in the evaluation and treatment of sex offenders.
3. WAC 388-880-034 specifically requires a forensic interview under a RCW 71.09.040 evaluation.
4. The last evaluation of Mr. Williams pursuant to RCW 71.09.040 was conducted in October 2003.
5. An updated evaluation pursuant to RCW 71.09.040 is necessary for the May 2009 trial.

The order stated that Williams' failure to comply with the examination "may result in the imposition of appropriate sanctions."

Williams met with Dr. Wheeler on April 6 and 7, 2009. Dr. Wheeler issued a 42-page report on April 20, 2009, concluding that Williams suffered from mental abnormalities—paraphilia not otherwise specified (NOS) nonconsent and antisocial personality disorder—and expressing the opinion that Williams was more likely than not to engage in further acts of sexual violence if not confined to a secure facility.

On May 11, 2009, Williams filed

another motion for a continuance so that he could obtain an expert witness to rebut Dr. Wheeler's testimony. The motion was granted and trial was delayed another year until May 3, 2010.

A 10-day trial began May 4, 2010. On the first day of trial Williams moved to prohibit Dr. Wheeler from relying on the diagnosis of paraphilia NOS nonconsent as the mental abnormality qualifying him for indefinite commitment. Williams sought a Frye hearing to determine the scientific validity of the diagnosis. The court denied the motion.

At trial, Dr. Wheeler testified in detail as to his examination of Williams, his diagnoses, and his conclusion that Williams should remain indefinitely confined. Williams' expert Dr. Richard Wollert disputed the validity of the paraphilia NOS nonconsent diagnosis and criticized Dr. Wheeler's methodology. Dr. Wollert expressed the opinion that because Williams was now 51 years old, his likelihood of committing a predatory act of sexual violence had diminished with his advancing age. The State also put on testimony by four female Special Commitment Center employees who claimed Williams behaved threateningly toward them during his residency. Williams was called by the State to testify about his sexual history and past acts of violence.

On May 19, 2010, a jury found the State proved beyond a reasonable doubt that Williams is a sexually violent predator. The court committed him to the custody of the Department of Social and Health Services. This appeal followed.

COMPELLED FORENSIC INTERVIEW

Williams mounts two basic challenges to the court's order compelling him to participate in the mental examination: he argues that the order exceeded the court's authority under RCW 71.09.040(4) and that it violated his constitutional rights to due process and privacy.

The statute that authorized the mental examination is RCW 71.09.040(4), as worded at the time of the court's order:

> If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone.

As a threshold matter, the State contends Williams failed to preserve error on his argument that RCW 71.09.040(4) does not require him to participate in a forensic examination. We disagree. Although the issue is raised with less than crystal clarity in his brief below, Williams did bring it to the attention of the trial court at the hearing:

> The other thing I do want to point out is that there is no clear statutory authority compelling him to participate. . . .
>
> . . . .
>
> . . . I do want to point out, because . . . I didn't actually address it extensively in my brief, was 71.09.040 ordered DSHS to evaluate. It doesn't necessarily order the respondent to participate. The WAC that the State cites indicates that DSHS can ask the prosecution to approach

> the Court, but doesn't require it.
>
> And it's our position that if the WAC were to require that that it would exceed the authority that's conferred by the statute and would, therefore, be invalid if that's how it's being read.[3]

This argument was sufficient to preserve the claim of error in interpreting the statute.

The State alternatively contends the legitimacy of Dr. Wheeler's examination of Williams is moot because the examination has already taken place. An issue is moot when the court cannot provide the basic relief originally sought in proceedings below. In re Det. of Swanson, 115 Wn.2d 21, 24, 804 P.2d 1 (1990). The State cites federal cases indicating that discovery orders are moot and need not be reviewed if the discovery has already been produced before appeal is taken. But the order to undergo examination here was not a "discovery order" entered under the civil rules, as was true in the cases cited by the State. It was a statutory order entered under RCW 71.09.040, recognizing the holding of Williams, 147 Wn.2d at 488, 490-91. The State's authorities are inapposite. We conclude it is appropriate to review Williams' challenge on the merits.

Questions involving statutory interpretation and allegations of constitutional violations are both reviewed de novo. In re Det. of Strand, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009); W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wn.2d 599, 607, 998 P.2d 884 (2000).

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[3] Report of Proceedings (March 20, 2009) at 7-9.

Williams' statutory and privacy challenges to the order compelling examination were both recently addressed and rejected by In re Detention of Thomas Williams, 163 Wn. App. 89, 97-100, 264 P.3d 570 (2011). The court held that compelling participation in an examination under RCW 71.09.040(4) is not an improper infringement on the subject's constitutional right to privacy because the privacy interests of a convicted sex offender are truncated and the substantial interest in public safety outweighs them. Thomas Williams, 163 Wn. App. at 97.

The court also ruled that RCW 71.09.040(4), even when construed in light of the Supreme Court's 2002 decision in Williams, permits the State to require a respondent to "participate" in a mental health examination. A principal authority cited for this holding was In re Det. of Audett, 158 Wn.2d 712, 726-27, 147 P.3d 982 (2006). In Audett, the Supreme Court emphasized the narrowness of its earlier holding in Eddie Williams' first appeal:

> In Williams . . . we did not preclude the use of CR 35 exams out of due process concerns. Rather, *we merely held that RCW 71.09.040 provides the exclusive means for obtaining mental examinations of civil commitment respondents.* We have never held that sexually violent predator civil commitment respondents have a due process right to refuse to submit to an examination of the type described in CR 35 or that such respondents have a Fifth Amendment right against self-incriminations. . . . *In fact, RCW 71.09.040(4) specifically provides that such respondents must submit to an evaluation after a court determines that there is probable cause to believe they are sexually violent predators,* and RCW 71.09.070 provides that they must submit to subsequent examinations annually after having been committed.

(Emphasis added.) The Thomas Williams court pointed out that the rules developed by the Department of Social

and Health Services to implement RCW 71.09.040(4) call for an examination of the resident that includes a forensic interview and medical examination, if necessary. The court concluded that the trial court "appropriately followed both the authorizing statute and implementing rules when it ordered Williams' mental health examination after finding probable cause to believe that he met the criteria" for a sexually violent predator. Thomas Williams, 163 Wn. App. at 97-100.

Following Audett and Thomas Williams, we conclude the trial court did not misinterpret RCW 71.09.040(4) and did not violate Williams' privacy and due process rights by compelling him to submit to the examination by Dr. Wheeler.

The Supreme Court's opinion in In re Detention of Hawkins, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010), does not require a different result. Williams cites Hawkins for the proposition that administrative rules created by the Department of Social and Health Services cannot provide authority for any genre of evaluation not expressly described by RCW 71.09.040(4). Hawkins, which concerned the State's authority to order a polygraph examination under RCW 71.09.040(4), does not extend to the facts of this case. Because of the "inherent problems" and "unique difficulties posed by polygraph examinations . . . which the courts have consistently recognized as unreliable and, unless stipulated to by all parties, inadmissible," the Hawkins court concluded that the legislature could not have intended to include polygraph examinations within the mandatory evaluation under subsection .040(4) without explicitly saying so: "it is fair to infer that the legislature intends to prohibit

compulsory polygraph examinations unless it expressly allows for their use." Hawkins, 169 Wn.2d at 802, 803 (citation omitted). Because of this prohibition, the court held rules providing for polygraphs actually contradicted the statute. Hawkins, 169 Wn.2d at 804. Here there is no such contradiction, where the State seeks only to have Williams personally interviewed by a doctor. A personal evaluation by a doctor is not a procedure subject to the same historical and legal mistrust as a polygraph test.

Below, one of the State's concerns was to establish its right to require a current examination of Williams under RCW 71.09.040(4). The State continues to argue on appeal that the statute authorizes a "current" examination. The State contends that its position is supported by a recently enacted statute, Laws of 2012, ch. 257, § 5 (Substitute S.B. 6493, 62d Leg., Reg. Sess. (Wash. 2012)) (signed into law March 30, 2012; effective date, July 1, 2012). Neither party has briefed the issue of retroactivity. We find it unnecessary to decide whether the version of the statute in effect before the recent amendment authorized a "current" evaluation. As discussed above, the statute authorized at least one evaluation including a forensic examination in which the respondent participated. The examination of Williams by Dr. Wheeler pursuant to the order of March 20, 2009, is the only forensic examination Williams has had in which he participated to the degree contemplated by the statute.

In view of this disposition, we also find it unnecessary to reach the State's motion to strike, submitted days before oral argument in this appeal, in which the State contends that the recent statutory

amendments render Williams' challenge to the examination a moot issue. Having conducted a review on the merits, we conclude the examination was properly ordered.

DENIAL OF REQUEST FOR FRYE HEARING

The second issue Williams raises on appeal is whether he was entitled to a Frye hearing in which he could litigate his contention that Dr. Wheeler's diagnosis of paraphilia NOS nonconsent fails tests of "medical recognition" and "medical justification."

Williams' argument was recently squarely rejected by this court. In re Det. of Berry, 160 Wn. App. 374, 248 P.3d 592, review denied, 172 Wn.2d 1005 (2011). The proper focus of Frye "is the science upon which the expert's opinion is founded," and there was no question that "the science at issue is standard psychological analysis." Berry, 160 Wn. App. at 379. Although Berry had "identified scientific criticism of the criteria and reliability" of the paraphilia diagnosis, he did not establish that it was no longer generally accepted. Berry, 160 Wn. App. at 380. The court concluded that challenges to the reliability of a diagnosis of paraphilia NOS nonconsent went "to the weight of the evidence, not its admissibility." Berry, 160 Wn. App. at 382. Berry, like Williams in this case, was given the opportunity to cross-examine the psychologist and to present his own witness, Dr. Wollert, to testify to the shortcomings of the diagnosis.[4] Thus

[4] Coincidentally, Williams' expert, Dr. Wollert, was the same doctor employed by the defense in Berry to rebut the paraphilia NOS nonconsent diagnosis. See Berry, 160 Wn. App. at 380. The State's expert in Berry testified that Dr. Wollert was among

"there was no evidentiary error and no violation of due process." Berry, 160 Wn. App. at 382.

Following Berry, we conclude the court did not err in denying the motion for a Frye hearing.

Affirmed.

Becker, J.

WE CONCUR:

Ellington, J.

Cox, J.

two or three psychologists who "decry the diagnosis." Berry, 160 Wn. App. at 380.