IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of: CASPER ROSS, Petitioner,	No. 37618-1-II UNPUBLISHED OPINION

Penoyar, A.C.J. — Casper Ross, a sexually violent predator (SVP) civilly committed to the Special Commitment Center (SCC) under chapter 71.09 RCW, appeals the trial court's ruling revoking its order conditionally releasing him to a less restrictive alternative (LRA). We affirm.

FACTS

In 1998, the State civilly committed Ross as an SVP[1] under chapter 71.09 RCW. During his commitment, Ross resided at the SCC on McNeil Island. On January 2, 2003, he moved to the Secure Community Transition Facility (SCTF), also located on McNeil Island.[2] This placement was an LRA under RCW 71.09.020(6).[3]

SVPs who reside at the SCTF may leave McNeil Island for trips to the mainland, but they

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[1] The phrase "sexually violent predator" refers to 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 that 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), *recodified as* RCW 71.09.020(1).

[2] The SCTF is a separate facility from the SCC that can house approximately 24 residents.

[3] RCW 71.09.020(6) defines the phrase, "less restrictive alternative" as "court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092." We discuss the conditions outlined in the trial court's release order in more depth below.

are required to obtain prior approval and must be accompanied by an escort, also called a Residential Rehabilitation Counselor (RRC).[4] During these trips, SVPs can only make stops at preapproved locations. RRCs are required to notify the SCTF of any proposed deviations, such as restroom or food breaks that have not been preapproved. The RRCs are also required to call and check in with the SCTF on a regular basis.

In October 2006, Ross began working full-time at various construction sites. In early 2007, Ross obtained approval to transition into a community residence. In April 2007, however, the trial court ordered Ross to return to the SCC. The following incident prompted Ross's move:

On April 1, 2007, Ross and his RRC, Nora Cutshaw, went on a preapproved visit to Ross's cousin's home in Lakewood. A Lakewood police officer subsequently went to the home and knocked on the door.[5] When no one answered, the officer went to the side of the house and knocked on a window. Appearing disheveled and adjusting her shirt, Cutshaw answered the door. At that moment, Ross emerged from a bedroom and appeared to be adjusting his belt.[6] The officer reported the matter to the SCTF, which subsequently confined Ross while it investigated the incident. On April 13, Ross returned to the SCC.

Upon his return to the SCC, staff members asked Ross to provide them with a list of items he needed from his room at the SCTF. While they searched for these items, staff members

[4] SVPs must also wear ankle bracelets and GPS tracking devices when they leave the island.

[5] Lakewood police officers conduct random spot checks of SCTF residents who travel to that jurisdiction. The officer visited the home to determine whether Ross was at his scheduled location.

[6] Both Cutshaw and Ross denied having inappropriate contact or an inappropriate relationship with the other.

discovered a framed picture of Ross's daughter, behind which he had hidden a photograph of Cutshaw in a bathing suit.[7] They subsequently found another hidden photograph of Cutshaw.

On April 18, Community Corrections Officer Tela Wilson questioned Ross about the first photograph of Cutshaw. During this time, Ross neither mentioned nor admitted to possessing a second photograph of Cutshaw. He only admitted to possessing both photographs to his sex offender treatment provider, Lang Taylor, after staff members discovered them. When Taylor questioned him, Ross stated that he had stolen the photographs from Cutshaw. The same day, Taylor terminated Ross's treatment.

The State's investigation following the April 1 incident also revealed the following: that Ross had deviated from this preapproved off-island trip schedules on more than one occasion;[8] that Ross had failed to report his deviations and those of his RRCs; and that Ross had withheld information from his treatment provider. On April 19, Wilson filed a conditional release violation notice.

On May 1, 2007, the State filed a petition to revoke Ross's LRA under former RCW 71.09.098 (2006),[9] alleging that he had violated the conditions of the trial court's release order. On March 24, 2008, the trial court revoked Ross's LRA. The trial court entered the following

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[7] Ross subsequently testified that he found the photograph on the floor at the SCTF.

[8] Ross testified that he went to the mall, a park, and a McDonald's without authorization and that his RRCs also took him to various unauthorized locations. Ross testified that when he reported the RRCs' deviations, either "nothing was done about it" or staff members told him that RRCs were allowed to do certain things necessary to perform their jobs. Report of Proceedings (RP) at 147. Cutshaw took responsibility for some of these deviations, subsequently testifying that they were her idea.

[9] Former RCW 71.09.098 governs LRA revocation or modification hearings.

findings of fact:

5. The release order requires [Ross] to comply with the requirements imposed on him in the release order.

6. The release order requires [that] [Ross] be treated in the community by Lang Taylor . . . . Mr. Taylor is the only treatment provider approved by the Court in its release order.

7. The release order requires [Ross] to remain in treatment and to comply with the requirements imposed on him by Mr. Taylor.

8. The release order requires [Ross] to abide by all rules and conditions imposed upon him by the SCTF.

9. The SCTF rules require that [Ross] obtain SCTF approval prior to receiving or possessing any still photographs.

10. [Ross] admitted to stealing a photograph of [Cutshaw]. The photograph depicts Ms. Cutshaw wearing a bathing suit. [Ross] concealed the photograph of Ms. Cutshaw in his room, behind a photograph of his daughter.

11. [Ross] did not tell his treatment provider, Mr. Taylor, or any member of his treatment team or SCTF staff that he had a photograph of Ms. Cutshaw in his possession, nor did he seek permission from [Taylor], any treatment team member or the SCTF to possess the photograph of Ms. Cutshaw.

. . . .

13. On multiple occasions while on off-island trips, [Ross] deviated from the travel plans approved by his treatment team. Some of those deviations occurred without the permission of any member of his treatment team.

14. [Ross] did not report to his treatment team all of the repeated deviations from the travel log.

15. The SCC and SCTF are no longer willing to provide housing for [Ross] at the SCTF.

16. Lang Taylor is currently not willing to provide community based treatment to [Ross].

> 17. The allegations relating to April 1, 2007 were dismissed by agreement of the parties.

CP at 158-59 (internal record cites omitted).

The trial court then concluded that the evidence demonstrated by a preponderance of the evidence that Ross violated its release order by failing to comply with all SCTF regulations, treatment plans, and treatment rules by deviating from his approved travel log and stealing and possessing a photograph of Cutshaw; being terminated from treatment by Taylor, the only treatment provider the trial court approved in its release order; and failing to obtain approved housing at the SCTF, the only residential placement the trial court approved in its release order. Ross now appeals.

ANALYSIS

I. Outrageous Government Conduct

Ross first argues that his supervising RRCs engaged in a pattern of unauthorized deviations during his off-island trips and failed to report these deviations. He contends that "the government has [therefore] engaged in a continuing cycle of outrageous misconduct by placing [him] in an impossible situation [in which] he was subjected to the control of [RRCs] who exhibited a pattern of breaking . . . rules, but nevertheless made [him] liable for their misconduct." Appellant's Br. at 15. The State disagrees, arguing that (1) Ross waived this issue by failing to raise it below; (2) the outrageous government conduct doctrine does not apply to civil cases; and (3) even if this doctrine applied, there was neither state action nor outrageous conduct in this case. The State's arguments are persuasive.

Generally, an appellant cannot raise an issue for the first time on appeal unless it is a

"manifest error affecting a constitutional right." RAP 2.5(a)(3). The exception to the general rule does not automatically mandate review whenever an appellant identifies some constitutional issue not raised below. *State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). The appellant must show actual prejudice in order to establish that the error is "manifest." *Munguia*, 107 Wn. App. at 340 (quoting *McFarland*, 127 Wn.2d at 333).

Ross's argument that the RRCs' misconduct violated his constitutional rights is misplaced. He asserts that "[a]lthough reported Washington decisions [applying the outrageous government conduct doctrine] involve criminal matters, the doctrine . . . is equally applicable here." Appellant's Br. at 16. Without citing authority or developing his argument, this alone is insufficient to identify either a constitutional issue or actual prejudice.[10] Because Ross has not identified a manifest error affecting a constitutional right, he has waived this issue on appeal. Even if he had not waived this issue *and* the outrageous government conduct doctrine applied in the present context, Ross has failed to establish outrageous conduct in this case.

Whether the State has engaged in outrageous conduct is a matter of law. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). We review questions of law de novo. *State v. Ford*, 125 Wn.2d 919, 923, 891 P.2d 712 (1995). In some situations, government conduct is "so outrageous that due process principles would absolutely bar the government from invoking

[10] The State notes that there appears to be only one case in which a court applied this doctrine to a civil matter. *See In re Commitment of Schulpius*, 270 Wis.2d 427, 678 N.W.2d 369 (2004) (held that application of statute governing supervised release of sexual predators did not violate offender's substantive or procedural due process rights). The doctrine almost exclusively appears, however, in criminal cases involving entrapment. Ross does not raise entrapment issues on appeal.

judicial processes to obtain a conviction." *Lively*, 130 Wn.2d at 19 (quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). The government conduct must "shock the universal sense of fairness." *Lively*, 130 Wn.2d at 19. Outrageous government conduct will warrant dismissal only in the most egregious circumstances and not merely because the government acted deceptively. *Lively*, 130 Wn.2d at 20.

Even if we assume that state action existed in this case—that the RRCs were acting under color of state law when they took part in the aforementioned deviations[11]—Ross has still failed to establish that their conduct shocks the universal sense of fairness. In reviewing outrageous government conduct, we evaluate the conduct based on the "totality of the circumstances." *Lively*, 130 Wn.2d at 21 (quoting *United States v. Tobias*, 662 F.2d 381, 387 (1981); *State v. Hohensee*, 650 S.W.2d 268, 272 (Mo.App. S.D. 1982)). Each case must be resolved on its own unique set of facts. *Lively*, 130 Wn.2d at 21.

In evaluating whether the State's conduct violated due process, we focus on the State's behavior and not the defendant's predisposition. *Lively*, 130 Wn.2d at 22 (citing *United States v. Luttrell*, 889 F.2d 806, 811 (9th Cir. 1989)). There are several factors that courts consider when determining whether conduct offends due process: whether the conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; whether the government controls the criminal activity or simply allows for the criminal activity to occur; whether the motive was to prevent crime or protect the public; and whether the

[11] Ross's RRCs testified that their deviations were primarily personal in nature and involved eating lunch and picking up personal medication, for example.

government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice." *Lively*, 130 Wn.2d at 22 (quoting *People v. Isaacson*, 44 N.Y.2d 511, 409 N.Y.S.2d 714, 378 N.E.2d 78, 83 (1978). None of these factors is present in this case.

First, this appeal does not involve a criminal conviction; rather, it involves the trial court's order revoking Ross's LRA and returning him to civil commitment at the SCC. Ross does not address this distinction. Second, no crime occurred in this case. Rather, the trial court ordered Ross's return to the SCC when he violated the terms of his release order. Third, the RRCs neither infiltrated nor instigated the ongoing "pattern of [rule-breaking]." Appellant's Br. at 15. Although two RRCs testified regarding their own deviations, the record demonstrates that Ross also participated in numerous unauthorized deviations of his own. Furthermore, the record shows that Ross alone violated many other SCTF and treatment rules by possessing an unauthorized image and withholding information from his treatment team.

Ross has not demonstrated that he expressed reluctance to commit the deviations or that the RRCs pleaded with, made promises, or solicited him to commit any of the aforementioned violations. Additionally, Ross fails to show that the RRCs controlled the violation activity. He argues that because the RRCs had control over the vehicles used during off-island trips and because Ross's failure to report their unauthorized deviations constituted a violation of his LRA, they had control over the violation activity. This argument, however, is unpersuasive. Although Ross did not have control over the vehicles used for these trips, he was required to keep his treatment provider informed of his movements within the community. He failed to do this. Furthermore, he was required to seek clarification if he was confused about any of the rules. That he may have feared retaliation for reporting the RRCs' violations did not excuse him from this

condition.

Moreover, although it is clear that the RRCs' motives were unrelated to preventing crime or protecting the public, they were not engaged in any criminal investigation and their motives were largely personal in nature. Ross does not appear to dispute this. Finally, Ross has failed to demonstrate that the RRCs' conduct was either criminal or repugnant to a sense of justice. Although their actions may have violated SCTF or other employment rules, this alone is insufficient. Ross has failed to establish any of the elements of outrageous government conduct.

II. LRA Revocation

Ross next argues that a preponderance of the evidence does not support the trial court's finding that his LRA should be revoked. The State responds that the evidence supports the trial court's decision, as Ross engaged in a pattern of behavior that violated his LRA terms. The evidence in this case supports the trial court's decision.

At an LRA hearing, the State bears the burden of proving by a preponderance of the evidence that the conditionally released person has violated or is in violation of the court's conditional release order or that the person is in need of additional care, monitoring, supervision, or treatment. RCW 71.09.098(5)(c).[12]

In its order releasing Ross to a less restrictive alternative, the trial court provided that Taylor would treat Ross and that the SCTF would house Ross.[13] Furthermore, it provided that

[12] The legislature adopted this version of RCW 71.09.098 in May 2009. The version under which Ross's LRA was revoked, however, was substantively the same.

[13] Before the trial court may enter a conditional release order, "housing [must exist] that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person . . . ." Former RCW 71.09.092(3) (1995).

Ross would be required to comply with both Taylor's treatment plans and rules and the SCTF's rules and conditions. Taylor's treatment rules prohibited lies of commission and omission and "any other forms of deception." Clerk's Papers (CP) at 48. SCC policy also required Ross to obtain staff permission before acquiring and possessing still photographs.

Additionally, Ross's treatment plan required that he submit a detailed travel plan to a member of his treatment team for any trips he made outside of the SCTF. It also required that he maintain a daily log containing the times and locations of all activities he engaged in outside the SCTF. The treatment plan required that Ross seek clarification for any rules he did not understand and provided that not understanding a rule was not a valid excuse for a violation. Ross testified that he signed both documents.

Ross admitted to possessing and concealing an unauthorized photograph.[14] Both he and his treatment provider testified that Ross admitted to stealing the photographs. Ross admitted that he knew he was not permitted to possess unauthorized photographs. Furthermore, Ross admitted that he had been dishonest to his treatment providers regarding his possession of the photographs and that he had failed to keep them informed of his movements within the community. Cutshaw also testified that Ross requested unauthorized deviations. Finally, at the time of the hearing, Ross had neither approved housing nor an approved treatment provider. His

[14] The State notes Ross's argument that his possession of the photographs was not a serious violation under RCW 71.09.325. This statute, however, lists criteria under which the State may take an SVP into custody following a reported LRA violation. "Nothing in this section limits the authority of the department to return a person to the [SCC] based on a violation that is not a serious violation as defined in this section." RCW 71.09.325(1). Former RCW 71.09.098, which governs LRA revocation hearings, does not require that a "serious violation" occur in order for the trial court to revoke one's LRA.

assertion that "but for the government misconduct, the SCTF would still be willing to provide housing to him and Taylor would still be willing to provide offender treatment" is unpersuasive. Appellant's Br. at 24. Any one of these violations would have warranted the trial court's LRA revocation. Therefore, we affirm.

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

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.