

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Detention of ) No. 82907-1  
 )  
JAKE HAWKINS, )  
 )  
 ) En Banc  
Petitioner. )  
 ) Filed September 9, 2010

OWENS, J. -- In 2006, the State of Washington filed a petition alleging that Jake Hawkins was a sexually violent predator (SVP). After the trial court found probable cause to believe that Hawkins was an SVP, but before a jury had been asked to determine the issue beyond a reasonable doubt, Hawkins was taken into custody by the Department of Social and Health Services (DSHS) “for an evaluation as to whether [he] is a sexually violent predator.” RCW 71.09.040(4). As part of that evaluation, the State sought, and the trial court ordered, a polygraph examination of Hawkins about his sexual history. Hawkins argues that the trial court exceeded its statutory authority in ordering the polygraph examination. We agree and therefore reverse the Court of Appeals, vacate the trial court’s order, and remand for further proceedings consistent with this opinion.

## FACTS

In 1993, Hawkins was convicted of attempted rape in the second degree by forcible compulsion. While incarcerated, he successfully completed a 13-month sex offender treatment program. On February 21, 2006, the State submitted a petition alleging that Hawkins was an SVP based on the criteria set forth in RCW 71.09.020(18). At the February 23 hearing to determine whether probable cause existed to believe that Hawkins was an SVP, the State relied upon the testimony of, and a report by, Dr. Christopher North. Dr. North's report was based on his clinical interview with Hawkins in January 2005, as well as a review of records existing at that time. Dr. North's testimony at the probable cause hearing concerned additional documents related to Hawkins created since the 2005 report, especially those relating to Hawkins' participation in the sex offender treatment program. While noting that Hawkins "certainly did well in treatment," Dr. North testified that, "to a reasonable degree of scientific certainty," it was his opinion that Hawkins was likely to reoffend if not confined to a secure facility. Verbatim Report of Proceedings (VRP) at 8, 17-18. At the hearing, the trial court found probable cause to believe that Hawkins was an SVP.

After the finding of probable cause, Dr. North was assigned to conduct a new evaluation, pursuant to RCW 71.09.040(4), to determine whether Hawkins was an

SVP. As part of that evaluation, Dr. North requested that Hawkins submit to a sexual history polygraph examination. Hawkins refused. The State sought, and the trial court granted, an order compelling Hawkins to submit to the polygraph examination. Hawkins appealed and, in an unpublished opinion, the Court of Appeals affirmed the trial court's order. *In re Det. of Hawkins*, noted at 148 Wn. App. 1038 (2009). We granted Hawkins' petition for review of the Court of Appeals decision. *In re Det. of Hawkins*, 166 Wn.2d 1019, 217 P.3d 335 (2009).

#### ISSUE

Does RCW 71.09.040(4) prohibit the State from compelling a person to undergo a sexual history polygraph examination as part of a pretrial evaluation?

#### ANALYSIS

##### *A. Standard of Review*

Statutory interpretation is a question of law reviewed de novo. *In re Det. of Williams*, 147 Wn.2d 476, 486, 55 P.3d 597 (2002).

##### *B. RCW 71.09.040(4) Prohibits Compulsory Polygraph Examinations*

Hawkins argues that, properly construed, RCW 71.09.040(4) prohibits the State from compelling respondents to SVP commitment proceedings to submit to polygraph

examinations.<sup>1</sup> In advancing this argument, Hawkins emphasizes the unique status of polygraph examinations in the law, owing to their unreliability and invasiveness, and the fact that the legislature elsewhere specifically allows for compelled polygraph examinations. We agree and hold that RCW 71.09.040(4) prohibits the State from compelling respondents to SVP commitment proceedings to submit to polygraph examinations.

When interpreting a statute, a court's fundamental objective is to ascertain and carry out the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). This involves giving effect to the plain meaning of the statute, if any, by taking into account the ordinary meaning of the words used as well as the context in which the statute appears, including related provisions. *Id.* If the statute is susceptible to two or more reasonable interpretations, it is ambiguous and we may turn to additional tools of statutory construction in determining the meaning of the statute. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). In addition, statutes that involve a deprivation of liberty must be strictly construed. *In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828 (1983). Strict construction requires that, "given a

---

<sup>1</sup> The Court of Appeals mistakenly identified CR 26(a) as an alternative source of authority for the trial court's order. Because CR 26(a) is merely a preview of the following rules, its reference to "mental examinations" is actually a reference to CR 35. In *Williams*, 147 Wn.2d at 491, we held that CR 35 was inconsistent with chapter 71.09 RCW. It follows that neither CR 35 nor CR 26(a) authorize mental examinations in SVP commitment proceedings.

choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.” *Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County*, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973). As civil commitment is a “massive curtailment of liberty,” *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972), we must narrowly construe the present statute.

The statute authorizing a pretrial evaluation of a respondent to SVP proceedings is RCW 71.09.040(4). That statute provides:

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.

RCW 71.09.040(4). We are called upon to determine what the legislature intended with respect to polygraph examinations when it authorized “an evaluation as to whether the person is a sexually violent predator.” *Id.*

The legislature is undoubtedly aware of the unique difficulties posed by polygraph examinations. We presume that the legislature is aware of long-standing legal principles. *See M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 596-97,

70 P.3d 954 (2003). This is particularly true in the case of polygraph examinations, which the courts have consistently recognized as unreliable and, unless stipulated to by all parties, inadmissible. *See, e.g., In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 194-95, 117 P.3d 1134 (2005); *State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004); *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737 (1982); *State v. Sutherland*, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980). The very test that courts in this state use to determine the admissibility of new scientific evidence, the *Frye* test, *see, e.g., State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006), comes from *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), a case which held that testimony about a polygraph examination was inadmissible. This is the backdrop against which the legislature drafts its laws.

In addition to issues of unreliability and inadmissibility, polygraph examinations are also invasive, both physically and of one's private affairs. We have previously subjected to constitutional scrutiny a requirement that applicants for state employment submit to a polygraph examination, noting that persons had a "constitutionally protected privacy interest" in the information to be disclosed. *O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 116, 821 P.2d 44 (1991). Though that case permitted the polygraph examination after a constitutional analysis, it nonetheless stands for the proposition that polygraph examinations implicate privacy concerns. We further note

that the present polygraph examination is more troubling than the one at issue in *O'Hartigan* as it is truly compulsory: Mr. Hawkins does not have the luxury of avoiding the polygraph examination by pursuing an alternative line of work. Moreover, the inquiry is into his sexual history, one of the most private affairs of a person. The point, as the legislature is surely aware, is that polygraph examinations are intrusive and implicate constitutional concerns.

Because the legislature is undoubtedly aware of the inherent problems with polygraph examinations, it is fair to infer that the legislature intends to prohibit compulsory polygraph examinations unless it expressly allows for their use. This view is confirmed by RCW 71.09.096(4), which expressly permits compulsory polygraph examinations in a list of conditions that may be imposed upon an SVP released to a less restrictive alternative. Unlike RCW 71.09.096(4), RCW 71.09.040(4) does not expressly authorize a compulsory polygraph examination. This distinction has intuitive appeal: those subject to RCW 71.09.096(4) are persons who have been found, beyond a reasonable doubt, to be SVPs while those subject to RCW 71.09.040(4) have not. The legislature may well find this to be sufficient reason to treat the two classes differently. At a minimum, the express allowance of polygraph examinations in RCW 71.09.096(4) demonstrates that when the legislature desires to permit a compelled polygraph examination it knows how to do so. Our conclusion, particularly given our

duty to strictly construe the statute, is that because the legislature declined to specifically permit compelled polygraph examinations in RCW 71.09.040(4), the statute prohibits such examinations. This conclusion, as the foregoing analysis makes clear, applies only to polygraph examinations; the failure of the statute to enumerate other methods of conducting an examination does not necessarily preclude their use.

The dissent attempts to reframe the issue in this case, focusing on whether RCW 71.09.040(4) authorizes DSHS to develop rules for conducting a pretrial evaluation. Even assuming, as the dissent concludes, that the statute permits DSHS to create rules relating to the conduct of pretrial SVP evaluations, DSHS cannot create rules that contradict the statute. Having concluded that RCW 71.09.040(4) prohibits polygraph examinations, it is irrelevant whether the statute also permits DSHS to create other rules pertaining to the conduct of such evaluations.

Finally, we note that our holding does not unduly impair the ability of evaluators to assess whether an individual is an SVP. Evaluators may still request that respondents to SVP commitment proceedings undergo such an assessment and many persons may well choose to do so. Many respondents will have undergone polygraph examinations while incarcerated, whether as part of a voluntary sex offender treatment program or for other reasons. Nothing in RCW 71.09.040(4) prohibits evaluators from considering existing polygraph examinations as part of their evaluations, nor does that

statute prohibit voluntary polygraph examinations. Even where a respondent refuses to participate and no existing polygraph examination results are available, however, an expert is still capable of reaching an opinion as to whether the respondent is an SVP. In this case, Dr. North testified at the probable cause hearing that, “to a reasonable degree of scientific certainty,” Hawkins was likely to reoffend. VRP at 17-18. Dr. North reached this conclusion without the use or review of a polygraph examination. We are satisfied that professional evaluators will be able to reach conclusions without the use of such evidence.

#### CONCLUSION

RCW 71.09.040(4) prohibits the State from compelling respondents to SVP commitment proceedings to submit to polygraph examinations. The legislature knows how to permit such evaluations, but, aware of the concerns about the reliability of the results and intrusiveness upon privacy interests, declined to do so. As a result, we reverse the Court of Appeals, vacate the trial court’s order compelling Hawkins to submit to a polygraph examination, and remand for further proceedings consistent with this opinion.

AUTHOR:

Justice Susan Owens

---

WE CONCUR:

---

Justice Charles W. Johnson

---

Justice Gerry L. Alexander

Justice James M. Johnson

---

Justice Richard B. Sanders

---

Justice Tom Chambers

---