

the Double Jeopardy Clause precludes retrial of the appropriateness of the death penalty. Therefore, when the Ohio Supreme Court entered a finding that Mr. Bies was mentally retarded, that finding barred any future trial regarding whether Mr. Bies could be executed.

Although the Fifth Amendment initially applied only to the federal government, the U.S. Supreme Court has ruled that the Double Jeopardy Clause applies to the states, as well, through the Fourteenth Amendment (*Benton v. Maryland*, 395 U.S. 784 (1969)). Jeopardy attaches in a jury trial once the jury is sworn in. In a nonjury trial, jeopardy attaches at the swearing in of the first witness or once the first evidence is presented.

Another important and related doctrine is collateral estoppel. Collateral estoppel is a situation in which judgment in one case prevents a party to that suit from trying to litigate the issue in another course of legal action. In other words, once decided, the parties are permanently bound by that ruling. This common law doctrine is intended to protect defendants from the inequity of having to defend the same charge repeatedly. To bar relitigation of a charge under the collateral estoppel doctrine, a party must have had full and fair opportunity to litigate it.

Bies does not involve the substance of *Atkins* or mental retardation. Following the *Atkins* decision, some states faced the need to review postconviction capital punishment cases in which the question of mental retardation was raised. In affirming the death sentence for Mr. Bies, the Ohio Supreme Court also held that Mr. Bies was mentally retarded. Mr. Bies invoked *Atkins* in an attempt to bar his execution. The federal appeals court for the Sixth Circuit ruled that the Ohio Supreme Court had accepted that Mr. Bies was mentally retarded and that double jeopardy law prohibited Ohio courts from conducting a hearing to determine whether Mr. Bies met the Ohio standard for mental retardation.

Subsequent Developments

The State of Ohio is challenging the ruling in an appeal to the U.S. Supreme Court. In January 2009, the Court granted *certiorari*. The Ohio Attorney General's office is presenting three reasons for appeal. First, they contend that the Double Jeopardy Clause's protections attach only following an acquittal from the death penalty (*Arizona v. Rumsey*, 467 U.S. 203 (1984)). Acquittal is a not-guilty verdict or

a failure of the prosecution to prove that the death penalty is appropriate. Because the Ohio state court affirmed conviction and the death penalty, they argue that Double Jeopardy does not apply to this case. Second, the state contends that a postconviction proceeding on the question of mental retardation does not twice put the defendant at jeopardy of additional criminal sanctions. Finally, they maintain that the Sixth District's use of the collateral estoppel doctrine is incorrect, since Mr. Bies' diagnosis of mental retardation was not established as fact, based on the state definition of mental retardation. In *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the Ohio Supreme Court defined mentally retarded as significantly subaverage intellectual functioning, significant limitations in two or more adaptive skills, and an onset of these disabilities before the age of 18. The state contended that Dr. Winter's diagnosis appeared to rely on Mr. Bies' IQ without an analysis of adaptive skills or functional impairment. Oral arguments are scheduled for April 2009.

No Duty to Warn, but Common Law Duty of Care

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Application of the Common Law Duty of Care When a Therapist, With No Duty to Warn, Responds to a Question About Whether the Therapist's Patient Has a Weapon

In *Robinson v. Mount Logan Clinic, LLC*, 182 P.3d 333 (Utah 2008), the Utah Supreme Court reversed the First District Court's ruling that granted summary judgment to the defendant who had asserted that section 78-14a-102 (1) of the Utah Code shields from liability a therapist who erroneously informs a police officer that her patient is not armed.

Facts of the Case

A therapist at the Mount Logan Clinic called police to assist her with a patient whom she was treating

in her office. The patient was suicidal and she needed help transporting him to a secure psychiatric unit. The therapist was aware that the patient “had a history of threatening violent behavior and had sometimes waved a gun around at home, threatening himself and his family. She also knew that the patient sometimes kept a gun in his truck” (*Robinson*, p 334). During the session, with the therapist’s knowledge, the patient had gone out to his truck. When the therapist asked him if he had a weapon, the patient replied, “Maybe I do, maybe I don’t.” When police were called, the dispatcher asked the therapist if the patient had “any weapons or anything like that?” The therapist replied, “No.” Two officers, including the plaintiff, Officer Mark Robinson, went to the therapist’s office. It was then that the therapist, for the first time, told the police officers that her patient might have a weapon. When the police officers attempted to take the patient to the secure unit, a struggle ensued. During the struggle, a handgun in the patient’s pocket went off, and Officer Robinson was shot in the foot.

The injured officer filed a complaint against the therapist and the clinic, alleging negligently inflicted personal injury. The clinic filed a motion to dismiss, under Utah Code Ann. § 78-14a-102(1), arguing that it could not be held liable because the patient made no threat toward Officer Robinson and, therefore, it had no duty to Officer Robinson. Utah code provides that “A therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim.”

Ruling and Reasoning

The Supreme Court of Utah reversed the district court decision that the state code removed all common law statutory duties of the therapist and clinic to Officer Robinson and remanded to the lower court for further proceedings.

The Supreme Court reasoning began with an analysis of Utah Code Ann. § 78-14a-102(1). The exception to the rule that the therapist has no duty to warn is triggered when the patient communicates to the therapist “an actual threat of physical violence against a clearly identified or reasonably identifiable victim.”

In this case, the patient did not make an actual threat against Officer Robinson, and the therapist, according to statute, did not have a duty to warn or protect him. However, when the therapist responded to the police dispatcher’s question of whether the patient had “any weapons or anything like that,” she had a common law duty to exercise reasonable care.

Discussion

What makes the *Robinson* case interesting is the question of whether the therapist owed a common law duty to the police officer to act non-negligently? The therapist’s patient made no actual threat against an identifiable victim and, under Utah law, no duty to warn was triggered. There was, however, a common law duty that arose from the therapist’s affirmative act for which there was a duty to exercise reasonable care.

In 1768, Blackstone, in his *Commentaries on the Laws of England*, considered common law duties: “For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued” [Blackstone W: *Commentaries on the Laws of England*, Book the Third, Birmingham, AL: The Legal Classics Library, 1983, p 123].

The duty of a therapist to warn or protect an identifiable target of the therapist’s patient’s intention to do physical harm to an individual is not a cause of action that Blackstone considered. It is one of those novel causes of action covered by the general principle that:

... [E]very one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case [*Commentaries on the Laws of England*, p 163].

In 1932, Lord Akin stated that the general principle that creates a duty of care is derived of:

... the rule that you love your neighbor becomes in law, you must not injure your neighbor . . . [W]ho then, in law is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question” [*Donoghue v. Stevenson*, (1932) AC 562].

In 1996, in *Nelson by & ex rel. Stuckman v. Salt Lake City*, 919 P.2d 568 (Utah 1996), the Utah Su-

preme Court, echoing the common law principle, held that, “Where one undertakes an act which he has no duty to perform and another reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care” (p 573).

Relying on *Nelson*, the court concluded that the Utah statute did not require the therapist to protect Officer Robinson; however, when the therapist undertook the affirmative act of responding to the dispatcher’s question, the therapist had a common law duty to do so non-negligently.

Involuntary Medication to Restore Competence to Stand Trial: *Sell* Applied

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New Mexico Supreme Court Clarifies the Second *Sell* Criterion as a “Mixed Question of Law and Fact” and That the State’s Evidentiary Burden in *Sell* Cases Must Meet the Clear and Convincing Standard

In *State of New Mexico v. Dawna Cantrell*, 179 P.3d 1214 (N.M. 2008), the Supreme Court of New Mexico heard an appeal from the Sixth Judicial District Court as to whether ordering involuntary antipsychotic treatment for the sole purpose of restoring competency to stand trial violates an individual’s due process rights. The court applied the criteria from *Sell v. United States*, 539 U.S. 166 (2003), and affirmed the trial court’s order for involuntary medication.

Facts of the Case

On October 1, 2003, Dawna Cantrell was arrested and charged with the murder of her husband and two counts of tampering with evidence. Ms. Cantrell’s competency was questioned after evaluation by the defense expert, Dr. Eric Westfried. After subsequent evaluation by the state’s expert, Dr. Edward Siegel, both experts found that Ms. Cantrell had a “persecu-

tory delusional disorder” and that her mental illness precluded her from assisting her attorney in her defense. The trial court found her incompetent to stand trial and ordered a dangerousness evaluation. Dr. Siegel conducted another evaluation, after Ms. Cantrell had been treated with antidepressant medication, and opined that she was not dangerous and could probably assist her attorney during trial if she were also treated with antipsychotic medication.

In response to Dr. Siegel’s report, the court ordered a re-evaluation of competency to be performed by a new forensic evaluator, Dr. Gerald Fredman. He concurred with the previous competency evaluations that Ms. Cantrell was unable to assist her attorney and therefore not competent, but would become competent if treated with antipsychotic medications. The state filed a motion asking for the court to order Ms. Cantrell to submit to a psychiatric examination for the purpose of prescribing antipsychotic medication and restoring her competency. At the hearing on that motion, the court heard contrary testimony from two experts, Dr. Fredman, characterized by the court as an experienced clinical and forensic psychiatrist, and Dr. Westfried, characterized as an experienced research and forensic psychologist.

Dr. Fredman relied on clinical experience and testified that it was “more likely” than not that antipsychotic medication would restore Ms. Cantrell’s competency to stand trial and that disabling side effects from said medication would not occur. Dr. Westfried relied on the lack of literature support for antipsychotic medication in treating delusional disorder and testified that, in his opinion, antipsychotic drugs would not help, because they “diminish the frequency and severity of the looseness of associations,” a symptom he did not believe Ms. Cantrell displayed.

The trial court applied the due process guidelines from *Sell* and found clear and convincing evidence that the state had met the burden for each leg of the *Sell* test. Ms. Cantrell was ordered to submit to a medication evaluation and take said medication, if medically appropriate. The trial court certified the decision for an interlocutory appeal, sending the matter to the New Mexico Supreme Court.

Ruling and Reasoning

Relying primarily on *Washington v. Harper*, 494 U.S. 210 (1990), and *Sell*, the court ruled that the trial court appropriately determined that there was no question of dangerousness that would allow in-