Supreme Court No. 90522-3
COA No. 68873-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONNA L. HOWLAND,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

Other Authorities

A. IDENTITY OF PETITIONER/DECISION BELOW

Donna L. Howland requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Howland, No. 68873-I, filed March 24, 2014. A copy of the opinion is attached as Appendix A. A copy of the Court of Appeals order denying Ms. Howland's motion to reconsider, filed June 16, 2014, is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. Washington courts have routinely allowed "criminally insane" persons committed to a mental hospital to appeal as a matter of right a trial court's order denying a petition for release. The Court of Appeals' published opinion in this case is a stark departure from this case law. Is review therefore warranted? RAP 13.4(b)(1), (2), (4).

2. The Court of Appeals held Ms. Howland not only could not appeal as a matter of right the trial court's order denying conditional release, but she could not meet the standards of discretionary review as long as the trial court's order had no immediate effect outside the litigation. Does the Court of Appeals' opinion effectively and unreasonably deny appellate review to "criminally insane" persons who are denied a petition for release? RAP 13.4(b)(4).

3. Does the Court of Appeals' opinion denying review to Ms. Howland conflict with In re Detention of Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999) and violate Ms. Howland's constitutional right to appeal? RAP 13.4(b)(1), (3).

4. Is a "criminally insane" person who is committed to a mental hospital and petitions for conditional release required to present expert testimony to show she is no longer dangerous?

C. STATEMENT OF THE CASE

Donna Howland was acquitted by reason of insanity after she killed her boyfriend with a knife while in the throes of a psychotic episode. CP 2, 5-6. She was committed to Western State Hospital for several years and then conditionally released. CP 6, 9. Although she was successful in the community for several years, she ultimately violated a condition of release and was returned to Western and her conditional release revoked. 5/28/10RP 37, 69; CP 19.

Sometime later, Ms. Howland again petitioned for conditional release and requested a hearing. CP 64. The petition was opposed by the Risk Review Board and the State filed a motion to dismiss it. CP 65-83. The trial court granted the State's motion and dismissed Ms. Howland's petition without holding a hearing. CP 106-08. Although

the court acknowledged Ms. Howland had made progress in managing her mental illness, the court found, "[w]ithout expert testimony to support defendant's position, the court has no basis to conditionally release the defendant." CP 108.

Ms. Howland appealed. The Court of Appeals issued a published opinion holding she did not have a right to appeal the trial court's order. Slip Op. at 4-5. Relying upon In re Detention of Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999), the court concluded the trial court's order was not an appealable "final order" because the trial court has continuing jurisdiction over Ms. Howland. Slip Op. at 6. The court also reasoned that the trial court's order was not "final" because it did not settle all the issues of the case, in that Ms. Howland may petition again for conditional release at least every six months. Slip Op. 6.

Although the State had not argued that Ms. Howland did not have a right to challenge the trial court's order via discretionary review under RAP 2.3(b), the court concluded Ms. Howland also did not have this right. The court first concluded the trial court did not commit "probable error" in denying the petition for conditional release, as required for discretionary review under RAP 2.3(b)(2). Slip Op. at 9-

10. Although this conclusion alone was sufficient to deny review, the court went further and concluded Ms. Howland also did not show the trial court's order "substantially alter[ed] the status quo or substantially limit[ed] the freedom of a party to act." Slip Op. at 10-12; see RAP 2.3(b)(2). The Court reasoned that the "effect prong" warranting discretionary review under RAP 2.3(b)(2) is established

> only when a trial court's order has, as with an injunction, an immediate effect outside the courtroom. For example, when a party is compelled by court order to remove a structure, the order, if given effect, quite literally alters the status quo. Or if a court restrains a party from disposing of his or her private property, the party's freedom to act to conduct his or her affairs, is at least arguably, substantially limited. In each example, the court's action has effects beyond the parties' ability to conduct the immediate litigation. When this occurs in combination with the trial court's probable error, discretionary review is appropriate. But where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2).

Slip Op. at 11-12. The court concluded that, in cases where the trial court's order does not have an immediate effect outside the courtroom and instead merely alters the status of the litigation or limits the freedom of a party to act in the conduct of the lawsuit, such errors "are properly reviewed, if necessary, at the conclusion of the case where

they may be considered in the context of the entire hearing or trial." Slip Op. at 12.

Applying this reasoning, the court concluded that even though the trial court's order denying Ms. Howland's petition for conditional release arguably limited the manner in which she may conduct the litigation regarding her conditional release, it "has no effect beyond the immediate litigation" and is therefore not subject to discretionary review under RAP 2.3(b)(2). Slip Op. at 12.

Ms. Howland filed a motion to reconsider. The Court of Appeals called for an answer from the State but then denied the motion to reconsider without explanation. Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' opinion is a sharp departure from long-standing case law in which Washington courts routinely allow persons acquitted as criminally insane to appeal trial court orders denying their petitions for release

The Court of Appeals' published decision is a dramatic departure from long-standing case law in Washington that has routinely permitted persons committed as "criminally insane" to appeal as of right a trial court's denial of a petition for release. Review by this Court is therefore warranted. RAP 13.4(b)(1), (2), (4).

Washington courts have repeatedly and routinely considered the denial of an insanity acquittee's application for release to be an appealable order. See State v. Klein, 156 Wn.2d 103, 112, 124 P.3d 644 (2005); State v. Reid, 144 Wn.2d 621, 626-27, 30 P.3d 465 (2001); State v. Platt, 143 Wn.2d 242, 246, 19 P.3d 412 (2001); State v. Haney, 125 Wn. App. 118, 121-22, 104 P.3d 36 (2005); State v. Sommerville, 86 Wn. App. 700, 701, 937 P.2d 1317 (1997). The Court of Appeals' opinion is a marked departure from those cases and dramatically limits the right to obtain review that has been the accepted norm in both this Court and the Court of Appeals.

The Court of Appeals acknowledged in a footnote that in Sommerville it indeed reviewed an order denying conditional release. Slip Op. at 5 n.3. But the court reasoned that Sommerville is not controlling because the issue of appealability was not raised by the parties. Id. The court attempted to distinguish the other cases—Klein, Reid, and Haney—by noting that they "concerned orders denying final release, not conditional release." Id. But based on the court's own reasoning, this is a distinction without a difference.

The court's reasoning does not support its conclusion that Klein, Reid and Haney are distinguishable. The court reasoned that Ms.

Howland is not entitled to appeal the court's order denying her petition for conditional release because "the trial court has continuing jurisdiction over Howland," and because the court's order did not settle all the issues in her case but only whether she was entitled to conditional release at that time. Slip Op. at 6. These two conclusions apply equally when a court denies a petition for final release.

Any person who is committed as "criminally insane" is subject to the jurisdiction of the trial court up until the time person is finally released. To obtain release, the person may petition either for conditional release or for final discharge. RCW 10.77.150, ..200. But regardless of whether the person seeks conditional or final release, if the court denies the petition, the acquittee remains under the jurisdiction of the court. Thus, there is no principled basis to conclude an acquittee can appeal a trial court's denial of a petition for final discharge as a matter of right but not an order denying a petition for conditional release. This Court should grant review and reverse.

2. The Court of Appeals' opinion unreasonably denies appellate review to "criminally insane" persons who are denied release

The Court of Appeals held not only that Ms. Howland may not appeal the trial court's order denying release as a matter of right, but

also that she could not meet the criteria for discretionary review under RAP 2.3(b)(2) because the trial court's order did not have "an immediate effect outside the courtroom." Slip Op. at 10-12. The Court of Appeals' published opinion warrants review because the logical implication of the opinion is that an insanity acquittee seeking review of a trial court order denying release will *never* be able to obtain appellate review. This is a matter of substantial public importance that should be decided by this Court. RAP 13.4(b)(4).

The Court of Appeals reasoned that RAP 2.3(b)(2) warrants discretionary review only in cases where the trial court's order has, as with an injunction, an effect beyond the parties' ability to conduct the immediate litigation. Slip Op. at 10-12. Where the trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2). "Errors such as these are properly reviewed, if necessary, at the conclusion of the case where they may be considered in the context of the entire hearing or trial." Id.

The upshot of the Court of Appeals' opinion is that a person committed as "criminally insane" will *never* be able to obtain appellate

review of a trial court order denying either a petition for conditional release or final discharge. When conditional or final release is denied, the acquittee suffers no direct effect beyond his or her ability to effectively file another petition for release. A trial court's order denying a petition for release will *never* have "an immediate effect outside the courtroom" beyond its effect on the parties' ability to conduct the litigation. Thus, review will be denied regardless of whether the order is erroneous.

The Court of Appeals' opinion does not take account of this unjust result. To the contrary, the court reasoned that appellate courts are justified in denying discretionary review of trial court decisions that have no immediate effect beyond the current litigation because such decisions may be reviewed "at the conclusion of the case where they may be considered in the context of the entire hearing or trial." Slip Op. at 12. But of course, there will be no "conclusion of the case" for Ms. Howland unless she is ever finally discharged. That may never happen. Based on the court's reasoning, if the trial court continues to deny Ms. Howland's petitions for release, she will have no means of obtaining appellate review.

The court's conclusion that discretionary review is warranted under RAP 2.3(b)(2) only in cases where the trial court order has direct and immediate effects outside the litigation is unnecessarily harsh and inconsistent with the plain language of the rule. As the court acknowledged, "'[n]othing in subsection (b)(2) limits its applicability to cases involving injunctions and the like.'" Slip Op. at 11 (quoting Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1545-46 (1986)).

In concluding that discretionary review under RAP 2.3(b)(2) should be limited to trial court orders that have an immediate effect outside the litigation, the court relied heavily on Commissioner Crooks's law review article, cited above. Slip Op. at 11. But that article was written more than 25 years ago and does not take account of trial court orders such as the one in the present case. Commissioner Crooks argued that it is reasonable to preclude discretionary review for most interlocutory orders because litigants will generally be able to remedy the effects of any claimed pretrial error through a later appeal of the final order entered at the conclusion of the litigation. Crooks,

Discretionary Review, supra, at 1551, 1553. But as noted, Ms. Howland's case will never be concluded until she is finally released.

Moreover, other commentators do not agree with Commissioner Crooks's analysis. Karl Tegland observed, RAP 2.3(b)(2) "was designed to draw into the area of discretionary review a number of determinations that previously were appealable as a matter of right, principally orders on injunctions and attachments. The term 'probable error,' however, is undoubtedly broad enough to encompass other situations as well." 2A Karl B. Tegland, Washington Practice: Rules Practice § RAP 2.3, at 197 (7th ed. 2011).

Because the Court of Appeals' published opinion is unnecessarily harsh and unfair, and will have a deleterious effect on future cases, this Court should grant review. RAP 13.4(b)(4).

3. The Court of Appeals' opinion conflicts with In re Detention of Petersen and violates Ms. Howland's constitutional right to appeal

In concluding that Ms. Howland did not have a right to appeal the trial court's order denying her petition for conditional release, the Court of Appeals relied on In re Detention of Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999). Slip Op. at 5-6. But the court's subsequent conclusion that Ms. Howland could not obtain discretionary review is

directly contrary to Petersen and in violation of her constitutional right to appeal.[1]

In Petersen, Petersen was committed indefinitely as a "sexually violent predator" pursuant to chapter 71.09 RCW. Petersen, 138 Wn.2d at 76. He subsequently petitioned for release, which the trial court denied. Id. He then filed a notice of appeal seeking review. Id.

This Court held Petersen could not appeal the trial court's order denying his release as a matter of right because it was not a "final judgment." Id. at 87-88. That was because, as in Ms. Howland's case, the trial court had continuing jurisdiction over Petersen until he was unconditionally released. Id.

But the Court also concluded that, even though Petersen could not appeal the order as a matter of right, he was not denied constitutional due process because he could appeal by moving for discretionary review under RAP 2.3(b). Id. at 88-90. The Court noted

---

[1] In its answer to Ms. Howland's motion to reconsider, the State argued she had no constitutional right to appeal because this is not a criminal case. State's Answer at 7-8. That argument is plainly incorrect. When a person is charged with a crime and acquitted and committed as "criminally insane," the "proceeding cannot be characterized as anything other than a criminal case." In re Pers. Restraint of Well, 133 Wn.2d 433, 439, 946 P.2d 750 (1997); see also State v. Reanier, 157 Wn. App. 194, 207, 237 P.3d 299 (2010) (characterizing case in which defendant was acquitted and committed as criminally insane as a "criminal case").

that although article 1, section 22 of the Washington Constitution[2] guarantees the right of appeal in all criminal cases, the chapter 71.09 RCW proceeding was not a criminal case. Id. The Court concluded that a motion for discretionary review would afford Petersen sufficient process under the Due Process Clause. Id. Thus, "review of the decisions in hearings held pursuant to RCW 71.09.090(2) will be determined under the provisions of RAP 2.3(b)." Id.

The Court of Appeals' opinion grants Ms. Howland even *less* appellate process than Petersen received, even though Ms. Howland's case is a criminal and not a civil case. In contrast to Petersen, Ms. Howland had a constitutional right to appeal under article I, section 22. Notwithstanding that right, the Court of Appeals concluded she could not appeal the trial court's order denying her petition for conditional release as a matter of right and could not pursue discretionary review because she could not establish the trial court order had an immediate effect outside the litigation. In Petersen, although Petersen also would not have been able to make that showing, this Court held he was nonetheless entitled to pursue discretionary review.

---

[2] Article 1, section 22 of the Washington Constitution provides: "In criminal prosecutions the accused shall have . . . the right to appeal in all cases."

The Court of Appeals' opinion conflicts with Petersen and denies Ms. Howland's constitutional right to appeal. This Court should therefore grant review. RAP 13.4(b)(1), (3).

4. The trial court erred in ruling that Ms. Howland was required to present expert testimony to show she was no longer dangerous

Washington's statute provides a mechanism for persons committed as "criminally insane" to petition for conditional release even if they are still mentally ill and present some possible danger. The question to be determined in such a proceeding is "whether or not the person may be released conditionally without substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security." RCW 10.77.150(3)(c).

The statute provides for conditional release of an acquittee who is still mentally ill and dangerous as long as her dangerousness can be adequately controlled through conditions. State v. Reid, 144 Wn.2d 621, 628-2 30 P.3d 465 (2001) ("Conditional release is appropriate for an insanity acquittee who continues to be mentally ill but may not be unacceptably dangerous if certain conditions are imposed.").

Thus, the principal issue to be determined when an acquittee files a petition for conditional release is her dangerousness, not her

mental status. Id. at 630 (the conditional release statute "does not inquire into mental status, only dangerousness"); RCW 10.77.150(3)(c). The question is not whether the petitioner remains mentally ill, but the degree to which any possible danger can be mitigated through court-imposed conditions. RCW 10.77.150(3)(c).

Here, the State presented expert evidence of Ms. Howland's mental status. CP 76-78, 80-83. Ms. Howland did not dispute that she was still mentally ill. There was therefore no need for her to present expert testimony regarding her mental status. The principal question was not her mental status but whether the court could impose conditions that would adequately mitigate any potential danger she presented. RCW 10.77.150(3)(c); Klein, 156 Wn.2d at 118; Reid, 144 Wn.2d at 630. There is no authority for the court's position that Ms. Howland was required to present expert testimony to answer this question. Instead, the determination of Ms. Howland's possible dangerousness and the degree to which it could be controlled did not principally lie within the realm of medical knowledge.

Chapter 10.77 RCW requires a defendant who pleads not guilty by reason of insanity in the first instance to provide expert testimony of her mental condition in order to support the insanity defense. See

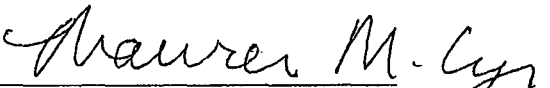
RCW 10.77.060(1)(a) ("Whenever a defendant has pleaded not guilty by reason of insanity, . . . the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant."). The statute does not require the presentation of expert testimony to address the question of dangerousness.

The only question to be determined was whether any possible danger Ms. Howland presented could be mitigated through conditions. This was not a question that required expert testimony to answer. The trial court's ruling to the contrary was erroneous.

E. CONCLUSION

The Court of Appeals' opinion conflicts with long-standing Washington case law, conflicts with Petersen, violates Ms. Howland's constitutional right to appeal, and presents issues of substantial public importance that should be decided by this Court. This Court should grant review and reverse the Court of Appeals

Respectfully submitted this 7th day of July, 2014.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 68873-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
DONNA L. HOWLAND,	)	PUBLISHED OPINION
	)	
Appellant.	)	FILED: March 24, 2014

SPEARMAN, A.C.J. — More than two decades after Donna Howland was found not guilty of first-degree murder by reason of insanity and confined to Western State Hospital (WSH), she petitioned for conditional release under RCW 10.77.150. The trial court dismissed the petition without a hearing, concluding it was frivolous because it was unsupported by expert testimony. Howland appeals, contending the trial court erred by requiring her to provide expert testimony in support of her petition. We conclude that the trial court's order is not appealable as of right under RAP 2.2 and that discretionary review under RAP 2.3 is not warranted. Accordingly, we dismiss Howland's appeal.

FACTS

In 1988 Donna Howland was charged with first-degree murder in the death of her boyfriend. At that time, Howland had a three-year history of repeated hospitalization for suicidal gestures and psychotic ideation. Prior to trial, she was diagnosed with chronic

paranoid schizophrenia and borderline personality disorder. Howland pleaded not guilty by reason of insanity and was acquitted of the murder charge. The trial court found that Howland presented a substantial danger to the public and a substantial likelihood of committing felonious acts if not confined to a state mental hospital. It ordered Howland committed to Western State Hospital (WSH).

After nearly two decades of treatment, during which Howland made significant progress, WSH recommended that she be conditionally released. In May 2005, Howland was transferred to a group home in West Seattle. After struggling with delusions, depression, and diabetes, she returned voluntarily to WSH for stabilization from June to July 2009. In February 2010, after refusing to take her medication and becoming increasingly agitated, Howland was involuntarily readmitted to WSH. The court revoked her conditional release on May 28, 2010 and she has since remained at WSH.

On February 7, 2012, Howland filed a one page petition requesting a hearing on the issue of her conditional release, but included no supporting declarations.[1] The State moved to dismiss, the petition as frivolous because Howland could not "present any evidence whatsoever that supports a conditional release at this time." Clerk's Papers at 65.

In support of its motion, the State submitted a letter, dated October 12, 2011, in which Howland's primary therapist and attending psychologist opposed her conditional

[1] Howland filed a previous motion for conditional release in March 0f 2011 without the support of WSH. The denial of that petition is not at issue in this appeal.

release. The State also presented a letter from the WSH Risk Review Board (RRB) dated March 15, 2012, which noted ongoing symptoms of mental illness, including paranoia, fixed delusions, and an unwillingness to fully engage in recommended treatment. This letter also expressed the RRB's determination that "Howland is considered a substantial danger to other persons, and she DOES present a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions." CP at 83. The only witness Howland intended to call at an evidentiary hearing was her then current primary therapist, Clyde Travis, a member of the RRB and signer of the March 15, 2012 letter.

The trial court observed that:

> The Risk Review Board found that given her fixed delusions, her acute psychotic symptoms and trouble managing emotional liability, Ms. Howland is a substantial danger to other persons and presents a substantial likelihood of committing criminal acts jeopardizing public safety or security. There has been no declaration provided by defense to the contrary . . . .

CP at 108. It then concluded that "[w]ithout expert testimony to support defendant's position, the court has no basis to conditionally release the defendant. Without any such evidence, her petition is frivolous and will be dismissed." Id.

Howland appeals.

DISCUSSION

As a threshold matter, we consider the appealability of the trial court's order dismissing Howland's petition for conditional release. Howland contends that she is

entitled to appeal under RAP 2.2(a) or, in the alternative, this matter is appropriate for discretionary review under RAP 2.3(b)(2). We disagree with both contentions.

Right to Appeal

Howland asserts that she may appeal the trial court's order dismissing her petition as a matter of right under RAP 2.2(a). She observes that the rule provides for appeal as of right of other types of mental health treatment orders and other orders entered after trial and argues by analogy, that the order in this case is also appealable.[2] Howland is incorrect.

In general, the failure to mention a particular proceeding in RAP 2.2(a) indicates the Supreme Court's intent that the matter be reviewable only by discretionary review under RAP 2.3. In re of Chubb, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). As Howland notes, an order of commitment is listed as an appealable order under RAP 2.2(a), but the rule makes no mention of an order denying a motion for the conditional release of a person already committed. In light of Chubb, we conclude that the matter is not appealable as a matter of right under RAP 2.2(a) (1)-(12).

Howland also cites RAP 2.2(a) (13), which provides for appeal from "[a]ny final order made after judgment that affects a substantial right." However, she fails to

[2] For example, orders of incompetency (RAP 2.2(a)(7)); commitment (RAP 2.2(a)(8)); on motion for new trial or amendment of judgment (RAP 2.2(a)(9); for vacation of judgment (RAP 2.2(a)(10); on arrest of judgment (RAP 2.2(a)(11); and denying a motion to vacate order of arrest of a person (RAP 2.2(a)(12).

establish that the superior court's order denying her motion for conditional release is a "final order" within the meaning of the rule.[3]

In re Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999), is instructive. In that case, Petersen had been adjudicated a sexually violent predator (SVP) pursuant to chapter 71.09 RCW and was indefinitely committed to the Special Commitment Center for treatment. Under the statute Petersen was entitled to annual reviews at which the trial court was to consider whether there was probable cause to believe Petersen's condition had so changed, he either no longer met the definition of an SVP or that he could be conditionally released. RCW 71.09.090(2). If so, Petersen would be entitled to a full evidentiary hearing on the issue. The trial court concluded that probable cause had not been established and declined to set the matter on for a full hearing. Petersen sought direct review in our Supreme Court, asserting a right to appeal as a matter of right under RAP 2.2(a)(13). The Court rejected his assertion and expressly held that RAP

---

[3] Howland's arguments to the contrary are unpersuasive. First, relying on Seattle First Nat'l Bank v. Marshall, 16 Wn. App. 503, 508, 557 P.2d 352 (1976), Howland contends that, because the trial court's order prejudicially affects a substantial right other than one which was adjudicated by an earlier judgment, it is a "final order." Reply Brief at 3-4. Under certain circumstances, appeals from orders entered subsequent to a final judgment are permitted if the orders prejudicially affect a substantial right other than rights adjudicated by the previously entered final judgment. Seattle First Nat'l Bank, 16 Wn. App. at 506-08; RAP 2.2(a) (13). However, that an order affects a substantial right is not enough to warrant review. In addition, the order must determine the action or proceeding and prevent a final judgment therein, discontinue the action, or otherwise be a "final order." Ibid. Thus, review of an order entered after judgment is predicated upon a showing of (1) effect on a substantial right and (2) finality. Although Howland arguably satisfies the first prong, she fails to satisfy the second. Howland cites State v. Klein, 156 Wn.2d 103, 124 P.3d 644 (2005); State v. Reid, 144 Wn.2d 621, 30 P.3d 465 (2001); State v. Haney, 125 Wn. App. 118, 104 P.3d 36 (2005); State v. Sommerville, 86 Wn. App. 700, 701, 937 P.2d 1317 (1997) to argue that appellate courts "routinely consider[] the denial of an insanity acquittee's application for release to be an appealable order." Appellant's Reply Brief at 4. Her reliance on these cases is misplaced. Klein, Reid, and Haney are inapposite because those cases concerned orders denying final release, not conditional release. Howland is correct that we did review an order denying conditional release in Sommerville, but because there is no indication that the issue of appealability was raised by the parties, it is not binding precedent on this issue and we decline to follow it.

2.2(a)(13) was inapplicable because the trial court's order denying a full evidentiary hearing "is not a final order after judgment in light of the court's continuing jurisdiction over the committed persons until their unconditional release. In re Peterson, 138 Wn.2d 88 (citing RCW 71.09.090(3)). It disposes only of the petition before the trial court and achieves no final disposition . . . ."

Similarly, here, the trial court has continuing jurisdiction over Howland under RCW 10.77.200. Nor has the trial court's denial of her motion for conditional release settled all the issues in her case. It disposed only of the petition before the court at that time. It is evident from the record in this case that Howland's mental health status is not static and she may, under RCW 10.77.140[4] and RCW 10.77.150,[5] move for conditional release at least every six months. At which time, she may present new evidence regarding the propriety of her release under the statutory criteria. See In re Dependency of Chubb, 112 Wn.2d at 724. We conclude that Howland may not appeal as a matter of right under RAP 2.2(a)(13) because the trial court's order denying her motion for conditional release is not a "final order."

Discretionary Review

In the alternative, Howland seeks discretionary review of the order denying her petition. Under RAP 2.3(b) discretionary review may only be accepted in the following

---

[4] "Each person committed to a hospital or other facility or conditionally released pursuant to this chapter shall have a current examination of his or her mental condition made by one or more experts or professional persons at least once every six months . . . ."

[5] "Any person, whose application for conditional release has been denied, may reapply after a period of six months from the date of denial."

circumstances:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
>
> (3) The superior court has so far departed from the accepted and usual course of proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Howland contends review is appropriate under RAP 2.3(b)(2). A party seeking discretionary review under that section must show that the trial court committed probable error and that the decision substantially alters the status quo or substantially limits the freedom of a party to act. Howland fails to satisfy either prong.

Probable Error

Howland asserts that the trial court committed probable error when, without a hearing, it summarily dismissed her petition for conditional release as frivolous because it was unsupported by expert testimony. Howland claims this is so because, as she sees it, the trial court abused its discretion when it wrongly

concluded that in the absence of expert testimony in support of the petition, it did not have the discretion to conduct a hearing on the matter.

The statute under which Howland petitioned for relief, provides that "[t]he court may schedule a hearing on applications recommended for disapproval by the secretary" [of the Department of Social and Health Services (DSHS)] (emphasis added.)."[6] See RCW 10.77.150(3)(a) (emphasis added). Thus, when an individual petitions the court directly for conditional release without the approval of the secretary, the court has discretion whether to convene a hearing. State v. Platt, 143 Wn.2d 242, 248, 19 P.3d 412 (2001). Because Howland's petition was opposed by WSH, whether to grant a hearing on the petition was a matter within the trial court's discretion.

A trial court abuses its discretion when a decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. . . .' A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" Mayer v. STO Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[6] Under WAC 388-875-0090, either the Superintendent of the treatment facility (here, Western State Hospital) or the director of the division is authorized to act on behalf of the Secretary of DSHS on application for conditional release.

The crux of Howland's argument is that the trial court's decision was untenable because it applied the wrong legal standard when, in her view, the trial court concluded it was without authority to hold a hearing on her petition because it was not supported by expert testimony. Howland argues the only issue before the court was whether she presented "substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security." RCW 10.77.150(c). She contends the trial court confused the issues of her mental health status, for which an expert opinion is required, and of her dangerousness, which Howland argues is "not a technical or scientific question that required expert testimony to determine."[7] Reply Br. of Appellant at 7.

But, in this case, there is nothing untenable about the trial court's decision. In support of its motion to dismiss the petition, the State offered a letter dated October 12, 2011, from Howland's primary therapist and attending psychiatrist and a letter dated March 15, 2012 from the Western State Hospital Risk Review Board. Neither supported Howland's petition for conditional release and the latter specifically opined that because of her mental illness, Howland "is considered a substantial danger to other persons" and presents "a substantial likelihood of committing criminal acts jeopardizing public safety or security. . . ." CP at 83. In light of this compelling evidence, it was not an abuse of discretion to require Howland to present an expert opinion in support of her petition

[7] We note Howland cites no authority for her assertion that expert testimony is unnecessary to assist in the determination of whether a person who suffers from a mental illness presents a substantial danger to others.

before conducting a full blown hearing. Therefore, we conclude there was no probable error.

Limitation of a Party's Freedom to Act

Even assuming probable error, Howland is not entitled to discretionary review unless she can show that the trial court's decision meets the "effect prong" of the rule, i.e., that the decision "substantially alters the status quo or substantially limits the freedom of a party to act." RAP 2.3(b)(2). Howland contends that she satisfies this requirement because the trial court's decision "means she may not file a petition under that statute in the future without presenting expert testimony." Reply Br. of Appellant at 7. Howland misperceives both the requirements of this prong of the rule and the trial court's decision.

Determining when the effect prong of RAP 2.3(b)(2) warrants accepting discretionary review is not easily done. Read literally, nearly every trial court decision alters the status quo or limits a party's freedom to act to some degree and, at least arguably, substantially. But because motions for discretionary review, though frequently made, are seldom granted, it is evident that a trial court order denying a motion to dismiss, excluding a crucial piece of evidence or granting a partial motion for summary judgment is generally insufficient to satisfy the effect prong. Understanding the reason the rule ties discretionary review to the effect of a trial court's decision on the status quo or a party's freedom to act, is helpful in correctly applying the effect prong to the facts of a particular case.

Former Supreme Court Commissioner Geoffrey Crooks observed in his law review article on discretionary review:

> Subsection (b)(2) was intended to apply 'primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly been appealable as a matter of right.'

Geoffrey Crooks, Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure, 61 WASH. L. REV., 1541, 1545-46. (1986) (quoting RAP 2.3 cmt. b). But because "[n]othing in subsection (b)(2) limits its applicability to cases involving injunctions and the like[,]" practically applying the rule and drawing meaningful distinctions between those cases appropriate for discretionary review and those that are not is difficult. Id. at 1546

Crooks suggests that keeping the drafter's intentions in mind when considering whether discretionary review is appropriate is helpful. He contends that discretionary review should be accepted only when a trial court's order has, as with an injunction, an immediate effect outside the courtroom. For example, when a party is compelled by court order to remove a structure, the order, if given effect, quite literally alters the status quo. Or if a court restrains a party from disposing of his or her private property, the party's freedom to act to conduct his or her affairs, is at least arguably, substantially limited. In each example, the court's action has effects beyond the parties' ability to conduct the immediate litigation. When this occurs in combination with the trial court's probable error, discretionary review is appropriate. But where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not

sufficient to invoke review under RAP 2.3(b)(2). Errors such as these are properly reviewed, if necessary, at the conclusion of the case where they may be considered in the context of the entire hearing or trial.

Utilizing this analytical framework, Howland fails to satisfy the effect prong of RAP 2.3(b)(2) because the trial court's decision was merely an exercise of the discretion granted it under the statute to determine whether a full blown hearing is necessary in a given case. While the decision arguably limited the manner in which Howland can conduct the litigation regarding her conditional release, it has no effect beyond the immediate litigation.

Moreover, Howland's contention that the trial court's order limits her freedom to act because it means she may not file a petition for conditional release without presenting expert testimony is not well taken. In the context of this case, where the State has presented expert opinions on the issue of Howland's dangerousness, the court concluded that in the absence of a professional opinion to the contrary, a full blown hearing was unwarranted. In other circumstances, where, for example, the State either offers no such opinions or does so but they are unpersuasive in the absence of other evidence or testimony, the court could determine a hearing is necessary regardless of whether Howland offers such evidence herself. Thus, the trial court's order does not limit Howland's freedom to file a petition for conditional release as provided by statute.

Because Howland may not appeal the decision below as a matter of right and because she is unable to meet the strict criteria required for discretionary review, review is denied and her appeal is dismissed.

Spearman, A.C.J.

WE CONCUR:

Dwyer, J.

Schindler, J.

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DONNA L. HOWLAND, Appellant.	)	No. 68873-1-I ORDER DENYING MOTION TO RECONSIDER

A motion to reconsider the opinion filed on March 24, 2014 in the above matter was filed by the appellant, Donna Howland and the panel requested the parties file an answer to the motion for reconsideration. A majority of the panel has determined the motion should be denied.

Now therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 16th day of June 2014.

FOR THE COURT:

Spearman, C.J.

Presiding Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68873-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Alison Bogar, DPA
King County Prosecuting Attorneys-SVP/Detention Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 7, 2014

WASHINGTON APPELLATE PROJECT

July 07, 2014 - 4:44 PM

Transmittal Letter

Document Uploaded: 688731-Petition for Review.pdf

Case Name: STATE V. DONNAL HOWLAND
Court of Appeals Case Number: 68873-1

Party Respresented: PETITIONER
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org