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NO. 68664-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re Detention of

LOUIS W. BROCK,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ADDITIONAL ISSUE

Can a person who has been committed as a sexually violent predator temporarily waive his right to petition for unconditional release, even when such petition has been authorized by DSHS?

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Appellant.

III. ARGUMENT

UNDER THE SEXUALLY VIOLENT PREDATOR COMMITMENT STATUTE, DSHS CAN AUTHORIZE A DETAINED PERSON TO PETITION FOR RELEASE, BUT IT CANNOT FILE THE PETITION ITSELF.

Mr. Brock seeks to defend the trial court's ruling on a ground that was neither raised in nor relied on by that court. He contends that a trial on unconditional release is automatically required whenever DSHS concludes that an SVP no longer meets commitment criteria. According to him, neither the court nor the SVP himself can preclude such a trial. The statute does not support this argument.

The relevant statutory provision is RCW 71.09.090(1) (emphasis added):

> If the secretary determines that the person's condition has so changed that either: (a) The person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative is in the best interest of the person and conditions can

> be imposed that adequately protect the community, the secretary shall *authorize* the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge.

This statute does *not* allow DSHS to petition for release itself. It only allows DSHS to *authorize* the committed person to petition for release. "'Authorize' means to empower or to give a right or authority to act." State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). DSHS can give the committed person to power to petition, but the ultimate decision rests with that person. If the person chooses not to petition, DSHS cannot compel him to do so.

This provision of the statute is different from both other provisions of the SVP statute and other involuntary commitment statutes. For example, RCW 71.09.098 provides for petitions for revocation of conditional release:

> Any service provider submitting reports pursuant to RCW 71.09.096(6), the supervising community corrections officer, the prosecuting agency, *or the secretary's designee* may petition the court for an immediate hearing for the purpose of revoking or modifying the terms of the person's conditional release to a less restrictive alternative ...

Under this statute, DSHS is not limited to authorizing someone else to petition: it may file the petition under its own authority.

Another example involves involuntary commitment under RCW ch. 71.05. When a person is committed under that statute,

the person may be released "when, in the opinion of the superintendent or professional person in charge, the person being involuntary treated no longer presents a likelihood of serious harm." RCW 71.05.330(1). A court hearing is only required in one situation: if the committed person had been found incompetent to stand trial, the superintendent must provide notice to the prosecutor. The prosecutor then has the right to petition for continued commitment. Even then, the committed person is not required to take any action to obtain release. The release will occur unless the court blocks it on petition of the prosecutor. RCW 71.05.330(2).

The procedures under RCW ch. 71.09 are entirely different. DSHS cannot release a committed person without court approval. It cannot announce its intention to release the person unless a prosecutor seeks continued detention. It cannot even petition for release under its own authority. It can only *authorize* the person to petition for release. If the person chooses not to file such a petition, DSHS cannot compel him to do so.

In view of these statutory provisions, there was nothing "ultra vires" about the agreement that was approved by the original trial judge. Mr. Brock could not be released without court approval.

Obtaining such approval required a petition on his part. RCW 71.09.090(1), (2). He could agree to waive his right to petition for a particular type of release, if he considered it advantageous to do so. The court could approve this agreement as part of a settlement of pending litigation. Since all of this was within the power of the original trial judge, the later judge had no justification for disapproving it.

Mr. Brock claims that his agreement transformed RCW 71.09 into a voluntary commitment statute. This is not correct. Initial commitment requires a petition by a prosecutor or the attorney general. RCW 71.09.030(2). Once a person has been committed, however, release will occur only if he files a petition.

Mr. Brock argues that he had a constitutional right to a periodic review of the basis for his commitment. In his agreement, however, he specifically "agree[d] to waive his statutory and constitutional right to seek, petition or accept an unconditional release ... for a period of four (4) years from the date of this order." 2 CP 234. Mr. Brock cites no authority that precludes him from waiving his constitutional rights.

Mr. Brock repeatedly asserts that the agreement provided for his continued commitment. Contrary to this argument, it only

prevented him from seeking *un*conditional release during the specified period. Nothing precluded him from seeking *conditional* release. The prosecutor agreed not to oppose any petition for conditional release that was supported by the SCC. 4 Trial RP 306. As the original trial judge warned Mr. Brock, however, conditional release required best efforts on his part. 4 Trial RP 312-13. Mr. Brock chose not to cooperate with attempts to evaluate him. 2 CP 208. Rather than pursuing the avenue for release that he had agreed to, he chose to seek a form of release that he had renounced.

Ultimately, the agreement in this case provided that after 25 years in confinement, Mr. Brock would not be released without treatment or supervision. At the time of the agreement, he recognized that this was in his own best interests. 4 Trial RP 297-98. Nothing in that agreement violated RCW 71.09 or public policy.

Finally, Mr. Brock argues that the stipulation was not a "judgment" governed by CR 60. In this regard, he is repudiating one of the grounds relied on by the trial court. The trial court was, however, correct in holding that the case was governed by CR 60 (although incorrect in the way the rule was applied). Although the denial of a new trial commitment trial is not an appealable order,

the Supreme Court has suggested that the outcome of that trial is an appealable order:

> Arguably, although we do not now so decide, review of decisions made after a full hearing on the merits under RCW 71.09.090(2) would be reviewable as of right. Such hearings appear to be equivalent to whole new trials with the same procedural protections as the initial commitment trial. The State must again prove Petersen to be a sexually violent predator beyond a reasonable doubt. If the jury at that hearing would so find, the predator's continuing commitment would flow from this new, subsequent determination, rather than from the original order of commitment, for purposes of RAP 2.2(a)(8).

In re Detention of Petersen, 138 Wn.2d 70, 87 n. 13, 980 P.2d 1204 (1999). Since the stipulation here concluded a commitment trial, it constituted an appealable "judgment."

Ultimately, however, it does not matter. Even if the stipulation was not a judgment, it was a judicially-approved settlement of pending litigation. The parties were entitled to rely on that approval. The second trial judge erred in setting aside a key provision of the agreement based on his disagreement concerning its policy.

IV. CONCLUSION

For these reasons, as well as those set out in the Brief of Appellant, the order modifying the settlement agreement should be

reversed, and the petition for unconditional release should be dismissed.

Respectfully submitted on December 10, 2013.

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