SUPREME COURT NO. 98904-4
COA NO. 37356-8-III

IN THE SUPREME COURT OF WASHINGTON

IN RE DETENTION OF MICHAEL A. MCHATTON:

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL A. MCHATTON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Michael McHatton asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

McHatton requests review of the partially published decision in State v. Michael A. McHatton, Court of Appeals No. 37356-8-III (slip op. filed July 14, 2020), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a court order revoking a less restrictive alternative placement under chapter 71.09 RCW is appealable as a matter of right?

2. Whether the revocation statute should be interpreted to require the trial court to consider shortcomings in how the less restrictive alternative plan was implemented in the community?

D. STATEMENT OF THE CASE

In 2002, Michael McHatton stipulated to commitment as a sexually violent predator under chapter 71.09 RCW. CP 26. In 2017, the court entered an order conditionally releasing McHatton to Aacres WA, LLC, a less restrictive alternative (LRA) in the community, with Dr. Paula van Pul as his treatment provider. CP 25-44.

In 2018, the Department of Corrections filed a notice of violation of LRA conditions, alleging McHatton possessed images of minors and

failed to comply with treatment rules. CP 386-431. Under the terms of the LRA order, McHatton was prohibited from possessing images of children without the prior consent of the transition team. CP 42. McHatton was returned to confinement at the SCC. CP 388. The State moved to revoke the LRA. CP 649-975. McHatton's counsel opposed revocation, arguing the LRA plan was improperly implemented. CP 491-97. Mr. McHatton's expert, Dr. Blasingame, submitted a report detailing the failings of the implemented LRA. CP 496-559.

At the revocation hearing, Dr. Blasingame testified that the LRA plan that was ordered did not materialize, as Aacres staff were not trained in McHatton's specific needs, did not provide adequate support, and did not provide proper supervision. RP 16-17, 23-29, 40-41. The treatment provider, Dr. van Pul, had grown complacent and the treatment she provided did not meet recognized standards. RP 39-40. Dr. Blasingame acknowledged McHatton intentionally violated the prohibition against possessing pictures of children, but the violation was foreseeable in the absence of adequate supports for McHatton to succeed. RP 42, 45, 47. Dr. Blasingame contended McHatton should not stay at Aacres and, instead of confinement, should be placed in a suitable community LRA. RP 41-45. The trial court entered an order revoking the LRA, sending McHatton back into total confinement. CP 636-38; RP 61-63.

McHatton appealed, arguing the trial court erred in treating the failure of the LRA plan to be properly implemented as irrelevant to the revocation decision. In the published portion of its decision, the Court of Appeals held the revocation order was not appealable as a matter of right. Slip op. at 1. In the unpublished portion, it held the trial court did not abuse its discretion in revoking the LRA. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE ORDER REVOKING THE LESS RESTRICTIVE ALTERNATIVE IS APPEALABLE AS A MATTER OF RIGHT.

RAP 2.2 sets forth a list of orders that are appealable as a matter of right. The order revoking McHatton's LRA and committing him to total confinement is appealable as a matter of right because it is an order of commitment under RAP 2.2(a)(8) or a final order after judgment under RAP 2.2(a)(13).

In a 2-1 decision, the Court of Appeals majority disagreed, holding In re Detention of Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999) required discretionary review. Slip op. at 3-6 (Korsmo, J., majority opinion). The partially dissenting judge would have held review of the revocation order is appealable as a matter of right. Slip op. at 1-3 (Fearing, J., dissenting in part, concurring in part). McHatton seeks review under RAP 13.4(b)(4).

a. The revocation order qualifies as an "order of commitment" under RAP 2.2(a)(8).

Under RAP 2.2(a)(8), a party may appeal an "*Order of Commitment*." The plain language of RAP 2.2(a)(8) allows for appeal of "[a] decision ordering commitment, entered . . . after a sexual predator hearing." The LRA revocation hearing is a type of sexual predator hearing. RCW 71.09.098(5) ("At any hearing to revoke or modify the conditional release order: . . . "). An LRA revocation order is an order of commitment. See RCW 71.09.098(8) ("A person whose conditional release has been revoked shall be remanded to the custody of the secretary for control, care, and treatment in a total confinement facility"). The trial court ordered McHatton's confinement at the Special Commitment Center. CP 638.

The Court of Appeals majority relied on this Court's decision in Petersen to conclude an order revoking an LRA is not appealable as of right. In Petersen, a sharply divided court in a 5-4 decision held there is no right to appeal a trial court's probable cause decision at the annual show cause stage under RCW 71.09.090. Petersen, 138 Wn.2d at 95. Petersen did not address an LRA revocation order.

Petersen explained "[a]n order denying a petition for a show cause hearing is not an 'order of commitment'" because "[t]he show cause hearing is in the nature of a summary proceeding wherein the trial court

makes a threshold determination of whether there is evidence amounting to probable cause to hold a full hearing." Id. at 85-86. The annual show cause proceeding "is a summary proceeding designed to determine if an evidentiary hearing on the merits as to the person's condition is warranted." Id. at 83.

This hearing is limited to verification of the detainee's identity and the determination of probable cause. In re Pers. Restraint of Young, 122 Wn.2d 1, 46, 857 P.2d 989 (1993). In determining probable cause, a court cannot "weigh and measure asserted facts against potentially competing ones." State v. McCuistion, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012) (quoting In re Detention of Petersen, 145 Wn.2d 789, 797, 42 P.3d 952 (2002)). The court thus does not weigh competing expert opinions or resolve evidentiary disputes. In re Detention of Elmore, 162 Wn.2d 27, 37, 168 P.3d 1285 (2007). Rather, the court "must assume the truth of the evidence presented" and from that determine whether probable cause is satisfied, such that an evidentiary hearing is required to ultimately determine whether unconditional release or an LRA is appropriate. McCuistion, 174 Wn.2d at 382.

By contrast, revocation of an LRA order is not a summary proceeding. Revocation takes place only after an evidentiary hearing is held, the judge weighs the evidence, and from that determines whether the

State has met its burden of proof such that return to total confinement is appropriate. RCW 71.09.098(5), (6). Witnesses testified at McHatton's revocation hearing. The judge, as trier of fact, weighed and resolved competing evidence, including the expert testimony offered by McHatton, listened to each side's argument about what should be done with the LRA, and entered findings of fact and conclusions of law based on its resolution of the evidence in its order revoking the LRA. That the LRA revocation proceeding is not a summary proceeding supports the conclusion that the revocation order is appealable as of right.

Petersen, in holding there is no right to appeal the denial of an evidentiary hearing at the annual show cause stage, relied in large measure on the nature of that proceeding. Petersen, 138 Wn.2d at 85. It observed "such commitments are of an indefinite duration, persisting 'until such time as the person's mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, *or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092*.'" Id. at 78 (quoting RCW 71.09.060(1) (emphasis added). Petersen drew a distinction between the initial commitment order, which subjects the person to indefinite confinement, and *release from indefinite confinement* via a less restrictive alternative placement. Annual reviews do not change the indefinite nature of the commitment. Id. at 83. The LRA does, as

recognized by Petersen: "the statutory scheme of chapter 71.09 RCW provides for commitment of a sexually violent predator for an indefinite period, *until that person's condition has changed sufficiently that he or she is safe to be* either at large or *in a less restrictive setting*." Id. at 82. It is that distinction that separates the LRA revocation order from the mere denial of an evidentiary hearing at the show cause stage.

In holding RAP 2.2(a)(8) does not apply to orders finding no probable cause at the annual review stage, Petersen relied on what it described as the "analogous statutory scheme" for dependency review hearings analyzed in In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). Petersen, 138 Wn.2d at 86. The comparison helps show why an LRA revocation order is appealable as a matter of right.

Under Chubb, "[t]he juvenile court is not required to make the determination of dependency anew at each hearing. Its function is to determine whether court supervision should *continue.* Essentially, if this supervision is to continue, then what the juvenile court has decided is to abide by the status quo: the determination of dependency." Chubb, 112 Wn.2d at 724. "The language of RAP 2.2(a) and RCW 13.34.130 indicates that appeal by right applies only to the disposition decision following the finding of dependency or to a marked change in the status quo, which in effect amounts to a new disposition." Id. at 724-25.

Petersen saw "no principled distinction" between the analysis in Chubb and the review of an adverse probable cause determination under chapter 71.09 RCW. Petersen, 138 Wn.2d at 87.

There is a principled distinction when it comes to LRA revocation orders. An order finding no probable cause and denying a new trial at the show cause stage does not change the status quo. Mr. Petersen, for example, remained in total confinement following the denial of his show cause petition. An order revoking an LRA, however, significantly alters the status quo. It removed McHatton from the community and placed him back into total confinement. Unlike in Petersen and Chubb, where the trial court simply abided by the status quo in entering its order, a trial court's LRA revocation markedly changes the status quo by requiring removal from the community and placement into total confinement. A "marked change in the status quo," which in effect amounts to a new disposition, is appealable as a matter of right. Chubb, 112 Wn.2d at 725.

Citing to a 1994 draft comment, Petersen stated "our initial intent was to provide an appeal as of right only from the initial commitment order that followed the full evidentiary adjudication of an individual as a sexually violent predator." Petersen, 138 Wn.2d at 85. From this, the Court of Appeals majority concluded LRA revocation orders are not commitment orders. Slip op. at 4. Petersen, though, had no occasion to

consider whether LRA revocation orders qualify as an order of commitment under RAP 2.2(a)(8).

The plain language of RAP 2.2(a)(8) is not so restrictive, as Petersen itself recognized. Petersen noted an order of commitment following an evidentiary hearing held pursuant to RCW 71.09.090, at which the State has the burden of proof, would arguably be appealable as a matter of right as well, even though commitment status remains unchanged. Id. at 84, 87 n.13. As recognized by the partial dissent in McHatton's case, the decision to revoke an LRA "is not a perfunctory ruling, but a hearing similar in nature to the hearing referenced in Petersen's footnote 13." Slip op. at 2 (Fearing, J., dissenting in part, concurring in part). Orders issued following an RCW 71.09.090 evidentiary hearing are routinely appealed as of right, with no challenge from the State.[1]

In determining appealability, Petersen relied on the nature of the proceeding at issue, and specifically contrasted the denial of an evidentiary hearing, which does not alter the petitioner's indefinite

[1] See, e.g., In re Detention of Harell, 5 Wn. App. 2d 357, 367-68, 426 P.3d 260 (2018), review denied, 192 Wn.2d 1019, 433 P.3d 809 (2019); In re Detention of Belcher, 196 Wn. App. 592, 597, 385 P.3d 174 (2016), aff'd, 189 Wn.2d 280, 399 P.3d 1179 (2017); In re Detention of Bergen, 146 Wn. App. 515, 520, 195 P.3d 529 (2008), review denied, 165 Wn.2d 1041, 205 P.3d 132 (2009).

confinement status, with release from indefinite confinement by means of an LRA. Petersen, 138 Wn.2d at 82-83. LRA revocation orders should be appealable as matter of right because LRA revocation following an evidentiary hearing significantly changes the status quo, once again subjecting the person to indefinite confinement in the SCC.

b. Alternatively, the revocation order is a final order after judgment under RAP 2.2(a)(13).

Alternatively, the LRA revocation order is appealable as a final order after judgment under RAP 2.2(a)(13). That provision permits appeal of "[a]ny final order made after judgment that affects a substantial right."

A final order entered after judgment is appealable under RAP 2.2(a)(13) "if it affects a right other than those adjudicated by the earlier final judgment." State v. Campbell, 112 Wn.2d 186, 190, 770 P.2d 620 (1989) (citing Seattle-First Nat. Bank v. Marshall, 16 Wn. App. 503, 508, 557 P.2d 352, 355 (1976)). The Court of Appeals majority did not dispute that revocation of McHatton's LRA affects a substantial right that was not adjudicated at the original commitment hearing.

While there is no liberty interest in an LRA before one is granted, an order revoking an LRA deprives the person of a liberty interest in conditional release. In re Detention of Wrathall, 156 Wn. App. 1, 6-7, 232 P.3d 569 (2010). An order revoking an LRA requires the person be

returned to total confinement. RCW 71.09.098(8). That person remains committed unless and until at some future date he is once again able to satisfy the requirements of RCW 71.09.090 and RCW 71.09.092 providing for release to an LRA. RCW 71.09.098(8). Wrathall equated the revocation of an LRA with the revocation of parole. Wrathall, 156 Wn. App. at 6-7. The revocation of parole has long been reviewed as appealable as a matter of right. State v. Pilon, 23 Wn. App. 609, 611, 596 P.2d 664 (1979). The confinement resulting from the order in question establishes the substantial right at stake, making the order appealable.

A final judgment or order leaves "nothing else to be done to arrive at the ultimate disposition of the petition." State v. Gossage, 138 Wn. App. 298, 302, 156 P.3d 951 (2007), rev'd in part on other grounds, 165 Wn.2d 1, 195 P.3d 525 (2008)). The "petition" at issue here is the State's petition to revoke McHatton's LRA. The court granted that petition and ordered McHatton's commitment to the SCC. By granting the State's petition, nothing else was to be done to arrive at the ultimate disposition of that petition and McHatton's LRA. The order is therefore final.

Per Petersen, "[a] decision under RCW 71.09.090(2) finding no probable cause is not a final order after judgment in light of the court's continuing jurisdiction over the committed persons until their unconditional release," as it "disposes only of the petition before the trial

court and achieves no final disposition of the sexually violent predator." Petersen, 138 Wn.2d at 88. In that context, the denial of an evidentiary hearing is simply "an interlocutory order." Id. Again, Petersen analogized to Chubb. Petersen, 138 Wn.2d at 86-87. In Chubb, the Supreme Court held periodic review orders in dependency proceedings were not "final" because the dependency statute "mandates that review hearings occur every 6 months after the original disposition. This review process continues until either the status quo changes and the court decides that its supervision should not continue or until a petition for termination is made. Because they take place on an ongoing process, the review hearings and the orders issued from them are interlocutory: they are not final, but await possible revision in the next hearing." Chubb, 112 Wn.2d at 724.

There is no "next hearing" for McHatton at which the trial court may revise its determination that his LRA should be revoked. There is nothing more for the trial court to do in terms of revocation. Chubb reasoned the function of the review hearing is to "determine whether court supervision should *continue*," and, when it makes that determination, it has decided "to abide by the status quo." Chubb, 112 Wn.2d at 724. This is the context in which Petersen held denial of a hearing at the show cause stage was not a final order because of the court's continued jurisdiction.

Petersen is a review hearing case. Chubb, upon which Petersen relies, is a review hearing case. The driving force behind Petersen and Chubb is the certainty of future, regularly occurring proceedings mandated by statute at which the same issue could be litigated. See Gossage, 138 Wn. App. 298, 302 n.7 ("A renewed petition for termination of registration obligations is a mere potentiality, dependent entirely on the offender filing anew, whereas in Petersen [and] Chubb, . . . future proceedings were certain."). There can be no finality when the same petition is brought again and again on a regularly recurring basis as mandated by statute. The State's petition to revoke McHatton's LRA stands on a different footing. The order granting that petition is a one-time event.

It is appropriate to consider policy ramifications. See Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 445, 783 P.2d 1124 (1989) (factoring policy considerations into its holding on appealability). To avoid unwarranted consumption of limited judicial resources, discretionary review may be the proper procedure where the court has continuing jurisdiction over a case in which the status quo has not changed, and in which the same issue recurs on an automatically recurring basis in a summary proceeding. That is a far cry from McHatton's situation. While the court retains jurisdiction over McHatton, the trial court has snatched

away his LRA after a full-blown evidentiary hearing, upending the status quo and sending McHatton back into confinement.

The Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). It is appropriate to take this policy into account in determining the appealability of an order. Alpine Indus., Inc. v. Gohl, 101 Wn.2d 252, 255, 676 P.2d 488 (1984) (considering RAP 1.2(a) in holding an order appealable under RAP 2.2(a)(13)). Despite the Petersen court's mollifying statement that the discretionary review screening should present no great obstacle for meritorious claims, Petersen, 138 Wn.2d at 89, the reality is that discretionary review is "seldom granted," State v. Richardson, 177 Wn.2d 351, 365, 302 P.3d 156 (2013), and confined to "rare instances." Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591, review denied, 169 Wn.2d 1029, 249 P.3d 623 (2010). The overwhelming majority of motions for discretionary review are denied, meaning the merits of the claims are never adjudicated on appeal. See In re Dependency of Grove, 127 Wn.2d 221, 235-36, 897 P.2d 1252 (1995) (fewer than 10 percent of the motions for discretionary review filed in the Court of Appeals were granted in the preceding five years).

The Court of Appeals' holding that LRA revocation orders are not appealable, if left to stand, will mean most challenges to revocation will

never be adjudicated on their merits. This may not be a compelling concern for something like the denial of an evidentiary hearing at the annual show cause stage because there is always an automatic opportunity for litigation of the same issue the next year. But the revocation of an LRA is a unique, non-recurring action with tremendous consequence.

The Court of Appeals' decision will have far reaching effects. Appeals are routinely taken from LRA revocation orders in analogous commitment contexts without anyone giving it a second thought, including revocation of LRAs under chapter 71.05 RCW and revocation of an insanity acquittee's conditional release under chapter 10.77 RCW.[2] In the RCW 71.05 and RCW 10.77 context, the superior court retains continuing jurisdiction over LRA and conditional release recipients. RCW 71.05.590(6)(c); RCW 10.77.190(4). If the be all and end all of appealability turned solely on continuing jurisdiction, then none of those cases can be appealed as of right. A decision that potentially affects

[2] See, e.g., In re Detention of P.K., 189 Wn. App. 317, 318-19, 358 P.3d 411, 412 (2015) (appeal from LRA revocation under chapter 71.05 RCW); In re Detention of R.R., 77 Wn. App. 795, 796, 802 n.8, 895 P.2d 1 (1995) (appeal from order dismissing petition to revoke LRA under chapter 71.05 RCW); State v. Beaver, 184 Wn. App. 235, 241, 336 P.3d 654 (2014), aff'd, 184 Wn.2d 321, 358 P.3d 385 (2015) (appeal from conditional release revocation in insanity acquittee case); State v. Derenoff, 182 Wn. App. 458, 460, 332 P.3d 1001 (2014) (same); State v. Bao Dinh Dang, 168 Wn. App. 480, 483, 280 P.3d 1118 (2012), aff'd, 178 Wn.2d 868, 312 P.3d 30 (2013) (same).

numerous proceedings in the lower courts warrants review as an issue of substantial public interest where review will avoid unnecessary litigation and confusion on a common issue. State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

Finally, if Petersen is interpreted to compel the conclusion that LRA revocation orders are not appealable, then Petersen is incorrect and harmful and should be overturned. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (precedent will be overruled when it is incorrect and harmful). Petersen is incorrect because it downplays the liberty interest at stake and the value of being able to appeal the loss of that interest as of right. Petersen is harmful because, as a practical matter, most claims relegated to discretionary review status are never reviewed on their merits because they cannot meet the discretionary review criteria.

2. THE TRIAL COURT MUST CONSIDER WHETHER THE LESS RESTRICTIVE ALTERNATIVE WAS PROPERLY IMPLEMENTED IN DECIDING WHETHER REVOCATION IS APPROPRIATE.

McHatton has a liberty interest in his LRA protected by due process. Before it can be snatched away, the trial court should be required to consider as relevant the extent to which the requirements of the court-ordered LRA failed to be implemented in the community. The LRA

conditions ordered by the court are designed to ensure the LRA will be in the person's best interest and adequate to protect the community. When the LRA that is ordered is not the LRA that is delivered, the person on the LRA is left in a perilous position, facing the loss of his liberty interest because the necessary supports are not in place. Consistent with due process, the revocation statute should be interpreted to require the court to take into account deficiencies in the LRA that are outside of the LRA recipient's control in determining whether revocation is the solution.

By statute, if the court determines that the State has met its burden of proving a violation, then:

> the court shall consider the evidence presented by the parties and the following factors relevant to whether continuing the person's conditional release is in the person's best interests or adequate to protect the community:
> (i) The nature of the condition that was violated by the person or that the person was in violation of in the context of the person's criminal history and underlying mental conditions;
> (ii) The degree to which the violation was intentional or grossly negligent;
> (iii) The ability and willingness of the released person to strictly comply with the conditional release order;
> (iv) The degree of progress made by the person in community-based treatment; and
> (v) The risk to the public or particular persons if the conditional release continues under the conditional release order that was violated. RCW 71.09.098(6)(a).

Statutes are construed to avoid constitutional problems, if at all possible. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).

There is no explicit statutory requirement that the court consider that the LRA that was ordered failed to be executed as anticipated before revoking the LRA. But it is possible and necessary to read such a requirement into the statute to avoid the due process problem that arises if a constitutionally protected liberty interest in the LRA is taken away because it was not properly implemented.

No person shall be deprived of liberty without due process of law. U.S. Const. amends. XIV; Wash. Const. art. I, § 3. The LRA is a protected liberty interest. Wrathall, 156 Wn. App. at 6. In determining whether commitment procedures satisfy due process, courts balance: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. In re Detention of Morgan, 180 Wn.2d 312, 320-21, 330 P.3d 774 (2014) (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 839, 47 L. Ed. 2d 18 (1976)).

The Matthews factors support the necessity for the trial court to consider and weigh the extent to which an LRA order was not implemented as envisioned and its effect on the recipient's violation in determining whether revocation is warranted. The first Mathews factor — the private risk affected — weighs in McHatton's favor because he has a

significant interest in his physical liberty. Morgan, 180 Wn.2d at 321. Second, the value of the proposed safeguard reduces the risk of an erroneous deprivation of the LRA recipient's liberty interest by requiring the court to consider shortcomings in the LRA as implemented in determining whether the draconian outcome of revocation is appropriate. Third, the burden of the additional procedure is minimal, as the court is already required to consider the evidence presented by the parties. RCW 71.09.098(6)(a). The trial court allowed McHatton to present evidence regarding the shortcomings in how the LRA was implemented. What was missing was any finding of fact or conclusion of law showing consideration of the lack of implementation of court ordered LRA requirements and its effect on McHatton's actions.

The Court of Appeals sidestepped the issue: "We need not analyze Mathews in this context because the trial court did actually consider the evidence and the argument about Aacres." Slip op. at 9. Under RAP 13.4(b)(4), McHatton asks this Court to review the issue of whether the trial court, before deciding to revoke, must consider whether the LRA plan as implemented is not the LRA plan that was ordered.

Contrary to the Court of Appeals' determination, the trial court found each factor favored revocation without treating the poor implementation of the LRA as a relevant consideration informing those

factors. CP 636; RP 61-63. The trial court thus stated: "certainly in hindsight any program could be judged and found to be flawed and may not have been ideal," but "[i]f he's not in a program that is meeting his needs or the community needs at this point, then the rest of it really isn't relevant." RP 21. The trial court did not find Dr. Blasingame's testimony on the point to be not credible. Rather, the court thought it didn't matter. The trial court needed to consider and weigh the failure of the LRA to be implemented as required by court order and its effect on McHatton's behavior in deciding whether revocation was warranted. The court treated the point as irrelevant to its decision. The court therefore applied the wrong legal standard in reaching its decision.

F. CONCLUSION

For the reasons stated, McHatton requests review.

DATED this 13th day of August 2020.

Respectfully submitted,

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APPENDIX

FILED
JULY 14, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Detention of	)	
	)	No. 37356-8-III
MICHAEL A. MCHATTON,	)	
	)	
	)	OPINION PUBLISHED IN PART
Appellant.	)	

KORSMO, J. — Michael McHatton appeals from an order revoking his community-based less restrictive alternative (LRA). We conclude in the published portion of this opinion that the LRA revocation is not an appealable order. We grant discretionary review and, in the unpublished portion, conclude that the trial court did not abuse its discretion by revoking the LRA.

PROCEDURAL HISTORY

Mr. McHatton stipulated to commitment as a sexually violent predator (SVP) in 2002. In 2012, he was conditionally released to an LRA at the Secure Community Transition Facility in Pierce County. In 2017, he was conditionally released to an LRA in the community at Aacres WA, LLC. One condition of the LRA prohibited McHatton from possessing any pictures of children.

A room search in May 2018 discovered numerous images of children. McHatton was returned to confinement and the State moved to revoke the LRA. The motion to

revoke was heard in conjunction with the annual show cause hearing in August 2018. Mr. McHatton's expert, Dr. Blasingame, testified at the hearing. He agreed that McHatton had intentionally violated the prohibition against possessing pictures of children. He criticized the Aacres program for not meeting Mr. McHatton's needs or the requirements of the LRA order. Dr. Blasingame agreed that McHatton should not stay at Aacres and, instead of confinement, should be placed in a more properly run community LRA.

The trial court entered an order revoking the LRA. The court also found that Mr. McHatton continued to meet the definition of an SVP and declined to order a new trial. Mr. McHatton timely appealed the LRA revocation ruling to the Court of Appeals, Division Two.

The State challenged the appealability of the revocation ruling and requested that the court treat the appeal as a motion for discretionary review. Mr. McHatton argued that the ruling was subject to appeal as a matter of right, but also asked the court to grant discretionary review. A Commissioner, after noting that prior rulings had inconsistently permitted review by appeal or by discretionary review without analyzing the issue, concluded that the order was appealable as a matter of right pursuant to RAP 2.2(a)(13).[1]

[1] Mr. McHatton also successfully obtained discretionary review of the order on the show cause hearing. That portion of the case was bifurcated, assigned a separate cause number, and later was also transferred to this division. Argument is scheduled for September 10, 2020. *In re Detention of McHatton*, No. 37423-8-III.

The State moved to modify that ruling while the parties proceeded to brief the merits of the LRA revocation ruling.

A Division Two panel granted the motion to modify and set the appealability issue before the panel hearing the case; the panel was also authorized to grant discretionary review. The parties filed supplemental briefs on appealability. Subsequently, the case was administratively transferred to Division Three. A panel considered the appeal without conducting argument.

ANALYSIS

Mr. McHatton argues that the case was appealable as a matter of right pursuant to either RAP 2.2(a)(8) or RAP 2.2(a)(13). We review each of those provisions in the order listed.

Although significantly guided by the due process clauses of the 14th Amendment to the United States Constitution and art. I, § 3 of the Washington Constitution, sexually violent predator proceedings are governed by chapter 71.09 RCW. As relevant here, the statutory scheme provides that a person can only be committed after a trial determines that a person meets the definition of "sexually violent predator." RCW 71.09.060. Upon commitment, there must be an annual review to determine if the person remains an SVP. RCW 71.09.070. When the SVP makes progress and is ready for more freedom, an LRA may be ordered upon various conditions particular to the individual. RCW 71.09.090.

RAP 2.2(a) identifies superior court rulings that may be appealed as a matter of right. An order revoking an LRA is not expressly specified in the rule. Accordingly, Mr. McHatton argues that an LRA revocation fits within the two other provisions.

The first of those at issue provides:

> (8) *Order of Commitment.* A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.

RAP 2.2(a).

Prior to amendment in 1994, subsection (8) addressed only commitment orders entered following a sanity hearing. *See* former RAP 2.2(a)(8) (1990). The 1994 amendment added the language: "or after a sexual predator hearing." RAP 2.2, at 124 Wn.2d 1109-10 (1994). The Washington Supreme Court explained the meaning of this addition in *In re Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999):

> There can be no dispute our initial intent was to provide an appeal as of right only from the initial commitment order that followed the full evidentiary adjudication of an individual as a sexually violent predator.

Id. at 85.

Petersen involved the question of whether an SVP could appeal as a matter of right from the annual review hearing. *Id*. at 77. The court rejected the argument that RAP 2.2(a)(8) applied, limiting the reach of that rule to the initial commitment order. *Id*. at 85. The court found analogous support in its case law rejecting efforts at appealing from a six month review hearing in a child dependency action. *Id*. at 86-87 (discussing *In*

re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989)). *Chubb* had declined to allow appeals from the review hearing even though RAP 2.2(a)(5) had permitted appeals from the dependency order. *Id*. Again relying on *Chubb*, *Petersen* also noted that the trial court's continuing jurisdiction over the case meant that the trial court's interlocutory orders were not final. *Id*. at 87.

Consistent with the narrow reach of RAP 2.2(a)(8) described by *Petersen*, we hold that an LRA revocation order is not a "commitment" order issued "after a sexual predator hearing." RAP 2.2(a)(8) does not authorize appeals of right from the revocation of a LRA.

Mr. McHatton, as had Mr. Petersen, also relies on the final provision of RAP 2.2(a):

> *Final Order After Judgment.* Any final order made after judgment that affects a substantial right.

RAP 2.2(a)(13). The *Petersen* majority also rejected this argument.[2]

The existence of the trial court's continuing jurisdiction over SVP proceedings rendered the court's orders interlocutory rather than final. *Petersen*, 138 Wn.2d at 87. Because of the court's continuing jurisdiction, "the order in this case cannot be a final judgment." *Id*. at 88. The order resolved only the petition before the trial court, not the final disposition of the case. *Id*. Any review of the probable cause ruling would need to

[2] Whether RAP 2.2(a)(13) authorized an appeal of right from a review hearing was the sole issue that divided the court. *Petersen*, 138 Wn.2d at 97 (Sanders, J., dissenting).

follow from an appellate court's discretionary review authority, RAP 2.3(b). *Id*. at 88-89.

McHatton distinguishes *Petersen* on the basis that it involved the annual review rather than revocation of an LRA. However, that distinction is analytically insignificant. Orders entered following either a review hearing or an LRA revocation both flow from the original commitment order that provides the trial court's authority over the case. Indeed, the revocation of an LRA arguably is less significant than a probable cause ruling in a review hearing. A finding that probable cause no longer exists ultimately can lead to the SVP status ending, while a revocation ruling merely returns the SVP to an earlier stage of his treatment regime. It is not a final order.

Neither RAP 2.2(a)(8) nor RAP 2.2(a)(13) authorize an appeal as a matter of right from the revocation of an LRA.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

"A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review." RAP 5.1(c). As authorized by the panel decision on the motion to modify, and in the interests of justice, we accept discretionary review of Mr. McHatton's challenge to the LRA revocation. *State v. Campbell*, 112 Wn.2d 186, 190, 770 P.2d 620 (1989).

Revocation of an LRA is controlled by statute. RCW 71.09.098. The State has the option of pursuing either modification or revocation of the existing LRA, and bears the burden of establishing a violation of the conditional release order by a preponderance of the evidence. RCW 71.09.098(5). In the event that the violation is established, the court must determine whether continuing the LRA is in the person's best interests or is adequate to protect the community. RCW 71.09.098(6)(a).

In making that determination, the court must weigh the evidence against five factors:

> (i) The nature of the condition that was violated by the person or that the person was in violation of in the context of the person's criminal history and underlying mental conditions;
> (ii) The degree to which the violation was intentional or grossly negligent;
> (iii) The ability and willingness of the released person to strictly comply with the conditional release order;
> (iv) The degree of progress made by the person in community-based treatment; and
> (v) The risk to the public or particular persons if the conditional release continues under the conditional release order that was violated.

RCW 71.09.098(6)(a). Any of these factors, "alone, or in combination, shall support the court's determination to revoke the conditional release order." RCW 71.09.098(6)(b).

Typically, orders revoking suspended criminal sentences are reviewed for abuse of discretion. *See, e.g.*, *State v. McCormick*, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009);

State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). At least one unpublished decision has applied that standard to the revocation of an LRA. *In re the Detention of Ward*, No. 75679-6-I, at *7-*8 (Wash. Ct. App. Dec. 12, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/373568.pdf.[3] The parties agree that the abuse of discretion standard applies to this case. *See* Br. of Appellant at 16; Br. of Resp't at 15. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. McHatton does not contest the fact that he possessed the photographs of children in violation of the conditions of the LRA. The court properly found that he violated the LRA. The remaining question is whether the trial court abused its discretion in revoking the LRA instead of modifying it. Mr. McHatton's expert testified about the failures of the Aacres program and blamed lack of room searches for his client's ability to stockpile photographs of children. McHatton argues that due process required the trial court to consider the inadequacies of the Aacres program in addition to the five statutory factors of RCW 71.09.098(6)(a)(i)-(v). To that end, McHatton argues that the familiar due process standard of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), required the trial court to do so.

[3] *See* GR 14.1(c).

We need not analyze *Mathews* in this context because the trial court did actually consider the evidence and the argument about Aacres. Report of Proceedings at 61-63. The court knew that its choices were revocation or continuing the LRA with modification. The problem from Mr. McHatton's perspective is that he did not have a firm alternative plan to present to the court and the State was only seeking revocation in light of his failure to make progress. Instead, McHatton attacked the management of the existing program, giving further weight to the State's motion to revoke, and had only a vague outline of what to do next. The trial court correctly noted that any alternate placement proposal would have to be investigated by the department of corrections and presented to the court for its consideration. Neither of those steps had occurred.

But Mr. McHatton's attack on the treatment providers is not fully supported by the court's findings. The court's oral remarks concluded that Mr. McHatton had lied to his treatment provider and attempted to manipulate her. The court entered written finding of fact 9, unchallenged on appeal, stating that Mr. McHatton lied to the treatment provider about his behavior and progress, coming clean only as his violations were about to be discovered. Clerk's Papers at 635. Mr. McHatton's view that the treatment provider failed him simply is contrary to the trial court's assessment of the situation. He failed treatment, not the other way around.

All parties ultimately agreed that Mr. McHatton's placement at Aacres was a failure. They differed on the cause of that failure, with the trial court coming down

against Mr. McHatton on the credibility determination. His spirited effort to defend the revocation by seeking modification without having a new plan failed to convince the court.

There were tenable grounds for granting the revocation. The trial court did not abuse its discretion by revoking the LRA.

Affirmed.

Korsmo, J.

I CONCUR:

Pennell, C.J.

No. 37356-8-III

FEARING, J. (dissenting in part/concurring in part)—In *In re Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999), the Washington Supreme Court held that a sexual violent detainee has no right to appeal the superior court's annual review decision, under RCW 71.09.090, that finds no probable cause to believe that the detainee's condition has changed such that he can be released or sent to a less restrictive alternative. The court denied the detainee a right to appeal under both RAP 2.2(a)(8) and (13). Nevertheless, in footnote 13 of the decision, the court wrote with regard to RAP 2.2(a)(8):

> 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 at 87 n.13.

In re Detention of Petersen is a split decision with four dissenters concluding that the detainee could appeal under RAP 2.2(a)(13). According to the minority, the trial court's decision constituted a final order entered after judgment that affected a substantial right. The earlier judgment was the order of commitment. The final order was the denial of a trial on the merits as to whether the detainee could be released or moved to a less restrictive facility. The substantial right was the right of liberty protected by the federal and state constitutions. The dissenters emphasized the importance of an appeal as a fundamental right in a free society.

I believe the minority, not the majority, correctly decided the issue of the right to an appeal in *In re Detention of Petersen*. Nevertheless, I would follow, based on stare decisis, the *Petersen* majority, in Michael McHatton's appeal, if not for footnote 13.

Michael McHatton seeks an appeal as a matter of right to the superior court's revocation of his less restrictive alternative after an evidentiary hearing. Thus, the decision before us for review is not a perfunctory ruling, but a hearing similar in nature to the hearing referenced in *Petersen*'s footnote 13. Based on the footnote and the sound reasoning found in the *Petersen* dissent, the ruling we review today was either an order of commitment in accordance of RAP 2.2(a)(8), a final order after a judgment that impacts one's substantial right in light of RAP 2.2(a)(13), or both.

An order revoking one's probation may be appealed as a matter of right as an order after final judgment affecting a substantial right. *State v. Pilon*, 23 Wn. App. 609, 611, 596 P.2d 664 (1979). An order modifying a parent's visitation rights to a child is

also a final order affecting substantial rights. *Sutter v. Sutter*, 51 Wn.2d 354, 356, 318 P.2d 324 (1957). An order revoking a less restrictive alternative of a sexually violent detainee parallels an order revoking probation and order altering visitation rights.

I dissent from the majority's ruling that Michael McHatton could not appeal the superior court order revoking his less restrictive alternative detainment. I concur in the majority's ruling on the merits of the appeal.

Fearing, J.

NIELSEN KOCH P.L.L.C.

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