68873-1

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No. 68873-1

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

STATE OF WASHINGTON,

Respondent,

v.

DONNA L. HOWLAND,

Appellant.

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

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR
Attorney for Appellant

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

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A. ARGUMENT IN REPLY

1. Ms. Howland is entitled to appeal as a matter of right the trial court's order dismissing her petition for conditional release.

Decisions of the superior court that may be appealed as a matter of right are set forth in RAP 2.2(a).[1] The list includes appealable orders

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[1] RAP 2.2(a) provides:

Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) *Final judgment.* The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) [Reserved.]

(3) *Decision Determining Action.* Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.

(4) *Order of Public Use and Necessity.* An order of public use and necessity in a condemnation case.

(5) *Juvenile Court Disposition.* The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) *Termination of All Parental Rights.* A decision terminating all of a person's parental rights with respect to a child.

(7) *Order of Incompetency.* A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.

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

(9) *Order on Motion for New Trial or Amendment of Judgment.* An order granting or denying a motion for new trial or amendment of judgment.

(10) *Order on Motion for Vacation of Judgment.* An order granting or denying a motion to vacate a judgment.

(11) *Order on Motion for Arrest of Judgment.* An order arresting or denying arrest of a judgment in a criminal case.

that illustrate the propriety of appeal here. The list includes orders regarding various aspects of mental health treatment including orders of incompetency and orders of commitment. RAP 2.2(a)(7), (8). The rule also contemplates appellate review of a number of different orders entered after trial, for example orders on motions for new trial or amendment of judgment, orders on motions for vacation of judgment, orders on motions for arrest of judgment, and orders denying motions to vacate orders of arrest of a person. RAP 2.2(a)(9), (10), (11), (12). The rule then includes a broad-ranging provision extending the scope of appealable orders beyond these specific post-trial orders to permit appeal of "[a]ny final order made after judgment which affects a substantial right." RAP 2.2(a)(13).

In practice, the appellate courts have found a number of orders similar to the denial of Ms. Howland's petition for conditional release to be appealable pursuant to RAP 2.2(a)(13). For example, a district court's refusal to continue a hearing on the imposition of sentence, forfeiture of bail and issuance of a warrant, amounted to a final

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(12) *Order Denying Motion to Vacate Order of Arrest of a Person.* An order denying a motion to vacate an order of arrest of a person in a civil case.

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

decision because it affected a "substantial right." City of Yakima v. Aubrey, 85 Wn. App. 199, 202, 931 P.2d 927 (1997). A central part of the Aubrey Court's "substantial right" analysis was tied to the fact that the order in question involved issuance of an arrest warrant. Id. This indicates that confinement is the form of "substantial right" contemplated by RAP 2.2(a)(13).

Similarly, the appellate courts have held that a person can appeal as a matter of right from an order revoking probation. State v. Pilon, 23 Wn. App. 609, 611-12, 596 P.2d 664 (1979). Again, it is the direct nature of the confinement resulting from the order in question that establishes the substantial right at stake, making the order appealable.

Also supporting the conclusion that the order here is an appealable order is that Ms. Howland seeks to vindicate rights that were not adjudicated by the earlier judgment on sanity. See Seattle-First Nat'l Bank v. Marshall, 16 Wn. App. 503, 508, 557 P.2d 352 (1976) (order entered subsequent to final judgment is not appealable unless later order prejudicially affects substantial right other than one which was adjudicated by earlier final judgment). This view of finality is well-settled. In 1926, the Washington Supreme Court held an order

quashing subpoenas was final and appealable since it disposed of the attempt to compel witnesses to appear. State v. Superior Court of King Co., 129 Wash. 704, 247 P. 457 (1926); State v. Lamprey, 57 Wash. 84, 106 P. 501 (1910).

Under these authorities, the superior court's order denying conditional release was a final appealable order because it disposed of the issue of Ms. Howland's current dangerousness, which was not determined by the earlier commitment order. As stated in the opening brief, there is no presumption that a person found not guilty by reason of insanity continues to be dangerous years later. State v. Klein, 156 Wn.2d 103, 118, 124 P.3d 644 (2005); State v. Reid, 144 Wn.2d 621, 627-28, 30 P.3d 465 (2001).

Consistent with these rules and the cases interpreting them, the appellate courts have repeatedly and routinely considered the denial of an insanity acquittee's application for release to be an appealable order. See Klein, 156 Wn.2d 103; Reid, 144 Wn.2d at 626-27; 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).

In accordance with the foregoing authorities, the trial court's order granting the State's motion to dismiss Ms. Howland's petition for

conditional release is a "final order made after judgment which affects a substantial right," and is therefore appealable as a matter of right. RAP 2.2(a)(13); Klein, 156 Wn.2d 103; Reid, 144 Wn.2d at 626-27; Haney, 125 Wn. App. at 121-22; Sommerville, 86 Wn. App. at 701.

2. Discretionary review is warranted because the trial court committed probable error, substantially limiting Ms. Howland's freedom to act, by requiring her to present expert testimony in support of her petition for conditional release.

Alternatively, the trial court's order is subject to review under RAP 2.3(b), which governs discretionary review. Discretionary review is warranted if "[t]he 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." RAP 2.3(b)(2).

If the Court determines the order denying conditional release is not an appealable "final judgment," the Court should designate the appeal seeking review of that order as a "notice for discretionary review." In re Det. of Turay, 139 Wn.2d 379, 393, 986 P.2d 790 (1999); RAP 5.1(c) ("A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review."). The issue then is whether the criteria of RAP 2.3(b)(2) are satisfied. Turay, 139 Wn.2d at 393.

As argued in the opening brief, the superior court committed probable error by requiring Ms. Howland to present expert testimony in support of her petition for conditional release. The State contends the court did not err in summarily dismissing the petition because Ms. Howland, who bore the burden or production and persuasion, "presented no evidence whatsoever." SRB at 10. The State's argument is not persuasive because it rests on a misunderstanding of the nature of the burden of proof. The question in determining whether the evidence was sufficient to submit the question of Ms. Howland's dangerousness to the trier of fact was not whether Ms. Howland submitted expert testimony but whether there was "substantial evidence" in the record to support a finding regarding dangerousness. State v. Paul, 64 Wn. App. 801, 806, 828 P.2d 594 (1992). Substantial evidence is "evidence sufficient to persuade a fair-minded person of the truth of the declared premise." Id.

The function of the "burden of production" is "to identify whether there is an issue of fact to be submitted to the trier of fact for its decision." In re Dependency of C.B., 61 Wn. App. 280, 282, 810 P.2d 518 (1991). If there is, the issue is deferred to the trier of fact for decision. Id. Deferral is accomplished by taking the evidence and the

reasonable inferences therefrom in the light most favorable to the non-moving party. Id.

Here, there was sufficient evidence in the record to submit the question of Ms. Howland's dangerousness to the trier of fact. That evidence is recounted at length on pages 2 through 10 of the opening brief. The trial court's error was in summarily concluding that it could not consider and weigh that evidence simply because Ms. Howland did not present expert testimony in support of her petition. The question of Ms. Howland's dangerousness was not a technical or scientific question that required expert testimony to determine. The record was adequate for the trial court to make a finding regarding Ms. Howland's dangerousness.

Finally, the trial court's erroneous determination that an insanity acquittee must present expert testimony in support of a petition for conditional release under RCW 10.77.200(5) limits Ms. Howland's freedom to act because it means she may not file a petition under that statute in the future without presenting expert testimony. Therefore, the other criterion of RAP 2.3(b)(2) is satisfied and discretionary review is warranted.

B. CONCLUSION

The order denying Ms. Howland's petition for conditional release is a final, appealable order. In the alternative, discretionary review is warranted because the superior court committed probable error that limits Ms. Howland's freedom to act.

Respectfully submitted this 19th day of June, 2013.

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

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DIVISION ONE

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Respondent,	)	
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	)	
DONNA HOWLAND,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ALISON BOGAR, DPA KING COUNTY PROSECUTOR'S OFFICE SVP/DETENTION UNIT KING COUNTY ADMINISTRATION BLDG. 500 FOURTH AVENUE, 9TH FLR SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DONNA HOWLAND WESTERN STATE HOSPITAL 9601 STEILACOOM, BLVD SW TACOMA, WA 98498	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JUNE, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710