NO. 46319-9-II

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

In re Detention of Richard Hatfield,

STATE OF WASHINGTON,

Respondent,

v.

RICHARD HATFIELD,

Appellant.

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

The Honorable Robert A. Lewis, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. UNDER A MANDATORY STATUTE, CASE LAW, AND PRINCIPLES OF DUE PROCESS, HATFIELD WAS ENTITLED TO BE REPRESENTED AND APPEAR BY A GUARDIAN AD LITEM AT ALL TIMES DURING TRIAL

a. RCW 4.08.060 requires the guardian ad litem's presence in court at all times

RCW 4.08.060 provides that an incapacitated person in a superior court action "shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as a guardian ad litem . . . ." This statute is mandatory and leaves no room for the State's interpretation that the guardian ad litem (GAL) need only appear at his or her whim or convenience. See Am. Br. of Resp't at 7-9.[1] RCW 4.08.060 plainly means that when a superior court appoints a GAL to protect the interests of an incapacitated party, that GAL must actually protect the interests of the incapacitated party by appearing on his or her ward's behalf in court.

This was the holding of In re Dill, 60 Wn.2d 148, 372 P.2d 541 (1962), which is controlling here. Dill held RCW 4.08.060 was "mandatory" and meant that a person in Hatfield's position "can appear in court only by a guardian ad litem . . . ." 60 Wn.2d at 150. Moreover, "[t]he statutory

[1] Hatfield cites the State's amended brief in anticipation that this court will grant the State's March 19, 2015 motion to file the amended brief.

mandate is not satisfied when the person under legal disability is represented by an attorney. Id. Failure to comply with RCW 4.08.060's mandate requires reversal. Id. at 150-51.

The State attempts to circumvent Dill's holding by claiming Dill requires only the appointment of a GAL, not the GAL's actual attendance in court. Am. Br. of Resp't at 8. The State would apparently not fault a GAL if he or she did nothing else for the ward but read the order of appointment. The State's position farcically elevates form over substance. There is simply no point in appointing a GAL if the GAL does not attend critical court proceedings that decide his or her ward's future. This court should reject the State's argument that the mere appointment of a lame duck GAL is all RCW 4.08.060 requires.

The State also asserts Hatfield's GAL, Peter MacDonald, "determined that the best interests of his ward do not require his physical presence." Am. Br. of Resp't at 8. This is nothing more than baseless conjecture. The State then repeats that MacDonald "determined that Hatfield's best interests did not require his own presence. VRP at 16." Am. Br. of Resp't at 9. This court should reject the State's misleading construal of the record. As discussed in Hatfield's opening brief, the GAL's determination not to be present was based on the trial court's purported need to explain MacDonald's role to the jury. Br. of Appellant at 17; RP 15-16.

MacDonald did not want his role as GAL to create a negative inference for jurors. RP 15-16. But, given that ultimately there was no jury in Hatfield's trial, the GAL's concern was eliminated. Yet the GAL was not seen or heard from again and no additional explanation for the GAL's absence appears in the record. Nothing in the record supports the State's claim that the GAL's absence was based on his actual determination that Hatfield's best interests did not require his presence for any part of trial.

In comparison to its cursory treatment of RCW 4.08.060 and Dill, the State opts to respond at some length to Hatfield's suggestion that superior court guardian ad litem rules (GALR) provide persuasive authority and guidance regarding the GAL's proper role in superior court proceedings. Am. Br. of Resp't at 9-15. On the one hand the State acknowledges that Hatfield concedes the GALR "by their clear terms, apply only to certain specified types of proceedings." Am. Br. of Resp't at 10. On the other hand the State claims Hatfield's "argument ignores the explicit language of the GALR regarding the [r]ules' scope and effect." Am. Br. of Resp't at 10. The State's self-contradicting response to Hatfield's suggestion is unhelpful. And the State fails to point this court to any other authority or source of law that delineates what courts' expectations of GALs should be, which is the

precise issue this court must decide in this case.[2] This court may and should look to the GALR for needed albeit nonbinding guidance on the proper roles and responsibilities of GALs in superior court proceedings.

The State also suggests that under RPC 1.2, the respective roles of Hatfield and his lawyers were set in stone before the GAL was appointed. Am. Br. of Resp't at 12-14. The State claims, "At the point at which the GAL absented himself, what remained were only strategic decisions relating to the conduct of trial, decisions properly reserved to the attorneys." Am. Br. of Resp't at 14. Thus, the State concludes, "there was nothing the GAL's presence at trial would accomplish." Am. Br. of Resp't at 14.

The State is incorrect. Its argument is based on an untenable and unrealistic assumption that once a trial strategy has been established and the trial begins, lawyers no longer listen to their clients' (and therefore their clients' GAL's) concerns and insights, and clients (and therefore their GALs) no longer meaningfully participate or provide input in the proceedings. No prosecutor or court can say what observations a client or a GAL might provide to assist the defense, even on supposedly mere "strategic

[2] The State repeatedly asks this court to merely presume the GAL acted in Hatfield's best interests and seems to fault Hatfield for not challenging the GAL's effectiveness. Am. Br. of Resp't at 8, 12, 14-15, 22. But the State cites no authority that supports such a presumption. Hatfield's challenge is that the complete absence of the GAL throughout the trial violated a mandatory statute, case law, and also ran afoul of the policies embodied in the GALR. The State might not like the law Hatfield has identified, but presents no authority to counter it.

decisions." Nor does the State recognize the countervailing duty of lawyers to keep their clients (and therefore their clients' GALs) informed of the status of their cases or consult about how best to accomplish the clients' (and therefore their clients' GALs') objectives under RPC 1.4(a)(2) and (3). Moreover, the State's acknowledgment that the GAL in this case was "an attorney experienced in SVP matters and as such thoroughly familiar with the matters that would be dealt with at trial," Am. Br. of Resp't at 9, significantly undermines its supposition that the GAL's presence would accomplish nothing—having another set of experienced eyes and ears could have made and often does make all the difference. This court should reject the State's speculation that the presence of a GAL at trial is somehow a meaningless and empty formality.

Finally, the State does not respond to Hatfield's arguments that the deprivation of a GAL should be presumed prejudicial. See Br. of Appellant at 27-29. As discussed, the State merely presumes that the GAL's absence was not prejudicial. The Dill court did not engage in prejudice analysis or reach due process arguments. Such words and phrases never appeared in the Dill opinion. Thus, Dill establishes that when a GAL appointed under RCW 4.08.060 fails to appear in court on behalf of his or her ward, the absence is reversible error. This court should follow Dill and reverse.

b. The complete absence of Hatfield's GAL during trial violated Hatfield's due process rights

Much of the State's response to Hatfield's procedural due process claim misapprehends the purpose of the GAL in these proceedings. The State contends "it is clear that all parties understood that the appointment of the GAL was intended for the limited purposes of allowing Hatfield to waive his presence at trial." Am. Br. of Resp't at 22; see also Am. Br. of Resp't at 24 (asserting that attorneys sought appointment only for limited purpose of determining whether Hatfield could waive his presence at trial). The State's argument is based entirely on one request made by Hatfield's lawyer not to revisit decisions they had already made, such as demanding a jury trial.[3] RP 838-39. In this context, defense counsel asked the court to confine the scope of the GAL's appointment. RP 839.

But the trial court did not grant this request. It instead sought additional information to determine "the scope of the guardian ad litem's authority," wanted to ensure ample time for the GAL to get up to speed, and wished to hear from mental health experts regarding Hatfield's competency. RP 839-41. After hearing Dr. Richards's and Dr. Abbott's testimony on the issue of competency, nothing in the trial court's incompetency ruling

[3] However, no jury was ever demanded and this case was tried to the bench, regardless of the decision Hatfield and his attorneys had apparently made to demand a jury. RP 19-21, 28-29.

suggests the appointment of a GAL was limited to the issue of waiving presence at trial:

> Well. I tend to agree [that Hatfield is not competent and a GAL should be appointed]. I did not hear a lot of extensive testimony about Mr. Hatfield being questioned about the legal system or his understanding of it; however, based, on the information that I've received through testimony, it appears that he's had some sort of psychotic break and that his current active psychosis prevents him from meaningfully communicating about the proceedings with his attorneys or otherwise participating meaningfully in terms of it . . . . So until that psychosis is placed under control in some way, it appears that he meets the standard of being incompetent to proceed under Washington law. So under RCW 4.08.060, I would appoint a guardian ad litem for him.

RP 874. Similarly, the order appointing the GAL states the court was "reasonably convinced that Mr. Hatfield is not competent to understand the significance of legal proceedings and the effect of such proceedings on his best interests. As such, IT IS HEREBY ORDERED that a [GAL] shall be appointed pursuant to RCW 4.08.060 . . . ." CP 176. The trial court's written and oral rulings appointing a GAL do not support the State's assertion that the sole purpose of the GAL was to waive Hatfield's presence at trial. To the contrary, the trial court expressly noted it was appointing a GAL because Hatfield's current psychosis prevented him from meaningfully communicating about and participating in the proceedings overall. This court should reject the State's erroneous recitation of the record.

As for its Mathews[4] analysis, the State asserts there was no risk of erroneous deprivation of Hatfield's liberty essentially because our supreme court has said that chapter 71.09 RCW's protections were "[r]obust" in In re Det. of Morgan, 180 Wn.2d 312, 321, 330 P.3d 774 (2014). Am. Br. of Resp't at 16-18. But the Morgan court, though not squarely presented with the question of whether a GAL provided a valuable procedural protection, assumed it did. 180 Wn.2d at 321 (noting "the trial court's appointment of a GAL provided an additional safeguard"). And this court's language in State v. Ransleben even more strongly indicated a GAL's participation and attendance at hearings protected against the erroneous deprivation of an incompetent party's liberty. 135 Wn. App. 535, 537, 144 P.3d 397 (2006) (enumerating various undertakings of GAL to show Ransleben's liberty interest was adequately protected). Neither Ransleben nor Morgan supports the State's position that Hatfield did not require the procedural safeguard that an actively participating GAL would have provided. There is no authority supporting the State's position that the GAL's participation was not essential to protect against the erroneous deprivation of his liberty.

As for the third Mathews factor, it is telling that the State simply does not respond to Hatfield's argument that the government has no interest in providing sex offender treatment to Hatfield given his current state of

[4] Mathews v. Eldridge, 424 U.S. 319,332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

psychosis. Br. of Appellant at 24. Where, as here, a person has no ability to participate in such treatment, the government's interest in providing the treatment amounts to no interest at all.

The State argues that it also has an interest in keeping the public safe from sex offenders, and relies on Morgan for the proposition that chapter 71.05 RCW proceedings could not adequately protect this interest. Am. Br. of Resp't at 18-19; Morgan, 180 Wn.2d at 322. The State's own expert contradicted this argument by acknowledging Hatfield could actually receive treatment to improve his psychotic condition at Western State Hospital, and that such treatment was not available at the SCC. RP 295. And the Morgan court's assertion that chapter 71.05 RCW is "not suitable for the special challenges of SVPs" might be true of persons *actually committed* under chapter 71.09 RCW. But the Morgan court never explained how this could be so for persons *merely accused* of meeting chapter 71.09 RCW commitment criteria.[5] Such reasoning puts the cart before the horse: it would allow a person who stands only accused of a felony to lose his right to vote even though he has not been and might never be convicted. This court should reject this specious logic.

[5] In the past, the State has willingly housed persons suspected of meeting chapter 71.09 RCW commitment criteria in state mental hospitals under chapter 71.05 RCW to treat "schizophrenia and antisocial personality disorders," and there is no reason it could not do so here. See In re Det. of McGary, 128 Wn. App. 467, 470-71, 116 P.3d 415 (2005).

The State expressly agreed to the appointment of a GAL to protect Hatfield's interests in these proceedings. CP 171; RP 833, 856 (State jointly moved for the GAL's appointment). There was no administrative burden for the State to ensure Hatfield's GAL participated and attended all proceedings.[6] The State points to no administrative burden that could conceivably outweigh the high risk of erroneous deprivation that accompanies the complete deprivation of an incapacitated party's GAL. The third Mathews factor favors Hatfield.

Incapacitated persons should never face proceedings that potentially deprive them of physical liberty for the rest of their lives without every procedural protection to which they are legally entitled, including the participation and presence of GALs to guard their interests in court. As a matter of minimum due process, this court should hold Hatfield was entitled to have his GAL present in court at all times during trial.

2. NOTWITHSTANDING THE EGREGIOUS AND DISTURBING CONDITIONS OF HIS CONFINEMENT, THE BASIS FOR HATFIELD'S COMMITMENT VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT PROVIDES NO OPPORTUNITY TO IMPROVE HIS CONDITION

Instead of addressing Hatfield's substantive due process argument and the cases supporting it, the State accuses Hatfield of improperly

[6] Hatfield does not disagree with the State that defense counsel erred in acquiescing in the absence of Hatfield's GAL. See Am. Br. of Resp't at 22; Br. of Appellant at 25-27 (arguing ineffective assistance of counsel).

challenging the conditions of his confinement. Am. Br. of Resp't 26-29. While the record before this court reveals the State's shameful and repugnant mistreatment of Hatfield. Hatfield's substantive due process claim is based not on the conditions of confinement but on the grounds for his commitment. If we are all to operate with the understanding that the State's purpose in civilly committing Hatfield is mental health treatment—not punishment—then the treatment must provide Hatfield with a realistic opportunity to improve his mental health condition. The record in this case shows his commitment affords no such opportunity.

Persons facing civil commitment for mental illness have a constitutional right to receive individual treatment "as will give each of them a realistic opportunity to be cured or to improve [their] mental condition." In re Det. of D.W., 181 Wn.2d 201, 208, 332 P.3d 423 (2014) (internal quotation marks omitted) (quoting Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1981) (quoting Wyatt v. Strickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971))). "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). Were it otherwise, the State could simply warehouse the mentally ill indefinitely. Ohlinger, 652 F.2d at 778.

As Hatfield argued in his opening brief, Hatfield's psychotic state makes him unable to participate in the sex offender treatment available at the Special Commitment Center (SCC). Br. of Appellant at 31-34. The State's treatment of Hatfield to date demonstrates that it is not willing to provide Hatfield with treatment that he needs to improve his psychotic condition. Br. of Appellant at 34-37. Rather than treat him in a manner than could improve his condition, the SCC locks Hatfield in a cell, strips him naked, and forcibly administers a potentially lethal medication that has already proven ineffective. Br. of Appellant at 35-37; RP 543-50, 577-78, 682. Hatfield, under the guise of chapter 71.09 RCW, has now been warehoused indefinitely without any treatment that has even the barest potential to improve his condition. His commitment violates the Fourteenth Amendment to the United States Constitution.

Hatfield's claim is very different than the claim raised in In re Det. of Turay, 139 Wn.2d 379, 403-06, 986 P.2d 790 (1999), on which the State relies. See Am. Br. of Resp't at 26-28. Turay did not make a substantive due process claim but argued the trial court erred in excluding "evidence of the conditions of confinement at the SCC and of the verdict in Turay's federal litigation . . . ." Turay, 139 Wn.2d at 403. Unlike Turay, Hatfield is not claiming the unconstitutional conditions of his confinement are relevant to whether he meets the commitment criteria under chapter 71.09 RCW.

Hatfield is not claiming any type of evidentiary error at all. Rather, Hatfield asserts there is no valid basis for his commitment given that his commitment provides no opportunity to improve his current psychotic condition. The State's attempt to liken Hatfield's claim to Turay's is unavailing.

The State's reliance on Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), is even feebler. See Am. Br. of Resp't at 28-29. There, the Court "accepted the Kansas [Supreme] [C]ourt's apparent determination that treatment is not possible for this category of individuals . . . ." Id. at 365. Thus, the Court assumed there was no treatment available for Hendricks and allowed Kansas to "civilly detain those for whom no treatment is available, but who nevertheless pose a danger to others." Id. at 366.

This case is different because treatment exists that could help Hatfield. As Fabian Saleh, M.D. testified in great detail, Hatfield needs medical attention to ensure there is not a physical etiology that accounts for his condition, such as a tumor in or a lesion on his brain. RP 543-44. Dr. Saleh described the various diagnostics and examinations he would employ to rule out a serious medical condition. RP 544-45. The State's evidence did not rebut Saleh's testimony, it supported it: Dr. Richards conceded Hatfield could receive this necessary medical treatment at Western State Hospital but not at the SCC. RP 295.

Even if there were no clear physical explanation for Hatfield's psychosis, Saleh also explained at length how to appropriately treat psychosis with medication. RP 546-50. Saleh described how the State's "treatment" of Hatfield with an antipsychotic medication for almost a year at the same dose was both ineffective treatment and potentially lethal. RP 547, 549-50. Thus, contrary to the State's argument, there are ample treatment options available for Hatfield, the State just does not wish to be bothered to provide them.

Moreover, Hatfield's condition cannot be analogized to an "untreatable, highly contagious disease." Hendricks, 521 U.S. at 366; Am. Br. of Resp't at 29. This analogy presumes Hatfield is "dangerously insane" and "no acceptable treatment exist[s]." Id. As discussed, treatment does exist. And, if Hatfield poses any danger at all, in the words of the trial court, it is "being masked . . . by his psychotic symptoms." RP 818; see also CP 156 (psychotic disorders "mask" "underlying mental abnormality"). Indeed, the trial court determined, "The evidence supports the conclusion that [Hatfield]'s psychotic disorder, *if treated correctly*, would result in [Hatfield] reverting to actual reality, where he is Richard Hatfield. Richard Hatfield has a mental abnormality." CP 156 (emphasis added). As the trial court expressly acknowledged, Hatfield's condition is not like a high contagious disease—there is not even a possibility of any danger while Hatfield remains

in a psychotic state. The State's comparison of this case to Hendricks is inapt.

Finally, the State's cavalier assurance that Hatfield can obtain relief through a civil lawsuit for injunctive relief or damages is equal parts absurd and disturbing. Am. Br. of Resp't at 29. Hatfield, who qualifies for indigent defense services, is acutely psychotic, and has been repeatedly stripped naked and locked in a SCC cell. He is forcibly medicated with drugs that have severe side effects yet give him no benefit. Given the circumstances, it is unclear how Hatfield would contact, let alone retain, private counsel to pursue arduous and costly civil litigation against the State.

If detention under chapter 71.09 RCW is truly to treat mental illnesses that predispose persons to commit sexually violent acts, then the substantive due process rights of those facing such commitment require treatment that provides a realistic opportunity for improvement. Although such treatment is available here, the State withholds it. Our supreme court recently concluded that psychiatric boarding—i.e., detention without any ameliorating treatment—is unconstitutional. D.W., 181 Wn.2d at 204, 211. Hatfield asks this court, on these facts, to reach the same conclusion.

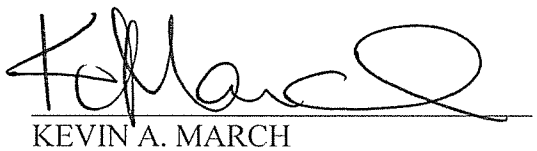
B. CONCLUSION

This court should reverse the trial court and provide Hatfield with fair proceedings where (1) a GAL fulfills his or her legal obligations and (2) his substantive due process rights are honored by providing him a realistic opportunity to receive treatment that might actually improve his condition.

DATED this 23d day of March. 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 46319-9-II
	)	
RICHARD HATFIELD,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD HATFIELD
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MARCH 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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