No. 46760-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

In re the Detention of:

JOHN BROOKS,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR.

The trial court erred and deprived John Brooks of due process in granting the State's motion for summary judgment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

The Fourteenth Amendment's Due Process Clause permits commitment of a person only so long as they are mentally ill and dangerous. Consistent with the dictates of Due Process, RCW 71.09.090(1) requires the Department of Social and Health Services (DSHS) authorize a committed person to petition for release to a less-restrictive alternative where DSHS's annual review concludes either (1) the person no longer meets the definition of a sexually violent predator or (2) where a less-restrictive alternative is in the person's best interest and can adequately protect the community. Where such authorization is provided, RCW 71.09.250 permits the use of the Secure Community Transition Facility (SCTF) as a placement for the less-restrictive alternative. Although its own evaluation concluded a less-restrictive alternative was appropriate DSHS refused to authorize Mr. Brooks to file a petition. In the absence of that authorization, Mr. Brooks could not present the SCTF as a housing placement for his proposed alternative. Because he could not secure housing, the trial court granted

the state's summary judgment motion. Did the State's failure to comply with the mandate of RCW 71.09.090(1) deny Mr. Brooks Due Process?

C. STATEMENT OF THE CASE

Mr. Brooks stipulated to his commitment under RCW 71.09 in 2007. CP 413.

Pursuant to RCW 71.09.070, DSHS conducted its annual evaluation of Mr. Brooks and filed it with the court in May 2013. CP 413. That evaluation concluded Mr. Brooks was appropriate for a release to a less restrictive alternative and concluded that the SCTF would be an appropriate placement. CP 414-16.

Despite its own evaluation, DSHS did not authorize Mr. Brooks to petition for placement in a less-restrictive alternative as required by RCW 71.09.090(1). CP 428. That denial precluded consideration of the SCTF as a placement, again despite DSHS's own evaluation.

In the absence of the mandated authorization, Mr. Brooks filed a petition for release to an less-restrictive alternative pursuant to RCW 71.09.090(2). CP 324-26. Although it found that a less-restrictive alternative was in Mr. Brooks's best interest and conditions could be imposed to adequately protect the community, the court concluded Mr. Brooks did not meet his burden under RCW 71.09.090(2) and denied

him a trial on whether he could be released to a less-restrictive alternative. 12/13/13 RP 20-22. Mr. Brooks filed a motion for discretionary review in this Court. The State subsequently agreed Mr. Brooks was eligible for a trial regarding a less restrictive alternative, and the motion for discretionary review was dismissed. CP 385.

The State continued to refuse to authorize Mr. Brooks to petition for a less-restrictive alternative, which again denied consideration of the SCTF as a housing placement.

The State then filed a motion contending that in the absence of a proposed housing plan, RCW 71.09.094 required the court grant summary judgment. CP 393-95. The Court granted the State summary judgment. CP 559-60.

D. ARGUMENT

The grant of summary judgment deprived Mr. Brooks of Due Process.

Even if a detainee's involuntary confinement was initially permissible, "it could not constitutionally continue after that basis no longer existed." *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 95 S. Ct 2486, 45 L. Ed. 2d 396 (1975). The "outside limits" on civil commitment are that the individual is mentally ill and dangerous due to that mental illness. *Foucha v. Louisiana*, 504 U.S. 71, 78 & n.5, 112 S.

Ct. 1780, 118 L. Ed. 2d 437 (1992). A person may be held "as long as he is both mentally ill and dangerous, but no longer." *Id.* at 77; *see In re Levias*, 83 Wn.2d 253, 257, 517 P.2d 588 (1973) ("neither logic nor law" permits state to involuntarily detain persons "who are not unsafe" for purpose of state offering beneficial treatment). "Periodic review of the patient's suitability for release" is required to render commitment constitutional. *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 3043 (1984); *see also In re the Detention of Ambers*, 160 Wn.2d 543, 553 n.7, 158 P.3d 1144 (2007) (noting constitution mandates meaningful annual review).

The "best interest" and protection of the community requirements in RCW 71.09.090 serve to "account[] for the inherent dangerousness of SVPs and their unique, extended treatment needs." *In re the Detention of Bergen*, 146 Wn. App. 515, 529, 195 P.3d 529 (2008), *review denied,* 205 Wn.2d 132 (2009). Thus, a finding that a less restrictive alternative as opposed to total confinement is in the person's best interest and can adequately protect the community equates to a finding that the person is no longer sufficiently dangerous to warrant total confinement. In that circumstance, where the person is no longer in need of that level of treatment or sufficiently dangerous,

due process does not permit their continued confinement at their current level. *Foucha*, 504 U.S. at 77.

Consistent with these requirements, RCW 71.09.070 requires DSHS conduct annual examinations of committed individuals to determine whether they "currently meet[] the definition of a sexually violent predator and whether conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community." RCW 71.09.090(1) requires DSHS "shall authorize" a person to petition for a trial on a less restrictive alternative if the annual review indicates a less restrictive alternative is in the persons best interest and can adequately protect the community. *State v. McCuistion*, 174 Wn.2d 369, 388, 275 P.3d 1092 (2012) (citing *In re the Personal Restraint of Young,* 122 Wn.2d 1, 39, 857 P.2d 989 (1993)); *In re the Detention of Morgan*, 180 Wn.2d 312, 321-22, 330 P.3d 774 (2014). Where DSHS provides authorization, RCW 71.09.250 in turn provides the secure community transitional facility (SCTF) as a location for such less-restrictive alternative.

McCuistion observed "[t]his statutory scheme comports with substantive due process because it does not permit continued involuntary

commitment of a person who is no longer mentally ill and dangerous." 174 Wn.2d at 388. *McCuistion* went further and described the scheme as "constitutionally critical." *Id.* But here, DSHS ignored this scheme.

DSHS's annual review concluded a less restrictive alternative was in Mr. Brooks's best interest and that conditions could be imposed to adequately protect the community. Despite its own annual report, DSHS failed to comply with the plain requirement of RCW 71.09.090(1) and refused to authorize Mr. Brooks to petition for a less restrictive alternative. That refusal to authorize his petition in turn precluded consideration of the SCTF as a placement for a less-restrictive alterative. That preclusion required he instead obtain an alternate placement ahead of trial lest he lose a summary judgment motion under RCW 71.09.094. That is precisely what occurred here.

DSHS's refusal to comply with the "constitutionally critical" statutory scheme renders it a hollow promise. Instead of ensuring that only those whose condition and dangerousness require total confinement, as *McCuistion* and *Morgan* believed, DSHS's application of the statute would permit total confinement even where the department's own annual report concludes it is unwarranted.

In place of the constitutionally critical scheme DSHS seeks to employ its own undefined extra-statutory criteria to determine when it will provide authorization to a committed person to seek a less restrictive alternative, even when DSHS's own report concludes total confinement is no longer necessary or appropriate. That conclusion finds no support in the case law and it is contrary to the rulings in *McCuistion* and *Morgan*. DSHS's view of its summary authority to authorize a petition on whatever criteria it wishes rather than those specifically delineated by the Legislature in the statue itself, is wholly at odds with the most basic concepts of due process. To be sure, no case from *Young* to *McCuistion* to *Morgan* has ever found the statute constitutional because all authority is vested in the bureaucratic machinations of DSHS. Instead it is the availability of the annual review and its function of determining the availability of release which ensures the constitutionality of the statute.

Courts must interpret a statute to avoid constitutional doubt. *Utter v. Building Industry Association of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015). DSHS's view that it may withhold authorization even where its own annual review concludes a less restrictive alternative is appropriate creates substantial constitutional doubt

regarding the validity of the statue. The procedure utilized by DSHS renders the annual review process hollow. Under its scheme, the annual review no longer performs the critical role of ensuring total confinement is limited to those for whom it is necessary.

RCW 71.09.090(1) mandates the department authorize the petition if it determines the confined person no longer meet the definition of a sexually violent predator or where a less-restrictive alternative is appropriate. The legislature did not leave the department to define the procedure employed in determining whether a person continues to meet the definition a sexually violent predator or whether a less restrictive alternative is appropriate. To the contrary, the Legislature provided a specific procedure by which to make that determination – the annual report. RCW 71.0.070 specifically requires the DSHS, in its annual report, to address the two criteria which govern the availability of either a release trial or a trial on a less-restrictive alternative. To avoid constitutional doubt, the statute could not possible satisfy due process if the secretary's decision to authorize a petition for release to a less-restrictive alternative is premised on undefined, extra-statutory criteria. *Utter*, 182 Wn.2d at 434. Instead, DSHS's annual review must drive that determination.

Because DSHS was required to authorize Mr. Brooks's petition under RCW 71.09.090(1), Mr. Brooks was entitled to present the SCTF as his housing placement. But for DSHS's refusal to comply with the mandate of RCW 71.09.090(1), the trial court could not have granted summary judgment. Thus, the trial court erred in granting the State's summary judgment motion. In doing so, the court derived Mr. Brooks of due process.

E. CONCLUSION

For the reasons above, the Court should reverse the order granting summary judgment and remand for a trial on appropriateness of a less-restrictive alternative.

Respectfully submitted this 21st day of May, 2015.

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