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Apr 21, 2016

Court of Appeals
Division III
State of Washington



No. 33810-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Charles Fletcher,

Appellant.

Spokane County Superior Court Cause No. 11-1-02625-7

The Honorable Judge Salvatore Cozza

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial judge erred by refusing to appoint counsel upon receipt of Mr. Fletcher's motion for appointment of counsel.

ISSUE 1: An indigent patient detained pursuant to RCW 10.77 is entitled to the assistance of appointed counsel at "any and all stages of the proceedings..." Did the trial court err by refusing to appoint counsel upon Mr. Fletcher's request?

2. The trial judge erred by failing to direct the secretary to develop a recommendation upon receipt of Mr. Fletcher's petition for conditional release.
3. The trial judge erred by summarily refusing Mr. Fletcher's petition for conditional release.
4. The trial judge erred by failing to schedule a hearing on Mr. Fletcher's petition for conditional release.

ISSUE 2: The secretary of DSHS is obligated to develop a recommendation upon receipt of a petition for conditional release. Did the trial court err by summarily refusing Mr. Fletcher's petition for conditional release instead of scheduling a hearing and directing the secretary to develop a recommendation for the court?

5. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 3: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Fletcher is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On September 1, 2015, Charles Fletcher sought conditional release from Eastern State Hospital, where he is detained pursuant to a Judgment and Order of Acquittal by Reason of Insanity. CP 4-5, 10-11. He provided copies of his petition (captioned “Motion for Conditional Release and for Appointment of Public Defender”) to Eastern State Hospital and to the Prosecuting Attorney’s office. –CP 10-11.

Rather than addressing the petition, the trial court judge directed Mr. Fletcher to apply to the Secretary of DSHS pursuant to RCW 10.77.150. The court would not consider appointing counsel or scheduling a hearing until after Mr. Fletcher had done so. CP 6. The court included a copy of RCW 10.77.150 in its letter to Mr. Fletcher.

Mr. Fletcher appealed. CP 15. Following briefing and a hearing on the issue of appealability, a Court of Appeals commissioner granted discretionary review. Commissioner’s Ruling, p. 3.

ARGUMENT

I. THE TRIAL JUDGE SHOULD HAVE APPOINTED COUNSEL, DIRECTED THE SECRETARY TO DEVELOP A RECOMMENDATION, AND SCHEDULED A HEARING ON MR. FLETCHER'S REQUEST FOR CONDITIONAL RELEASE.

A. The trial court should have appointed counsel for Mr. Fletcher.

An indigent person detained pursuant to RCW 10.77 is entitled to the assistance of appointed counsel at "any and all stages of the proceedings." RCW 10.77.020(1).

Upon receipt of Mr. Fletcher's "Motion...for Appointment of Public Defender," the trial court was obligated to appoint counsel. RCW 10.77.020(1). Instead, the court refused to even consider appointing counsel until after Mr. Fletcher had applied to the secretary for conditional release pursuant to RCW 10.77.150. CP 6.

Mr. Fletcher was entitled to the appointment of counsel at "any and all stages of the proceedings." RCW 10.77.020(1). The court should have appointed counsel.¹

The lower court's decision refusing to appoint counsel must be reversed. The case must be remanded for appointment of counsel pursuant to RCW 10.77.020(1).

¹ As noted in the Commissioner's Ruling, "Without counsel here, Mr. Fletcher had no one to assist him to apply to the Department for conditional release, as the superior court directed him to do." Ruling, p. 3.

B. The trial court should have scheduled a hearing and directed the secretary to develop a recommendation.

A person detained pursuant to RCW 10.77 may seek conditional release by petitioning the court. RCW 10.77.200(5). Upon receipt of the petition, the secretary is obligated to develop a recommendation for the court. RCW 10.77.200(5). Furthermore, the statute contemplates a “proceeding” at which

[t]he issue to be determined...is whether the patient, as a result of a mental disease or defect, is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.

RCW 10.77.200(5).

Upon receipt of Mr. Fletcher’s petition, the trial judge should have scheduled a hearing and ordered the secretary to develop a recommendation. RCW 10.77.200(5). Instead of doing so, the court incorrectly directed Mr. Fletcher to apply to the secretary for conditional release pursuant to RCW 10.77.150.²

The trial judge erred by refusing to order a hearing and by failing to direct the secretary to develop a recommendation. RCW 10.77.200(5).

² That statute provides an alternate mechanism for conditional release; however, it is not the exclusive mechanism available to patients. See RCW 10.77.200(5) (“Nothing contained in this chapter shall prohibit the patient from petitioning the court for release or conditional release.”)

The problem was compounded by the court's failure to appoint counsel to assist Mr. Fletcher, as argued above. RCW 10.77.020(1).

The trial court's error requires reversal and remand, with instructions to schedule a hearing and to direct the secretary to develop a recommendation. RCW 10.77.200(5). In addition, as argued above, the court must appoint trial counsel to assist Mr. Fletcher in pursuing conditional release. RCW 10.77.020.

II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, -- Wn. App. --, 367 P.3d 612 (2016).³

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 367 P.3d 612. The concerns identified by the Supreme Court in

³ Division II's commissioner has indicated that Division II will follow *Sinclair*. Division III has yet to decide the issue.

Blazina apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Fletcher indigent for purposes of appeal. CP 24-25. That status is unlikely to change, given his ongoing confinement at Eastern State Hospital. CP 6. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, the trial court's decision must be reversed. The case must be remanded for appointment of counsel, with instructions to schedule a hearing and to direct the secretary to develop a recommendation regarding Mr. Fletcher's request for conditional release.

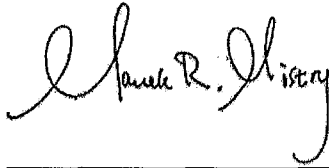
If Respondent substantially prevails, the Court of Appeals should decline to impose appellate costs in light of Mr. Fletcher's indigency.

Respectfully submitted on April 21, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Charles Fletcher
c/o Eastern State Hospital
PO Box 800
Medical Lake, WA 99022


With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org
JKaufman@spokanecounty.org

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 21, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

April 21, 2016 - 12:17 PM

Transmittal Letter

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