

FILE
COURT OF APPEALS
DIVISION II

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NO. 37993-7-II

STATE OF WASHINGTON
COURT OF APPEALS FOR THE STATE OF WASHINGTON
BY DEPUTY
DIVISION TWO

EVERETTE BURD,
Appellant

v.

HAROLD CLARKE,
Respondent.

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

The Honorable Gary Tabor, Judge

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases

In re Personal Restraint of Dutcher, 114 Wash.App. 755, 758, 60 P.3d 635 (2002) . . .2, 4
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Pentagram Corp. v. Seattle, 28 Wash. App. 219, 223; 622 P.2d 892 (1981). 3
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State v. Turner, et al., 98 Wn.2d 731, 733; 658 P.2d 658 (1983). 3
Walker v. Munro, 124 Wash.2d 402, 407, 879 P.2d 920 (1994). 3

Church of Scientology of Cal. v. United States, 506 U.S. 9, 13, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) 3

Statutes

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Other

13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER,
FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984). 3

A. REPLY ARGUMENT

The Department's response confirms that Mr. Burd brought a justiciable action, that the trial court erred, and the writ of mandamus must issue. The appellant asks the Court to order the DOC to do what it should have done long ago: obey the Legislature's command and complete the assessment of whether he meets the Dangerous Mentally Ill Offender (DMIO) criteria. See RCW 72.09.370. Contrary to how the Department characterizes the requested remedy, Mr. Burd is not trying to force the DOC to make a discretionary spending decision. Rather, Mr. Burd is asking that the Court disabuse the Department of the false belief that they have the power to write-in an "SVP exception" into a statute that has no such language.

RCW 72.09.370 is plain on its face. In the clearest of terms, the statute's use of the word "shall" commands the DOC to identify inmates for DMIO eligibility and release planning irrespective of the possibility that the offender may also become subject to an RCW 71.09 civil commitment action. This point is beyond argument and it alone provides the justification to find in Mr. Burd's favor. The Department's long-standing concession that Mr. Burd's DMIO assessment was halted because - and only because - "the King County Prosecutor's Office confirmed it would be filing probable cause documents detaining Mr. Burd in the Department of Social and Health Services (DSHS) custody under RCW 71.09" is fatal to their case. (Respondent's response brief at 2.)

Prior to 2002, the Department tried to write-in an identical "SVP exception" to the earned early release statute. The Department policy of refusing to consider release plans proposed by offenders referred for RCW 71.09 civil commitment was declared illegal in

In re Personal Restraint of Dutcher, 114 Wash.App. 755, 758, 60 P.3d 635 (2002). The Department then tried to amend its self-authored “SVP exception” to the earned early release statute. The Department adopted a policy of delaying responding to a proposed release plan until a forensic psychological evaluation was completed to determine whether the inmate met RCW 71.09 civil commitment referral criteria. This practice was also invalidated as “another unauthorized exemption from [the Department’s] obligation to timely review proposed plans on the merits. In re Personal Restraint of Liptrap, 127 Wash.App. 463, 473, 111 P.3d 1227 (2005). Still undeterred, the Department came up with another “SVP exception” scheme, whereby all earned early release proposals were summarily rejected for all offenders who had been evaluated by forensic psychologists to meet the SVP civil commitment criteria. Yet again, the Court of Appeals struck down the Department’s efforts at rewriting the statutes that bind them. In re Personal Restraint of Mattson, 142 Wash.App. 130, 172 P.3d 719 (2007). The Department has thus earned a reputation for its disregard for the law.¹

This case is no different. Because there is no escaping the fact that the Department has yet again ignored a clear legislative mandate, it attempts to shield itself from judicial scrutiny by claiming this action is moot. Legal precedent holds otherwise. This is a justiciable action because the Court can order an effective remedy. Sequim v.

¹ A recent decision reversing the way in which a trial court left an offender’s sentencing outcome to DOC discretion had this to say:

There is also the danger that the DOC may ignore an offender’s rights. In In re Personal Restraint of Dutcher, [] the DOC was statutorily required to evaluate the inmate’s plan for community custody but ignored this obligation and instead referred the offender for a civil commitment hearing. [] Since Dutcher, we have seen several situations in which the DOC has ignored a mandate.

State v. Linderud, ___ Wash.App. ___, 197 P.3d 1224, 1227 (2008), citing to Mattson and Liptrap. (Footnotes and citations omitted.)

Malkasian, 157 Wash.2d 251, 258-259, 138 P.3d 943 (2006). (“[A]n issue is not moot if a court can provide any effective relief.”).² Even though Mr. Burd is now held at a DSHS facility - rather than a DOC prison - the previously interrupted DMIO assessment may resume at any time, as it is essentially a review of an offender’s records.

The respondent DOC misstates the holding of Walker v. Munro, 124 Wash.2d 402, 407, 879 P.2d 920 (1994) to argue that in Mr. Burd’s situation, it is too late to remedy the violation of the clear legal duty imposed by RCW 72.09. However, Walker did not hold that a writ of mandamus will not issue unless the duty exists at the time the writ is sought, as the Department would have it. The case reads: “Until the time fixed for the performance of the duty has passed, there can be no default of duty.” Walker at 409, quoting State ex rel. Hamilton v. Cohn, 1 Wash.2d 54, 58-59, 95 P.2d 38 (1939). Premature requests for a writ of mandamus will be rejected because the Courts give government agencies until the very last possible minute to obey the law. Because here the time for the DOC to act has passed, a judicial remedy is needed and appropriate.

Similarly, the Department’s attempt at arguing to this Court that Mr. Burd is making a request for a discretionary allocation of resources is a mischaracterization.³ Mr. Burd is not asking the Court to order DOC how to spend public funds because RCW 72.09.370 in itself does not grant any financial benefit. Mr. Burd is asking the Court to

² See also State v. Turner, et al., 98 Wn.2d 731, 733; 658 P.2d 658 (1983); Pentagram Corp. v. Seattle, 28 Wash. App. 219, 223; 622 P.2d 892 (1981); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984) (“The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.”); Church of Scientology of Cal. v. United States, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (The availability remedy need not be fully satisfactory to avoid mootness).

³ The DOC writes: “mandamus is not available to force the Department to expend public funds in one particular manner, such as paying for Mr. Burd’s treatment, creating a support program in the community, or in securing Mr. Burd’s living arrangements.” (Respondent’s response brief at 14.)

order DOC to complete the DMIO assessment which they wrongfully interrupted. Given that the record shows that he meets the DMIO criteria, there is no reason to believe that a completed assessment will not result in a DMIO designation. But, the existence of particular services or the availability of monies to pay for such services is a completely separate matter from this lawsuit. RCW 72.09.370 establishes the duty to determine whether an offender meets the DMIO designation, not a duty to provide him with any specific programming upon his release. The statute does not allow the Department to categorically refuse to conduct a DMIO assessment of a man facing a civil commitment under RCW 71.09 just as the earned early release statutes did not allow the Department to write-in an “SVP exception.” See supra Dutcher, Liptrap, and Mattson.

B. CONCLUSION

The DOC “policy decision” cannot trump the plain language of the statute. RCW 72.09.370 sets out a clear legal duty, which the DOC willfully ignored.

Appellant Burd respectfully renews his request that this Court reverse the trial court’s summary judgment ruling and issue a writ of mandamus ordering the Department of Corrections to resume and complete the DMIO assessment in accordance with the legal obligation set out in RCW 72.09.370.

Respectfully Submitted, February 20, 2009



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| Everette Burd, |) | No. 37993-7-II |
| Appellant, |) | |
| v. |) | PROOF OF SERVICE |
| Harold Clarke, |) | |
| Respondent |) | |
| _____ |) | |

I certify that on February 20, 2009, a true and correct copy of Appellant's Reply Brief and Proof of Service was mailed by USPS to the Respondent's attorney:

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A courtesy copy was also sent by electronic mail to: amandam2@atg.wa.gov

DATED this 20th of February, 2009



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