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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

Brian Taylor-Rose,

Appellant.

Clallam County Superior Court Cause No. 12-2-01143-8

The Honorable Judge Brian P. Coughenour

Appellant's Reply Brief

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ARGUMENT

DR. FRANKLIN’S WELL-SUPPORTED OPINION PROVIDES *PRIMA FACIE* EVIDENCE THAT BRIAN TAYLOR-ROSE HAS “SO CHANGED” THROUGH TREATMENT THAT HE NO LONGER QUALIFIES FOR CIVIL COMMITMENT.

Dr. Karen Franklin concluded that Brian Taylor-Rose has “so changed” through treatment that he no longer meets criteria for commitment. CP 150. She based her opinion on his treatment records, his psychological and physiological test results, his low risk of predatory sexual violence, and his low score on the Sex Offender Treatment Intervention and Progress Scale (SOTIPS). CP 149.

Because a *prima facie* case is all that the statute requires, the case must be set for an unconditional release trial.

RCW 71.09.090(2)(c)(ii) and (4); *see In re Det. of Ambers*, 160 Wn.2d 543, 158 P.3d 1144 (2007); *Det. of Petersen v. State*, 145 Wn.2d 789, 796-797, 42 P.3d 952 (2002).

The standard “is not a stringent one;” it requires courts to “assume the truth of the evidence presented.” *State v. McCuiston*, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012). A court “may not ‘weigh and measure asserted facts against potentially competing ones.’” *Id.* (quoting *Petersen*, 145 Wn.2d at 797).

Instead, the court determines whether the asserted facts, “if believed, warrant further proceedings.” *Ambers*, 160 Wn.2d at 557. Mr. Taylor-Rose has met this low threshold. *Id.*

The State repeatedly invites the Court of Appeals to weigh Dr. Franklin’s report against recent annual reviews. Brief of Respondent, pp. 9-10, 11, 16, 17-19. Respondent justifies this request by arguing that the court should consider ““all of the evidence.””¹ Brief of Respondent, p. 9 (quoting *McCuiston*, 174 Wn.2d at 382).

The Court should decline the State’s invitation. The court may not weigh or measure one report against the other. *McCuiston*, 174 Wn.2d at 382. Instead, the court must take Dr. Franklin’s report at face value and determine if further proceedings are warranted.² *Ambers*, 160 Wn.2d at 557.

Respondent criticizes Dr. Franklin because she did not state her conclusions “until page 46 of her 48-page evaluation.” Brief of

¹ Whatever the *McCuiston* court meant by this *dicta*, it did not suggest that the court should weigh either party’s evidence against that submitted by the opposing party.

² The same is true for the facts underlying each report. The State claims that Dr. Franklin based her report on facts “that were neither accurate nor current.” See Brief of Respondent, p. 14. This does not provide a basis to overcome the prohibition against weighing competing facts. See *McCuiston*, 174 Wn.2d at 382. The State had the option of deposing Dr. Franklin and asking her if she would change her opinion when provided “accurate” or “current” facts. Having failed to do so, Respondent will have the opportunity to challenge Dr. Franklin’s conclusions on cross-examination at Mr. Taylor-Rose’s trial.

Respondent, p. 8. This is hardly unusual; the same could be said for the annual reviews submitted by the State. CP 33-70; 410-446.

Furthermore, even absent the remainder of Dr. Franklin’s report, the discussion beginning on page 46 (CP 148) establishes a substantial change through treatment. CP 148-150. After outlining her understanding of the forensic question, she recaps the patient’s course of treatment at the SCC, describes her administration of a structured instrument that measures treatment-based change, touches on his areas of weakness, and concludes with her opinion that he has so changed through treatment that he no longer meets criteria for commitment. CP 148-150.

Respondent also asks the Court to second-guess Dr. Franklin’s conclusion that Mr. Taylor-Rose has made a “substantial” change through treatment. Brief of Respondent, p. 8. According to Respondent, Dr. Franklin has “failed to articulate facts” supporting her conclusion.³ Brief of Respondent, p. 8.

This is incorrect: Dr. Franklin’s 48-page report outlines the facts she considered in reaching her determination that Mr. Taylor-Rose no longer qualifies for commitment. CP 102-150. The basis for her opinion

³ In addition, Respondent would apparently have the Court ignore the first 45 pages of the report and instead examine only Dr. Franklin’s “three-page analysis [for] facts to support a substantial change...” Brief of Respondent, p. 8. If courts were limited in this way, the State would seldom meet its own burden: in the annual review, facts supporting the authors’ conclusions are seldom packed into the final pages of their reports. *See* CP 33-70; 410-446.

include treatment records, the results of psychological and physiological testing, her risk assessment, and the Sex Offender Treatment Intervention and Progress Scale (SOTIPS). CP 101-157.

This last item (SOTIPS) is a structured instrument specifically designed to measure progress in treatment. CP 149. Respondent does not mention Dr. Franklin's use of SOTIPS. Brief of Respondent, pp. 7-19. This instrument, by itself, arguably provides sufficient support for Dr. Franklin's conclusions.

Portions of Respondent's brief are devoted to appellate counsel's own evaluation of Mr. Taylor-Rose's progress in treatment.⁴ *See, e.g.*, Brief of Respondent, p. 9 ("these facts merely indicated that although he wants to change, he has not yet changed and still does not understand..."); p. 18 ("these facts suggest... he still needs to address a number of treatment-related issues and fully engage in the therapeutic change process.") Appellate counsel's assessment of Mr. Taylor-Rose's progress cannot overcome Dr. Franklin's opinion.

Respondent also attempts to distinguish *Ambers* by pointing out that Mr. Taylor-Rose has not spent as much time in treatment as the patient in *Ambers*. Brief of Respondent, p. 10. Respondent apparently

⁴ Appellate counsel also provides a critique of Mr. Taylor-Rose's PPG result. Brief of Respondent, pp. 18-19. As with much of Respondent's argument, this may be a subject for cross-examination at trial.

believes patients must devote a certain amount of time to treatment before they can receive credit for undergoing substantial change; however, Respondent does not make clear what that period is.⁵ Brief of Respondent, p. 10.

Patients do not all start in the same position. A detainee who barely meets criteria for commitment may achieve substantial change in a short period of time, changing from one who barely meets criteria to one who *prima facie* does not. Under the State's argument, such a person would remain locked up for years without a trial, even if eligible for release.

Mr. Taylor-Rose engaged in treatment prior to his trial, and he returned to treatment "with a renewed commitment" after the verdict. CP 148. The question is not how much time he has spent in treatment; rather, the question is whether he has had a positive response to participation in treatment such that he no longer meets criteria for commitment. *See* RCW 71.09.090(4).

Respondent asserts that Dr. Franklin's report does not differentiate between Mr. Taylor-Rose's pre-commitment progress and his progress since his commitment trial. Brief of Respondent, pp. 11-12. This is untrue.

⁵ In addition, Respondent apparently finds the word "beneficial" crucial to an expert's conclusion on a patient's progress in treatment. *See* Brief of Respondent, p. 11 (noting the expert's use of that word in *Ambers* and criticizing Dr. Franklin for failing to "address how beneficial treatment had been for Taylor-Rose.")

Dr. Franklin explicitly differentiates between the treatment he undertook prior to his commitment trial and the treatment he engaged in “post-commitment (Aug. 2015-present).” CP 122-126. She also explains her understanding that the statute requires evidence that “exists since the person’s last commitment trial or LRA proceeding, of a ‘substantial change.’” CP 148. She also notes Mr. Taylor-Rose’s “renewed commitment” to treatment following his trial. CP 148.

Her report provides *prima facie* evidence that Mr. Taylor-Rose has undergone a substantial treatment-related change since his commitment trial. Furthermore, given that he was found to meet criteria for commitment at trial, Dr. Franklin’s determination that he “no longer meets the definition of a sexually violent predator” is, by itself, evidence of a substantial change in the interim. CP 150.

Respondent erroneously seeks to characterize Dr. Franklin’s report as a “collateral attack on [the] commitment.” Brief of Respondent, p. 13 (citing *McCuiston*, 174 Wn.2d at 382). Respondent bases this assertion on Dr. Franklin’s disagreement with the diagnosis reached by another expert. Brief of Respondent, p. 13.

Respondent’s argument reflects a misunderstanding of the Supreme Court’s decision in *McCuiston*. In that case, the patient sought a hearing based solely on his expert’s criticism of the initial commitment

proceeding. *McCuiston*, 174 Wn.2d at 376, 382-383. The Supreme Court rejected the request as a collateral attack. *Id.*

But nothing in *McCuiston* requires experts to agree on every diagnosis. Psychiatric medicine “is an imprecise science and is subject to differing opinions as to what constitutes mental illness.” *Matter of Det. of Belcher*, 189 Wn.2d 280, 292, 399 P.3d 1179, 1185 (2017). The subjective and evolving nature of the field ““may lead to different diagnoses that are based on the very same symptoms.”” *In re Meirhofer*, 182 Wn.2d 632, 644, 343 P.3d 731 (2015) (quoting *State v. Klein*, 156 Wn.2d 103, 120–21, 124 P.3d 644 (2005)).

A change in diagnosis does not undermine the initial commitment order. *Meirhofer*, 182 Wn.2d at 644. Here, as in *Meirhofer*, Dr. Franklin disagreed with diagnoses presented at the initial commitment trial; instead, she assigned Mr. Taylor-Rose a diagnosis of Borderline Personality Disorder and noted his problem with alcohol and drug use. CP 105, 108, 129, 140, 145, 146, 148-150. She did not claim that the initial commitment was unwarranted. CP 102-150.

Experts may point out errors made by their predecessors. This is a normal part of the process; it is not a bar to obtaining a release trial under RCW 71.09.090. *See, e.g., In re Det. of McGary*, 155 Wn. App. 771, 785, 231 P.3d 205 (2010) (a patient may “introduc[e] evidence of an erroneous

paraphilia diagnosis at a show cause hearing”); *see also Ambers*, 160 Wn.2d at 558-559 (evidence of treatment-based change merits trial, although defense expert’s opinion was also based on revisions to actuarial tables).

Mr. Taylor-Rose did not request a hearing based solely on an error in the initial diagnosis. *Cf. McCuiston*, 174 Wn.2d at 376, 382-383. He presented an expert opinion outlining positive treatment-based change. CP 101-157. Dr. Franklin’s opinion is well supported, and her conclusions are sufficient to meet the low *prima facie* threshold for trial.

When taken at face value, this evidence obligated the court to set the case for a hearing. *Ambers*, 160 Wn.2d at 558-559. The lower court’s order must be reversed. *Id.*

CONCLUSION

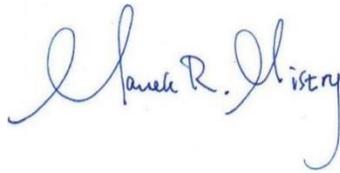
Dr. Franklin’s report provides *prima facie* evidence warranting “further proceedings.” *Ambers*, 160 Wn.2d at 557. Respondent disagrees with Dr. Franklin’s conclusions; however, this is not a basis to affirm the trial court’s erroneous decision. The Court of Appeals must reverse the Order on Respondent’s Petition for Unconditional Release trial. The case must be remanded with instructions to schedule the case for trial.

Respectfully submitted on October 2, 2018,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, 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 October 2, 2018.



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