

FILED
Court of Appeals
Division II
State of Washington
5/20/2019 12:28 PM

No. 51826-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Michael Canty,

Appellant.

Clark County Superior Court Cause No. 16-2-01450-3

The Honorable Judge Derek Vanderwood

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUE AND ASSIGNMENTS OF ERROR

1. The trial court should have considered Mr. Canty's petition for conditional release.
2. The trial court erred by concluding that it lacked authority to grant an LRA trial before the first annual review.
3. The trial court should have recognized that patients committed to the Special Commitment Center are entitled to petition for conditional release immediately after commitment.

ISSUE: Following civil commitment, may a patient immediately seek conditional release to a less restrictive alternative?

INTRODUCTION AND SUMMARY OF ARGUMENT

When Michael Canty petitioned for conditional release, the trial court refused to consider his petition. According to the trial judge, a petition for conditional release may not be brought before the court prior to the department completing its first post-commitment evaluation. The court concluded that it lacked authority to order a trial.

The civil commitment statute explicitly authorized Mr. Canty's petition. Nothing in the statute requires a patient to wait until after the first show cause hearing. The trial court should have considered the petition.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Michael Canty was civilly committed in June of 2017. CP 289. In December of that year, he petitioned for a conditional release trial (least restrictive alternative, or LRA). CP 75.

Mr. Canty brought his petition under RCW 71.09.090(2)(d), which permits a patient to seek conditional release without showing any change in condition since commitment. In support of his LRA petition, Mr. Canty filed a treatment plan, a psychological evaluation, a rental agreement,¹ GPS program details, and supporting declarations. CP 143-272.

¹ By the time the court held a show cause hearing on the petition, Mr. Canty's original housing was no longer available. He found new housing and submitted an updated petition. CP 273-275.

At the show cause hearing on Mr. Canty's petition, the trial judge refused to consider Mr. Canty's request for a trial. RP 22-28; CP 290. The court found the petition premature because Mr. Canty sought conditional release before the anniversary of commitment. CP 290 (citing *In Re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003)).

In the trial judge's view, it is improper for "[a] petition to be brought forth immediately without a single annual review being completed." RP 26. The court also suggested that petitions such as Mr. Canty's "would create a potential significant burden on the Court judicial process." RP 26.

The court apparently feared that allowing Mr. Canty to proceed would mean that "a petition can be presented at any time and any number of times to the Court for consideration." RP 26. According to the trial judge, "not having any limitation would in theory allow a party to repetitively bring petitions numerous different times." RP 26.

In its written order, the court concluded that Mr. Canty "is not entitled to consideration of an LRA until after his first annual review." CP 290. The trial judge also concluded that the court "does not have authority to grant Respondent's requested trial as DSHS has not yet conducted his first annual review." CP 290.

Mr. Canty seeks review of this decision.

ARGUMENT

Michael Canty sought conditional release six months after his civil commitment trial. His petition was authorized by statute. Nothing prevented the trial court from considering it. The court should have considered Mr. Canty's LRA proposal. The Court of Appeals should reverse and recognize a patient's right to seek conditional release immediately after commitment.

I. A PATIENT MAY IMMEDIATELY SEEK RELEASE FOLLOWING CIVIL COMMITMENT.

A. Mr. Canty's petition was authorized by statute.

Following civil commitment, patients have one opportunity to seek conditional release without showing a change in condition. RCW 71.09.090 (2)(d). The provision under which Mr. Canty petitioned ameliorates the effects of RCW 71.09.060(4). That statute bars patients from pursuing a less restrictive alternative (LRA) at the initial commitment trial, even if they would otherwise be eligible for conditional release. RCW 71.09.060(4).

Instead, if the court has not previously considered conditional release, it "*shall consider* whether release to a less restrictive alternative" is appropriate. RCW 71.09.090(2)(d) (emphasis added). The legislature

has placed no limits on when the patient may pursue conditional release under this provision. RCW 71.09.090(2)(d).

The statute is plain on its face. It does not require a patient to delay filing a petition for conditional release.

When interpreting a statute, courts look first to the provision's plain meaning, "and assume the legislature meant what it says." *In re Det. of Sease*, 190 Wn. App. 29, 47, 357 P.3d 1088 (2015) *review granted* 184 Wn.2d 1019, 361 P.3d 746, *review dismissed as improvidently granted* 366 P.3d 438 (2016). Where the statute's plain language is unambiguous, it must be "given effect according to its plain meaning." *Id.*

The provision under which Mr. Canty petitioned directs that the court "shall consider" conditional release. RCW 71.09.090(2)(d). Mr. Canty was not required to show proof of progress in treatment, or to wait for the department to conduct the yearly evaluation required under RCW 71.09.070(1).

Nothing in the civil commitment scheme requires a patient to delay filing his or her first petition for conditional release. The only restrictions on conditional release petitions relate to the initial commitment trial. *See* RCW 71.090.015; RCW 71.09.060.

Among other things,² RCW 71.09.060 provides that “[a] court has jurisdiction to order a less restrictive alternative placement only after a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section...” RCW 71.09.060(4). The provision was enacted following decisions requiring consideration of LRAs at the initial commitment trial. *See In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993); *In re Det. of Ross*, 102 Wn. App. 108, 6 P.3d 625 (2000), *rev'd sub nom. In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003).

The statute references “a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section.” RCW 71.09.60(4). The only temporal restriction in RCW 71.09.060(4) requires that any conditional release hearing ordered by the court “follow[] initial commitment.” RCW 71.09.060(4).

The “hearing ordered pursuant to RCW 71.09.090” is the trial on the patient’s conditional release petition.³ RCW 71.09.090 sets forth the show-cause procedure that can lead to such a trial. If the court finds

² The statute also restricts LRA evidence at the commitment trial. *See* RCW 71.09.060(1) (“[T]he fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention.”)

³ Instead of using the word “trial,” RCW 71.09.090 refers to “show cause hearing[s]” and a “hearing” on the issue of conditional or unconditional release. This latter “hearing” is the trial.

probable cause, “then the court shall set a hearing” on the issue of unconditional release, conditional release, or both. *See* RCW 71.09.090(c).

There are no restrictions on when such a show cause hearing can be held. RCW 71.09.090. The only timeframe set forth in RCW 71.09.090 requires the department to provide “an annual written notice of the person's right to petition the court for conditional release...” RCW 71.09.090 (2)(a). The department must file this notice along with the “annual report” prepared pursuant to RCW 71.09.070(1).⁴

A patient need not wait for notice from the department before seeking conditional release. RCW 71.09.090. Nor does the statute require a patient to wait for the department to complete and file the annual report before independently seeking conditional release. RCW 71.09.090. This is important, because the department often fails to meet its obligation to provide a timely report. *See In re Det. of Rushton*, 190 Wn. App. 358, 359 P.3d 935 (2015).

As the statute makes clear, “[n]othing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative... without the secretary's approval.” RCW 71.09.090. Courts have noted that “[a]part from the

⁴ The State “may rely exclusively upon the annual report” to meet its burden under RCW 71.09.090 (2)(b)(i).

annual review process, the confined person may independently petition the court for release at any time.” *In re Meirhofer*, 175 Wn. App. 1049 (2013) (unpublished), *aff’d*, 182 Wn.2d 632, 343 P.3d 731 (2015); *see also In re Det. of Breedlove*, 187 Wn. App. 1029 (2015) (unpublished); *In re Det. of Robinson*, 185 Wn. App. 1002 (2014) (unpublished) (“Indeed, chapter 71.09 RCW allows an individual to petition for release at any time.”)

Mr. Canty asserted his right to file such a petition. Because it was his initial conditional release petition, he was not required to show that his condition had changed since initial commitment. RCW 71.09.090(2)(d).

The provision governing Mr. Canty’s petition directs that the trial court “shall consider” conditional release “without considering whether the person’s condition has changed.” RCW 71.09.090(2)(d). Thus, there is no need for the department to evaluate the patient or to prepare a report on his or her condition.

The patient’s condition is irrelevant to the determination. RCW 71.09.090(2)(d). Instead, the relevant factors are whether the person has proposed an appropriate plan, whether the plan is in the patient’s best interests, and whether the community can be adequately protected. RCW 71.09.090(2)(d).

If the person proposes an “alternative placement meeting the conditions of RCW 71.09.092” at the show cause hearing, the only

decision facing the court is whether there is probable cause for a trial. RCW 71.09.090(2)(d). Mr. Canty filed such a proposal prior to the show cause hearing. CP 143-272. He was entitled to have the court consider his petition. RCW 71.09.090(2)(d).

The statute's plain meaning must be given effect. *Sease*, 190 Wn. App. at 47. The Court of Appeals should reverse the trial court's decision and recognize a patient's right to independently seek conditional release without waiting for the department to conduct a new evaluation and file a report. RCW 71.09.090(2)(d).

B. Petitions such as Mr. Canty's will not create a "potential significant burden" on the judiciary.

The trial judge apparently believed that considering Mr. Canty's petition would open the floodgates to successive petitions. The court feared "a potential significant burden on the Court judicial process," based on a wave of petitions "presented at any time and any number of times to the Court for consideration." RP 26. The court apparently believed that ruling in Mr. Canty's favor would "allow a party to repetitively bring petitions numerous different times." RP 26.

These concerns reflect a misunderstanding of the law governing conditional release.

Mr. Canty brought his petition under a provision that only applies “[i]f the court has not previously considered the issue of release to a less restrictive alternative.” RCW 71.09.090 (2)(d). Once the initial petition for conditional release has been heard, a patient may not pursue a second conditional release petition under that provision.

Instead, future petitions require a showing that the patient has “so changed” that he qualifies for conditional release. RCW 71.09.090 (2)(c)(ii). To meet this standard, Mr. Canty will need to provide evidence of “[a]n identified physiological change” or “[a] change in [his] mental condition brought about through positive response to continuing participation in treatment.” RCW 71.09.090(4).

This is a difficult standard to meet. *See, e.g., Meirhofer*, 182 Wn.2d at ___; *Sease*, 190 Wn. App. at 50. Contrary to the trial court’s fear, a petition cannot be “presented at any time and any number of times;” nor can a patient “repetitively bring petitions numerous different times.” RP 26.

Furthermore, any “potential [for a] significant burden” does not provide a basis to restrict the statutory right to petition for conditional release. In *Fletcher*, for example, the Supreme Court recognized a broad statutory right allowing insanity acquittees to petition for conditional release. *State v. Fletcher*, 190 Wn.2d 219, 228-234, 412 P.3d 285 (2018).

The court also recognized an expansive right to counsel. *Id.* The *Fletcher* court did not even mention the burden this might create for courts and indigent defense programs. *Id.*

Finally, it is the legislature’s prerogative to set additional limits. For example, an insanity acquittee whose administrative application for conditional release is denied “may reapply after a period of six months from the date of denial.”⁵ RCW 10.77.150(5). The legislature has not imposed any time constraints on the initial conditional release petition.

Subsequent petitions require the passage of time; however, this limitation does not apply to the initial petition brought under RCW 71.09.090(2)(d). A person who is subject to the “so changed” standard must show a qualifying change “since the person’s last commitment trial.” RCW 71.09.090 (4)(a) and (b). This applies to every petition for unconditional release, and to all but the initial petition for conditional release. RCW 71.09.090(2) and (4).

Mr. Canty is not subject to the “so changed” standard. RCW 71.09.090 (2)(d). He is not seeking unconditional release and has not previously sought conditional release.

⁵ *But see Fletcher*, 190 Wn.2d at 232 n. 11 (noting “current precedent” imposes a judicially created time bar for successive court petitions) (citing *State v. Kolocotronis*, 34 Wn. App. 613, 622-624, 663 P.2d 1360 (1983)).

Instead, his petition falls under RCW 71.09.090 (2)(d). He is not required to allege any facts arising “since [his] last commitment trial.” RCW 71.09.090 (4)(a) and (b). Nothing in Chapter 71.09 RCW required him to wait a year before seeking conditional release.

The trial court should have considered Mr. Canty’s petition. The Court of Appeals must reverse the trial court’s decision and recognize a patient’s right to petition for conditional release at any time following the initial commitment order.

C. The Supreme Court has not barred patients from seeking conditional release during the year following initial commitment.

The trial court refused to consider Mr. Canty’s petition, citing *Thorell*. CP 290. But *Thorell* did not impose restrictions beyond those set by the legislature.

The *Thorell* court addressed the legislative prohibition against conditional release at the initial commitment trial.⁶ The petitioners argued “that the statutory prohibition against considering LRAs during their commitment hearings... violate[d] their right to equal protection.” *Thorell*, 149 Wn.2d at 748.

⁶ The court addressed other issues as well, including a restriction on the kind of LRA that could be ordered at the commitment trial. *Id.*, at 721-722.

The Supreme Court found this “statutory prohibition” constitutional. *Id.*, at 751. The court “summarize[d] [its] conclusions in these consolidated cases [by making] three holdings.” *Id.*, at 766. The second of these holdings was that “LRAs need not be considered at the initial hearing.” *Id.*, at 766.

The court was not asked to determine if a petition for conditional release could be brought before the anniversary of commitment. It made no ruling on the subject. Any language in the opinion that suggests otherwise is *dicta*.⁷

Instead, the court’s focus was on the availability of conditional release at the initial commitment trial. In discussing this issue, the *Thorell* court made free use of the word “annual,” inventing phrases that do not exist in any part of Chapter 71.09 RCW.

For example, the court used the phrase “annual LRA review,” citing Laws of 2001, ch. 286, §7⁸ and RCW 71.09.090. *Id.*, at 751. The former statute does not include the word “annual,” “year,” or any other timeframe. *See* Laws of 2001, ch. 286, §7. The latter provision includes

⁷ A statement is *dicta* “when it is not necessary to the court’s decision in a case.” *State v. Burch*, 197 Wn. App. 382, 403, 389 P.3d 685, 697 (2016). *Dicta* is not binding authority. *Id.*

⁸ Amending RCW 71.09.060. Among other things, the amendment added the language limiting a court’s authority to order an LRA until “after a hearing ordered pursuant to RCW 71.09.090 following initial commitment under this section...” *See* Laws of 2001, ch. 286, §7(4); *see also* RCW 71.09.060(4).

only the limited references to annual notice and the annual report discussed above. RCW 71.09.090.

Similarly, the *Thorell* court used the phrase “annual LRA petition provision,” to refer to RCW 71.09.092 and RCW 71.09.096. But RCW 71.09.092 does not include the word “annual,” “year,” or any other timeframe. RCW 71.09.092. The other statute referenced by the court—RCW 71.09.096—requires reviews at least once every year *after* the patient has been conditionally released. RCW 71.09.096. Nothing in either provision restricts a patient’s ability to petition for conditional release during the first year of commitment.

Based on these untethered references to the word “annual,” the *Thorell* court went on to say that patients “are not entitled to consideration of LRAs until their first annual review.”⁹ *Id.*, at 751. According to the court, this is “[b]ecause of [the] restriction on the trial court” imposed by RCW 71.09.060(4) and “the annual LRA review provision, RCW 71.09.090.” *Id.*, at 751.

As noted, these statutes do not limit review hearings to one per year or require patients to delay their initial conditional release petitions.¹⁰

⁹ See also *Thorell*, 149 Wn.2d at 752, 753, 757, 764. Even the dissent used the phrase “first annual review.” *Thorell*, 149 Wn.2d at 775 (Alexander, C.J., dissenting).

¹⁰ Indeed, a limitation on review hearings would undermine the legislature’s directive to evaluate patients “*at least once every year.*” RCW 71.09.070(1) (emphasis added).

Instead, they prohibit consideration of conditional release at the initial commitment trial, vest the court with jurisdiction to order conditional release after a trial, and outline the show-cause procedure that leads to such a trial. RCW 71.09.060(4); RCW 71.09.090.

The court's casual use of the phrase "annual review" was apparently based on its assumption that the issue would not arise during the first year of commitment.¹¹ The court did not, and could not, amend RCW 71.09.090 to "prohibit [patients] from otherwise petitioning the court for conditional release to a less restrictive alternative... without the secretary's approval." RCW 71.09.090(2)(a).

A patient may bring such a petition whenever he or she can "propose[] a less restrictive alternative meeting the conditions of RCW 71.09.092." RCW 71.09.090 (2)(d).¹² The initial petition may be brought without any showing of a change in condition. RCW 71.09.090 (2)(d). Nothing in Chapter 71.09 requires a patient to wait until the anniversary of commitment.

The *Thorell* court's passing comments on the subject are *dicta*. The court addressed equal protection arguments; it did not engage in statutory interpretation. None of the patients in *Thorell* filed LRA petitions seeking

¹¹ The court did not mention RCW 71.09.090(2)(d) or Laws of 2001, Ch. 286 §9, the provision under which Mr. Canty petitioned.

¹² See also RCW 71.09.090 (2)(b)(ii)(B)(II).

conditional release, and the court made no mention of RCW 71.09.090(2)(d), the provision applicable to Mr. Canty.

Mr. Canty's proposal met the conditions outlined in RCW 71.09.090(2)(d). CP 75-275. He was entitled to consideration of his petition. RCW 71.09.090(2)(d). The Court of Appeals should reverse the trial court's decision and recognize a patient's right to bring a petition for conditional release prior to the anniversary of commitment.

II. THE COURT OF APPEALS SHOULD ADDRESS THE MERITS OF THIS CASE DESPITE ITS MOOTNESS.

Courts do not generally consider cases that are technically moot. *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015). However, a reviewing court may decide a moot appeal if it poses a question of "continuing and substantial public interest." *Id.* Courts consider three factors: the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question. *Id.*, at 330-331. Courts "may also consider the level of adversity between the parties." *Id.*, at 331.

Here, each factor favors review, even though Mr. Canty has passed the anniversary of commitment. The issue raised by Mr. Canty turns on the proper interpretation of RCW 71.09.060(4) and RCW 71.09.090

(2)(d). Cases “involving... interpretation of statutes are public in nature and provide guidance to future public officials.” *Id.*, at 331. The first two factors weigh in favor of review.

Furthermore, the issue raised by Mr. Canty is likely to recur. *See Id.*, at 330-331. Any patient who is eligible for conditional release at the time of commitment may wish to pursue a less restrictive alternative as soon as possible.

Indeed, nothing prevents a patient from submitting a petition immediately following commitment, assuming the proposed LRA meets the requirements of RCW 71.09.092. RCW 71.09.090 (2)(d). Thus, for example, a patient may stipulate to commitment with the understanding that conditional release will be considered after the commitment order is entered.

Without an authoritative determination, cases will continue to present the issue raised here. Accordingly, the third factor also favors review. *Id.*

Finally, the “level of adversity between the parties” weighs in favor of review. *Id.*, at 331. The State continues to hold Mr. Canty at the Special Commitment Center. Unless the State agrees to release him, the parties will remain in opposition.

For all these reasons, the Court of Appeals should address the issue presented on its merits. *Id.*

CONCLUSION

Although the legislature has barred consideration of less restrictive alternatives at the initial commitment trial, it has afforded patients one opportunity to seek conditional release thereafter without showing a change in condition. RCW 71.09.090(2)(d).

Mr. Canty filed a petition that met the requirements of this statute. The trial court should have considered his petition. Nothing in Chapter 71.09 RCW requires a patient to wait until the anniversary of commitment to seek conditional release. Nor has the Supreme Court imposed any such requirement.

A trial court faced with a petition brought under RCW 71.09.090(2)(d) “shall consider whether release to a less restrictive alternative” is appropriate. RCW 71.09.090(2)(d). The court refused to do so in Mr. Canty’s case.

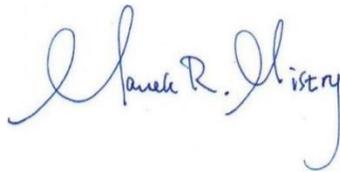
The trial court’s order must be reversed. The Court of Appeals should recognize a patient’s right to seek conditional release immediately following commitment.

Respectfully submitted on May 20, 2019,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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

Handwritten signature of Manek R. Mistry in blue ink.

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Michael Canty
McNeil Island Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

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

Office of the Attorney General
seanw1@atg.wa.gov
crjsvpef@atg.wa.gov
kellyp@atg.wa.gov
kristie.barham@piercecounty.wa.gov
pcpatcecf@piercecountywa.gov

I filed the Appellant's Opening 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 May 20, 2019.



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

BACKLUND & MISTRY

May 20, 2019 - 12:28 PM

Transmittal Information

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