

FILED
Court of Appeals
Division II
State of Washington
8/28/2019 10:01 AM

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 Reply Brief

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ARGUMENT

The statutes governing civil commitment authorize patients to seek conditional release. Residents have one chance to seek conditional release without showing any change in condition since the initial commitment trial. This ensures that those who can safely receive treatment in the community are not unnecessarily detained.

The trial judge erroneously believed he lacked authority to consider Mr. Canty's petition. This is incorrect: the statute does not impose any waiting period. Instead, it authorizes a detainee to seek conditional release at any time following the initial commitment. The trial court's decision must be reversed.

I. MR. CANTY WAS ENTITLED TO SEEK CONDITIONAL RELEASE FOLLOWING ENTRY OF THE INITIAL COMMITMENT ORDER.

A person facing civil commitment may not argue in favor of conditional release at the initial commitment trial. RCW 71.09.060(4). Instead, following the initial commitment, each patient has one opportunity to pursue a less restrictive alternative placement without showing a change in condition.¹ RCW 71.09.090 (2)(d).

¹ Subsequent petitions are limited by the requirements of RCW 71.09.090(4).

Nothing in the statute requires a patient to wait until after the first annual review. RCW 71.09.090(2)(d). Nor does any other statutory provision impose such a waiting period.

Respondent does not point to any statutory provision requiring patients to wait a year before seeking conditional release. Brief of Respondent, pp. 11-28. Nor does Respondent cite any case addressing a petition filed before the first annual review. Brief of Respondent, pp. 11-28.

Instead, Respondent relies primarily on *dicta* from two Supreme Court decisions, and on lower court decisions repeating that *dicta*. Brief of Respondent, pp. 11-15 (citing *In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003), and *In re Detention of Brooks*, 145 Wn.2d 275, 287, 36 P.3d 1034 (2001), *overruled by Thorell*, 149 Wn.2d at 724)). But contrary to Respondent's argument, the *Brooks* decision actually supports Mr. Canty's position.²

The *Brooks* court pointed out that a patient need not wait a full year prior to petitioning for conditional release.³ First, the court noted that

² In addition, *Brooks* was based on the statute as it existed prior to enactment of RCW 71.09.090(2)(d), the provision upon which Mr. Canty based his petition. *See* Laws of 2001 Ch. 286 §9. The provision was not enacted until after the court heard argument in June of 2000.

³ The *Brooks* court was not faced with a petition for conditional release filed prior to the anniversary of commitment.

the committed person “may either wait one year *or may petition for consideration for release to an LRA after a period of time considerably shorter than one year.*” *Brooks*, 145 Wn.2d at 291 (emphasis added).

Consistent with this language, Mr. Canty filed his petition “after a period of time considerably shorter than one year.” *Id.*; CP 75, 289.

Similarly, the *Brooks* court pointed out that the “the period of evaluation is usually one year” following commitment “unless the SVP files a petition for release, *in which case the period may be substantially less than one year.*” *Brooks*, 145 Wn.2d at 292 (emphasis added). Just as the *Brooks* court contemplated, Mr. Canty filed a petition “substantially less than one year”⁴ prior to the anniversary of his commitment. *Id.*; CP 75, 289.

Respondent’s reliance on *Brooks* apparently stems from that court’s discussion of petitions authorized by the secretary. Citing RCW 71.09.090(1), the court pointed out that a person cannot seek release based on the annual report “until such a report was provided to the court one full year after the SVP is committed.”⁵ *Id.*, at 287 and n. 2. Petitions authorized by the secretary *do* require issuance of the annual report and

⁴ *Id.*, at 292.

⁵ Respondent relies on this language but fails to note the citation to RCW 71.09.090(1). Brief of Respondent, p. 13. RCW 71.09.090(1) is not at issue in Mr. Canty’s case.

thus *do* require the patient to wait until the annual review’s completion.
RCW 71.09.090(1).

However, as the *Brooks* court pointed out, RCW 71.09.090(2) “allows the committed person to petition on his own for release.” *Id.*, at 291. Mr. Canty is not relying on authorization from the secretary under RCW 71.09.090(1). Instead, he is relying on RCW 71.09.090(2)(d).

The language in *Brooks* that provides the basis for Respondent’s position does not apply here. Instead, the *Brooks* court’s discussion of RCW 71.09.090(2) provides the relevant framework. *Id.*, at 291-292. That discussion makes clear that a patient may seek conditional release “after a period of time considerably shorter than one year.” *Id.*, at 291

Respondent makes no mention of this portion of the *Brooks* opinion. Brief of Respondent, pp. 11-15.

In contrast to *Brooks*, the *Thorell* court did not mention RCW 71.09.090(2). *Thorell* does not discuss a patient’s right to file a petition under RCW 71.09.090(2)(d).⁶ Nothing regarding that provision can be gleaned from *Thorell*.

The issue addressed in *Thorell* was “whether the fact finder must consider less restrictive alternatives (LRAs) to total confinement

⁶ As noted, this provision was enacted after the court heard argument in *Brooks*.

during the initial commitment hearing.”⁷ *Thorell*, 149 Wn.2d at 730 (emphasis added). The court did not address whether a patient could file a petition prior to the first anniversary of commitment. The court’s use of the word “annual” in *dicta* throughout the opinion does not relate to RCW 71.09.090(2), the provision under which Mr. Canty petitioned. See Appellant’s Opening Brief, pp. 12-16

Respondent discusses three Court of Appeals cases that were resolved by the *Thorell* decision. Brief of Respondent, pp. 15-17. None of the three cases involved a petition for conditional release filed prior to the first annual review. See *State v. Hoisington*, 123 Wn. App. 138, 144, 94 P.3d 318 (2004) (discussing LRA issues at initial commitment trial); *In re Det. of Halgren*, 124 Wn. App. 206, 98 P.3d 1206, 1216 (2004), *aff’d*, 156 Wn.2d 795, 132 P.3d 714 (2006) (same); *In re Det. of Skinner*, 122 Wn. App. 620, 94 P.3d 981 (2004) (addressing trial court’s order bifurcating initial trial into commitment and LRA phases in the absence of LRA petition). Any suggestion in these cases that the statute requires a patient to delay the initial LRA petition is therefore *dicta*. See Mr. Canty’s Motion to Modify, pp. 11-12.

⁷ In both *Brooks* and *Thorell*, the court addressed other issues that are not relevant here.

Finally, the State engages in a lengthy and convoluted argument in which it attempts to find a waiting period somewhere in the statute.⁸ Brief of Respondent, pp. 17-28. At the heart of this argument is the assumption that a patient may only petition for conditional release by “mak[ing] this election on the waiver of rights form.” Brief of Respondent, p. 21.

According to Respondent, “the waiver of rights form dictates whether a show cause hearing occurs.” Brief of Respondent, p. 22.

This is incorrect.

It is the statute, not the waiver form, that dictates whether a show cause hearing occurs. The statute’s waiver provision outlines only one of several mechanisms for consideration of a patient’s continued detention.

The statute explicitly guarantees that “[n]othing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release.” RCW 71.09.090(2)(a). Nor is there any provision or court rule that prohibits a patient from independently noting a hearing for consideration of such a petition.

Under Respondent’s argument, a patient could *never* file a petition or independently schedule a show cause hearing, even after the first anniversary of commitment. Respondent’s interpretation of the statute

⁸ In support of its argument, Respondent lists cases that have “summarized” the statute. Brief of Respondent, pp. 26-27. None of the cited cases involved a petition filed prior to the anniversary of commitment. Accordingly, these “summaries” are *dicta*.

would apply to any LRA request, including one filed years after the initial trial. Instead of petitioning for conditional release, the patient could only request an LRA by failing to waive the right to petition. Brief of Respondent, pp. 20-22.

The statutory scheme is much more straightforward than Respondent suggests. As the *Brooks* court noted, a patient “may either wait one year or may petition for consideration for release to an LRA after a period of time considerably shorter than one year.” *Brooks*, 145 Wn.2d at 291. When the person files a petition prior to the first annual review, the period between commitment and the show cause hearing “may be substantially less than one year.” *Id.*, at 292.

In this case, Mr. Canty exercised his right to file a petition. He was not required to wait until his first annual review. Instead, proceeding under RCW 71.09.090(2)(a) and (d), he petitioned “after a period of time considerably shorter than one year.” *Id.*, 145 Wn.2d at 291.

The trial court’s decision must be reversed. The Court of Appeals should hold that Mr. Canty was entitled to seek conditional release prior to the anniversary of his initial commitment.

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

Mr. Canty rests on the argument set forth in Appellant's Opening Brief.

CONCLUSION

The legislature has afforded committed persons the right to petition for conditional release. The civil commitment statute does not impose a waiting period. Mr. Canty properly petitioned for conditional release under RCW 71.09.090(2). The trial court's refusal to consider his petition must be reversed.

Respectfully submitted on August 28, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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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 August 28, 2019.



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August 28, 2019 - 10:01 AM

Transmittal Information

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Appellate Court Case Title: In re the Detention of: Michael Canty
Superior Court Case Number: 16-2-01450-3

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