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No. 51867-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re Detention of A.O.

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

The Honorable Craig Adams

BRIEF OF APPELLANT

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A. INTRODUCTION

Involuntary commitment is “a massive curtailment of liberty.” *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed.2d 394 (1972). The trial court found that appellant Anne Overbey was gravely disabled as a result of a mental disorder and ordered up to 90 days of involuntary commitment at Western State Hospital. The record substantiates that the court’s finding is not supported by clear, cogent, and convincing evidence that it is highly probable that Overbey is gravely disabled. Consequently, the court’s involuntary commitment order must be vacated.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that appellant Anne Overbey is gravely disabled.

2. In the event the State substantially prevails on appeal this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Former RCW 71.05.020(17) defines gravely disabled as a condition in which a person, as a result of a mental disorder, manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over her actions and is not receiving such care as is essential for her health or safety. Did the trial court

err in finding that Overbey is gravely disabled where the statutory requirement is not satisfied by clear, cogent, and convincing evidence?

2. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Overbey is presumably still indigent where there has been no evidence provided to this Court, and there is no reason to believe, that Overbey's financial condition has improved or is likely to improve?

D. STATEMENT OF THE CASE

1. Procedure

On November 27, 2017, the Pierce County Superior Court dismissed without prejudice a charge of second degree criminal mistreatment of a child against Anne Overbey. The court found that Overbey was not competent to stand trial and ordered a civil commitment evaluation at the state hospital. CP 22-23.

On December 6, 2017, Dr. Janene Dorio, Psy.D., and Dr. Glenn Morrison, D.O., of Western State Hospital, filed a petition for 180 Day Involuntary Treatment. CP 1-21.

At a commitment hearing on December 19, 2017, the State proceeded only the grounds that Overbey is gravely disabled. Commissioner Craig Adams heard from Dr. Dorio, Overbey's husband, and her brother-in-law. The court found that Overbey is gravely disabled as a

result of a mental disorder and ordered up to 90 days of intensive inpatient treatment at Western State Hospital. CP 28-31. Overbey filed a Motion to Revise the Order in Pierce County Superior Court, which the court denied with exceptions. CP 32-48, 83-84.

Following a review hearing on February 8, 2018, to ascertain medical and home services for Overbey, she was released from Western State Hospital on March 29, 2018. 02/08/18 RP 2-18; Supp. CP ____ (Notice of Release, 03/29/18).

Overbey filed a timely notice of appeal. CP 93-95.

2. Testimony ¹

Dr. Dorio interviewed Overbey on December 4, 2017. She also reviewed records and reports by Overbey's doctors and spoke with Overbey's nurse practitioner, treatment providers at the hospital, and husband. 12/19/17 RP 3. She diagnosed Overbey with unspecified neurocognitive disorder, a history of cerebral vascular accident and hypertension, ruling out neurological disorder. 12/19/17 RP 4. Overbey's symptoms included memory impairments; disjointed thoughts and speech;

¹The verbatim report of proceedings of the commitment hearing was filed in Pierce County Superior Court on January 9, 2018, and has been designated as Supplemental Clerk's Papers along with the filing of appellant's opening brief. The hearing is referred to by date and page number.

laughing and smiling at inappropriate times; poor insight and judgment; and a history of impulsive behavior. 12/04/17 RP 4.

Dorio learned from Overbey's nurse practitioner who saw her on October 2016, that cognitively she appeared to be functioning at least in the low average range. She could form full ideas and full sentences very fluidly and cohesively. Since that time, Overbey appears to be functioning cognitively at a much lower level than low average. Her ideas are much more disjointed and reflect confusion. 12/19/17 RP 5-6.

Dorio opined that if Overbey were released without any support in the community, she could not take care of her basic needs of health and safety because she needs one to one monitoring within arm's reach at all times. Her treatment providers at the hospital help her with activities of daily living and she has trouble ambulating due to a series of strokes. 12/19/17 RP 7-9. Overbey needs a higher level of professional care beyond what a family member could provide. 12/019/17 RP 11-12. A social worker informed Dorio that Overbey could undergo a home and community services study to evaluate her level of cognitive and physical disabilities, consider the current support in her home, and determine what services are available. 12/19/17 RP 10-11.

Dorio acknowledged that a home and community services study and neurocognitive tests could be conducted while Overbey is at home.

12/19/17 RP 13-14, 19. Overbey's chart at Western State Hospital reflected that her behavior was very good; she was cooperative, pleasant, polite, and socially appropriate; engaged in classes; and participated in cleaning her room and making her bed. 12/19/17 RP 14-15. When Overbey lived at home, there was no indication that she was not taking her medication, she appeared well-nourished, and Dorio was not aware of any medical issues that were not attended to or any problems that arose. 12/19/17 RP 15-16, 19. Overbey's doctor reported that she appeared to have average intelligence and he did not prescribe any psychotropic medication or recommend competency restoration. 12/19/17 RP 16-17.

Lawrence Overbey ² has been married to his wife for almost three years and they have a young daughter. 12/19/17 RP 34. He quit his job in August 2016 to take care of his family and things are going well. Overbey is able to feed herself and she "made up some pretty good dishes too." 12/19/17 RP 35-36. She toilets herself and showers with help getting in and out of the bathtub. 12/19/17 RP 34-35. Lawrence has been taking good care of Overbey and does not have any immediate concerns but believed that home services would be helpful with him at home. 12/19/17 RP 36-38.

² For clarity, Lawrence Overbey will be referred to as Lawrence.

Morton Perry, Lawrence's brother, sees the family three times a week. 12/19/17 RP 24-25, 28, 32. About two years ago, Overbey suffered a stroke and a year later she slipped and fell on ice outside their apartment. As a result of a concussion from the fall, she was "very disabled" but her cognitive function "was about the same." 12/19/17 RP 25-27. Lawrence quit his job in August 2016 to stay home with his family and has taken good care of Overbey and their daughter. 12/19/17 RP 27-29. Church members visit at least twice a week to keep Overbey involved in community activities and help the family with errands. Quite a few of the sisters from the church are retired and they are dedicated to helping families in need. One of them has been trained in nursing and was a caretaker. Lawrence or a sister would be within arm's length of Overbey at all times. 12/19/17 RP 29-32. "Things were going fine." 12/19/17 RP 30.

3. Ruling

Stating that it must follow the statute (former RCW 71.05.020(17)), the trial court found that prong A was not met because Overbey is not in danger of serious harm from a failure to provide for her essential needs of health or safety. However, the court found that prong B was met based on Dr. Dorio's testimony that there are significant cognitive and memory deficits that are getting greater; disjointed thoughts and inappropriate affect; poor insight and judgment; lower level of intelligence; increasing impulsive

behavior; and inability to care for herself without one on one care. 12/19/17 RP 44-45. The court concluded that Overbey is gravely disabled and ordered up to 90 days of intensive inpatient treatment at Western State Hospital. CP 28-31.

E. ARGUMENT

1. THE TRIAL COURT’S ORDER MUST BE VACATED BECAUSE ITS FINDING THAT OVERBEY IS GRAVELY DISABLED IS NOT SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE.³

Involuntary commitment for mental disorders is a significant deprivation of liberty that requires due process protection. *In re Matter of McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984)(citing *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). Mental illness alone is not a constitutionally adequate basis for involuntary commitment. *In re LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986)(citing *O’Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)). Thus, the State “cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family

³ Although this commitment has expired, because an involuntary commitment order may have adverse consequences on future involuntary commitment determinations, this issue is not moot. *In re Detention of M.K.*, 168 Wn. App. 621, 625-30, 279 P.3d 897 (2012).

members or friends.” *LaBelle*, 107 Wn.2d at 201 (citing *O’Connor*, 422 U.S. at 576)).

The burden of proof at involuntary commitment proceedings is by clear, cogent, and convincing evidence, which means the ultimate fact in issue must be shown by evidence to be “highly probable.” *LaBelle*, 107 Wn.2d at 209 (citing *In re Pawling*, 101 Wn.2d 392, 399, 679 P.2d 916 (1984)). Where the trial court has weighed the evidence, appellate courts review whether substantial evidence supports the trial court’s findings and, if so, whether the findings support the court’s conclusions of law. *Id.* (citing *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982)). Appellate courts do not disturb the trial court’s finding of grave disability if supported by substantial evidence which the court could reasonably have found to be clear, cogent, and convincing. *Id.*

Former RCW 71.05.020(17) defines gravely disabled as:

a condition in which a person, as a result of a mental disorder: (a) is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

Under former RCW 71.05.020(17)(b), the State must provide:

a factual basis for concluding that an individual “manifests severe [mental] deterioration in routine functioning.” Such evidence must include recent proof of significant loss of cognitive or volitional

control. In addition, the evidence must reveal a factual basis for concluding that the individual is not receiving or would not receive, if released, such care as is essential for his or her health or safety. It is not enough to show that care and treatment of an individual's mental illness would be preferred or beneficial or even in his best interests. To justify commitment, such care must be shown to be *essential* to an individual's health or safety and the evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered.

Furthermore, the mere fact that an individual is mentally ill does not mean that the person so affected is incapable of making a rational choice with respect to his or her need for treatment. Implicit in the definition of gravely disabled under RCW 71.05.020(b) is a requirement that the individual is *unable*, because of severe deterioration of mental functioning, to make a rational decision with respect to his need for treatment. This requirement is necessary to ensure that a causal nexus exists between proof of "severe deterioration in routing functioning" and proof that the person so affected "is not receiving such care as is essential for his or her health and safety."

LaBelle, 107 Wn.2d. at 208.

The record here substantiates that the evidence is insufficient to establish that Overbey is gravely disabled. Dr. Dorio described the symptoms that led to diagnosing Overbey with an unspecified neurocognitive disorder and she opined that Overbey appears to be cognitively functioning at a much lower level than a year ago. When asked if that would indicate a progression of her disorder, Dr. Dorio responded that it could but it is unclear right now without updated medical assessments. 12/19/17 RP 4-5. In light of Dorio's admission that her observations are inconclusive, her testimony fails to provide proof of recent

significant loss of cognitive or volitional control. Dr. Dorio testified further that Overbey could not take care of her basic needs of health and safety if released without any support in the community because she requires one on one monitoring within arm's length. When asked why the one on one monitoring is necessary, Dorio responded that Overbey has significant issues with ambulation and she has an unsteady gait and consequently has trouble showering and changing clothes due to a series of strokes. 12/19/17 RP 7-9. Dorio's observation of Overbey's physical decline fails to provide a factual basis for concluding that Overbey manifests severe mental deterioration in routine functions. Moreover, she recognized that the one on one monitoring had nothing to do any behavioral problems because Overbey's behavior in the hospital has been very good. 12/19/17 RP 14-15.

Dorio concluded that Overbey is not ready for a less restrictive alternative because she needs a higher level of professional care and a home and community services study could be conducted to determine what services could be provided given her current cognitive and physical disabilities. 12/19/17 RP 10-13. Importantly, Dorio acknowledged that the home and community services study could be done while Overbey is at home. 12/19/17 RP 13-14. Consequently, her testimony fails to show that commitment was essential to Overbey's health or safety, and furthermore,

she did not indicate any harmful consequences likely to follow if Overbey was permitted to return home.

Contrary to Dorio's opinion that Overbey needed a level of care beyond what a family member could provide, Overbey's husband Lawrence, who quit his job to take care of his family, explained that since he has been home "[t]hings are going well." 12/19/17 RP 34-35. Overbey's brother-in-law, Morton Perry, who visited three times a week testified that Lawrence or sisters from their church who help families in need were at the home at all times:

COATS: . . . Is there anyone at the home who could be within arm's length at all times with Ms. Overbey?

PERRY: Oh yeah.

COATS: At all times?

PERRY: At all times

COATS: 24 hours a day?

PERRY: 24 hours a day.

COATS: So if her husband needs to go to shopping, how would that work?

PERRY: He usually takes Laura along.

COATS: Um-hum.

PERRY: When he goes shopping. But if he, if he, if he decides not to there's always a sister that will come and stay with Laura. Because we have quite a few sisters that are retired.

COATS: Um-hum.

PERRY: And uh, they're like uh missionaries so to say.

COATS: Um-hum.

PERRY: And uh, that kind of outreach is what they do.

COATS: Are any of them uh, has been trained in nursing care?

PERRY: Uh one of them uh, has been trained in nursing care. She was a caretaker as well. Yes.

COATS: And what is her relationship to the family?

PERRY: A member, church member.

12/19/17 RP 29-32.

The State cannot constitutionally confine a nondangerous individual whose welfare is assured by the help of responsible family members or friends. *O'Connor*, 422 U.S. at 576.

The Supreme Court in *LaBelle* emphasized that implicit in the definition of gravely disabled under RCW 71.05.020(b) is a requirement that the individual is *unable*, because of severe deterioration of mental functioning, to make a rational decision with respect to the individual's need for care. *LaBelle*, 107 Wn.2d. at 208. There was no such evidence here. To the contrary, Dr. Dorio acknowledged that Overbey was taking her medication and she was well-nourished and Dorio was not aware of any medical issues that were not attended to at home. While at the hospital, Overbey was cooperative and pleasant, participated in the classes, and helped clean her room and make her bed. 12/19/17 RP 14-16. Overbey was clearly able to make rational decisions about her care.

As the Supreme Court cautioned, "there is a danger that excessive judicial deference will be given to the opinions of medical health professionals thereby effectively insulating their commitment recommendations from judicial review. *LaBelle*, 107 Wn.2d. at 207. The record substantiates that Dr. Dorio's opinion failed to establish by clear,

cogent, and convincing evidence that it was highly probable that Overbey was gravely disabled. The trial court's involuntary commitment order must therefore be vacated.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE OVERBEY REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs "is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all." The Court emphasized that the authority "is permissive" as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the "court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1)(emphasis added).

Accordingly, in the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Overbey is indigent. The trial court found that Overbey is entitled to appellate review at public expense due to her indigency and entered an Order of Indigency. CP 100-01. This Court should therefore presume that Overbey remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court, and there is no reason to believe, that Overbey's financial condition has improved or is likely to improve. Overbey is therefore presumably still indigent and this Court should exercise its discretion to not award costs.

F. CONCLUSION

For the reasons stated, this Court should vacate the trial court's involuntary commitment order.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because Overbey remains indigent.

DATED this 8th day of October, 2018.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Anne Overbey

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail a copy of the document to which this declaration is attached to the Attorney General's Office, P.O. Box 40124, Olympia, Washington 98504-0124 and Anne Overbey, 12809 47th Avenue SW, Apt. B14, Lakewood, Washington 98499.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of October, 2018.

/s/ Valerie Marushige
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