

FILED
Court of Appeals
Division II
State of Washington
12/13/2018 11:24 AM

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT'S ORDER MUST BE VACATED BECAUSE ITS FINDING THAT A.O. IS GRAVELY DISABLED IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The State incorrectly asserts in its Counterstatement of Facts that “the commissioner made the following findings of fact,” citing CP 30. Brief of Respondent at 7. The “findings of fact” listed by the State are taken from the “Facts in Support,” not the “Findings of Fact.” *See* CP 28-31 (Findings, Conclusion, and Order Committing Respondent for Involuntary Treatment attached as an appendix). The “Facts in Support” states that “[t]he Court was advised of the Respondent’s prior hospitalizations and detentions as follows” and summarizes the testimony of the Petitioner and Declaration in Support of Petition. CP 30. The court’s actual “Findings of Fact” are on the previous page. CP 29. Consequently, the State’s argument that because A.O. did not challenge the findings of fact they are verities on appeal fails. Brief of Respondent at 8-9.

Furthermore, the State relies on its misstatement of the “findings of fact” to argue that the “evidence produced at the commitment hearing on December 9, 2017 hearing and the unchallenged findings of fact by the trial court support its conclusion of law that A.O. is gravely disabled.” Brief of Respondent at 9-12. Importantly, the State fails to cite to the verbatim report of proceedings of the commitment hearing and cites only to the

“Facts in Support” at CP 30.¹ The State’s entire argument which is mistakenly based on “unchallenged findings of fact” is misguided and should be rejected by this Court. As argued in appellant’s opening brief, the trial court’s order must be vacated because its finding that A.O. is gravely disabled is not supported by substantial evidence. *In re LaBelle*, 107 Wn.2d 196, 207-08, 28 P.2d 138 (1986).

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

The State acknowledges that the trial court found that A.O. is indigent and offers no evidence to the contrary. The State also agrees that this Court has the discretion whether to award costs and takes no position on the matter. Brief of Respondent at 12. Accordingly, in the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because A.O. remains indigent. RAP 14.2.

B. CONCLUSION

For the reasons stated here and in appellant’s opening brief, this Court should vacate the trial court’s order.

¹ RAP 10.3(6) requires “argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record.”

In the event the State substantially prevails on appeal, this Court should not award costs because A.O. remains indigent.

DATED this 13th day of December, 2018.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant

DECLARATION OF SERVICE

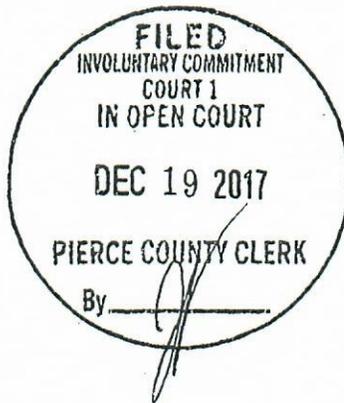
On this day, the undersigned sent by U.S. Mail a copy of the document to which this declaration is attached to the Attorney General's Office, P.O. Box 40124, Olympia, Washington 98504-0124.

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

DATED this 13th day of December, 2018.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
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APPENDIX



Superior Court of Washington
County of Pierce

In re the Detention of: <u>Anne R. Overbey</u> Respondent	Case No. <u>17-6-01408-7</u> Findings, Conclusions, and Order Committing Respondent for Involuntary Treatment
Petitioners: Glenn Morrison, D.O. and Janene Dorio, Psy.D.	<input checked="" type="checkbox"/> 90-day commitment (FNOR 90) <input type="checkbox"/> 180-day commitment (FNOR 180)

Hearing

- The court held a hearing on the petition for up to **90 Days** **180 Days** of involuntary treatment:
At the hearing:
 - Respondent appeared in person did not appear
 - Respondent waived his/her appearance
 - Separate appearance waiver has been filed.
 - Respondent has orally waived his/her appearance to defense counsel, and the court accepts this waiver.
 - The Court separately finds Respondent has waived his/her appearance.
 - Petitioner appeared and was represented by Sarah Coats, AAG.
 - Respondent's Attorney, Janene Gore, appeared.
- The Court heard testimony from and considered evidence per the Clerk's Memorandum of Journal Entry.
- In addition to the findings of fact and conclusions of law written below, the court incorporates by reference the oral findings of fact and conclusions of law.

Findings of Fact

The court makes the following findings of fact by clear cogent and convincing evidence:

1. Medication Rights.

- The Respondent was advised of the right to refuse medication 24 hours prior to the hearing of this petition and those rights were respected.

2. Reason/s for Commitment. Respondent suffers from a mental disorder. The diagnosis is Unspecified Neurocognitive Disorder; history of cerebral vascular incident with R/O of neurological disorder.

The Respondent Has a Developmental Disability.

Felony Charges Dismissed.

- The Respondent was determined to be incompetent and felony charges were dismissed. Respondent committed the following acts _____ which constitute the felony/felonies of _____ within the meaning of RCW 71.05, and as a result of a mental disorder, Respondent presents a substantial likelihood of repeating similar acts.

- The acts Respondent committed constitute a violent offense under RCW 9.94A.030.

- Respondent is in custody pursuant to RCW 71.05.280(3) and as a result of a mental disorder continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior.

- The Court previously made a special finding that the underlying offense was a violent offense under RCW 9.94A.030.

- During the current period of court ordered treatment has threatened, attempted, or inflicted physical harm upon the person of another, or substantial damage upon the property of another, and as a result of a mental disorder presents a likelihood of serious harm.

- Respondent was taken into custody as a result of conduct in which he or she attempted or inflicted serious physical harm on the person of another, or substantial damage upon the property of another, and as a result of a mental disorder presents a likelihood of serious harm.

- After having been taken into custody for evaluation and treatment, Respondent has threatened, attempted, or inflicted physical harm upon the person of another or himself/herself or substantial damage upon the property of another, and as a result of mental disorder presents a likelihood of serious harm. **(90 day commitment only)**

Is/Continues To Be Gravely Disabled and Respondent:

- as a result of a mental disorder is in danger of serious physical harm resulting from the failure to provide for his/her essential needs of health or safety.

- 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 actions, is not receiving such care as is essential for health and safety.

Facts in Support:

The Court was advised of the Respondent's prior hospitalizations and detentions as follows:
Per Testimony of Petitioner and Declaration in Support of Petition:

The Respondent's current mental status examination reveals: Medication rights given and wishes respected. Symptoms: cognitive deficits, including memory deficits, disjointed thoughts, inappropriate affect, poor insight and poor judgment, history of impulsive behavior. Nurse practitioner for respondent indicated that respondent was exhibiting some involuntary movements and was in low average range (now at a much lower level). Previously could share her history (I am married, have a child, etc.), now has very disjointed and confused and cannot really share her history—very jumpy and not linear in how she shares history. If released into the community she could not care for herself (is on 1:1 in WSH and has to have monitor within arms-reach). Has trouble ambulating, doing ADLs like showering, changing clothes, etc. She has had a series of strokes that have impaired her cognitive ability. WSH has not done all the needed analysis to deal with her progressive decline, needs Home and Community Services assessment. Has Medicare and is eligible for services. Has need of professional level of care beyond what family members can provide. She has no behavioral issues while at WSH. Is not on any psychotropic medications. Her husband has retired and can be home every day to be with family and provide level of care.

Further, based on the petition and testimony of Petitioner, the Respondent:

MORTON PERRY: he is respondent's brother in law. Goes to same church as respondent and her family. Has been around respondent in past year. He knows she had a stroke within past 2 years. Also had a fall (on ice) and a concussion about a year after the stroke. Developed memory problems, etc. and could no longer work. He feels that she has stabilized but lost some abilities. Sees family about 3x/week. Says that the sisters at the church come by 2x/week to do things for the family. Says that there are community service people from the church who can care for the family.

LAWRENCE OVERBEY: (husband of respondent for 2+years). Quit his job in 2016. Quit because his family needed his care more than he needed to be at any job. Says that he helps his wife with some ADLs. He would follow through with COPES program.

3. Less Restrictive Alternative Treatment.

- Less restrictive alternative treatment is not in the best interest of the Respondent or others.* **LRA ACCEPTABLE IF CAN FIND PLACEMENT WITH LEVEL OF CARE TO PROVIDE STRUCTURED CARE FOR HER INCLUDING IN HOME PLACEMENT IF CAN BE STRUCTURED WITH OTHER ASSISTANCE AS APPROPRIATE.**

*Absent this finding, less restrictive alternative treatment is in the best interest of the Respondent or others.

Conclusions of Law

1. **Jurisdiction.** The court has jurisdiction over the parties and subject matter of this mental illness proceeding.
2. **Detention Criteria.** The Respondent as a result of a mental disorder:
 - presents/continues to present a likelihood of serious harm.
 - presents/continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior.
 - is/continues to be gravely disabled.

3. Other:

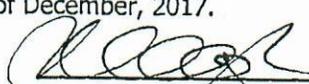
The Court Orders

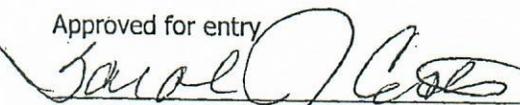
1. **Involuntary Treatment** as follows:

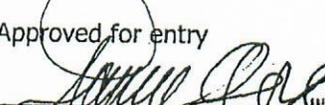
- Inpatient Treatment.** The court orders up to **90 Days** **180 Days** of intensive inpatient treatment. Respondent is remanded into the custody of DSHS for placement at WSH or other facility certified by DSHS for long term care.
- Less Restrictive Alternatives:** The Court having previously found that less restrictive conditions are in the Respondent's best interest, see separate Order Detaining Under Less Restrictive Conditions.

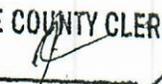
2. **Escape and Recapture.** If the Respondent escapes from the treatment facility, any Peace Officer shall apprehend, detain, and return the respondent to this treatment facility or to the evaluation and treatment facility designated by a Designated Mental Health Professional.
3. **Right to Full Hearing or Jury Trial.** If involuntary treatment beyond a 14 day period is sought Respondent will have the right to a full hearing or jury trial as required by RCW 71.05.310.
4. **Firearms Possession Prohibited.** Respondent has been detained pursuant to RCW 71.05.240 or 71.05.320 and is prohibited from possessing, in any manner, a firearm as defined in RCW 9.41.010.
5. **Notice to Department of Corrections.** If Respondent is, or becomes, subject to supervision by the Department of Corrections, Respondent must notify the treatment provider and Respondent's mental health treatment information must be shared with the department of corrections for the duration of the Respondent's incarceration and supervision, under RCW 71.05.445. Upon a petition by a person who does not have a history of one or more violent acts, the court may, for good cause, find that public safety would not be enhanced by the sharing of this information.

DONE IN OPEN COURT this 19th day of December, 2017.


CRAIG ADAMS
COURT COMMISSIONER
 Court Commissioner

Approved for entry

 Sarah Coats, WSBA No. 20333
 Attorney for Petitioner

Approved for entry

 Janene Gore, WSBA No. 18918
 Attorney for Respondent

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Appellate Court Case Title: Access to case information is limited
Superior Court Case Number: 17-6-01408-7

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