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NO. 51887-2-II

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

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IN RE THE DETENTION OF C.C.,

Appellant.

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

The Honorable Barbara McInville, Commissioner

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove that C.C. was gravely disabled during the 180 day petition hearing.
2. The trial court exceeded its jurisdiction by imposing a 180 day hold for grave disability.
3. The trial court abused its discretion by considering the 72 hour language in RCW 10.77.086 to be a drafting error.

Issues Presented on Appeal

1. Did the state fail to prove that C.C. was gravely disabled during the 180 day petition hearing when she understood her mental health issues, had a plan for housing and food and mental health treatment follow-up in the community using her own insurance?
2. Did the trial court exceed its jurisdiction by imposing a 180 day involuntary commitment for grave disability, when the statutory limit is 90 days?

B. STATEMENT OF THE CASE

After C.C.'s arrest for assault in the third degree, the state petitioned for a 14 day involuntary mental health evaluation commitment under RCW 71.05. CP 8-13. C.C. was never in

custody for an assault. CP 1-7; RP 64-65. C.C. moved to dismiss the involuntary commitment petition on grounds that the state did not file a “misdemeanor flip”. RP 6. The Court denied the motion and rejected her argument that her date of admission commenced in July 2017 with her initial 72 hour commitment. RP 8-9. The court considered the 72 hour language in RCW 10.77.086 requiring release to be a “drafting error”. RP 8-9.

On October 6, 2017, Western State Hospital (WSH) staff Dr. Jacqueline Means determined that C.C. suffered from schizoaffective disorder and that she presented as extremely labile and had disorganized thoughts. RP 11. Dr. Means also relied on C.C.’s homelessness to conclude that C.C. was gravely disabled under both prongs of the statute. RP 12.

C.C. testified that she had located an alcohol recovery center where she could reside and receive treatment on release. RP 17. The court entered an order that CC was gravely disabled and ordered a 14 day involuntary commitment. RP 18; CP 15-18.

Following an initial 14 day commitment, the state petitioned and the court granted an additional 90 day commitment. CP 20-28; RP 6. C.C. requested to proceed pro se. RP 19-20. The court

denied the request on grounds that the court did not believe that C.C. was competent to represent herself, even though C.C. knew she was the defendant, the state had the burden to prove she was gravely disabled, and she understood the meaning of a “least restrictive alternative”. RP 24-27.

During the October 20, 2017 hearing Dr. David Olegar a WSH psychologist testified that C.C. had schizoaffective disorder, rapid speech and some anger bursts, but C.C. was fully oriented, her short-term memory was intact, she was cooperative during the interview, answered the doctor’s questions, and was able to express herself. RP 30, 35-36. Dr. Olegar also agreed that C.C. was not assaultive on the ward but did bang on tangible items. RP 37. Dr. Olegar opined that C.C. was delusional and did not understand her mental health issues but wanted alcohol recovery treatment. RP 31. Dr. Olegar admitted that C.C. understood her diagnosis of schizoaffective disorder but believed the antipsychotic medications were poison. RP 32.

C.C. agreed to take her medications but requested a reduction in dosage to prevent her becoming dependent on the medications for sleep. RP 41-42. C.C. also agreed to seek mental

health treatment if released from WSH. RP 42. The court concluded that C.C. was gravely disabled and ordered an additional 90 day commitment. RP 43; CP 30-33.

On December 26, 2017, the state again filed an additional involuntary commitment, and requested a 180 day involuntary commitment based on the criteria "gravely disabled". CP 35-47. A third psychologist, Brian Hill confirmed C.C.'s diagnosis but added that she was also paranoid. RP 45-46. Inconsistently, Dr. Hill testified that C.C. was not socially connected, but that she regularly attended group therapy and therefore was connected to others. RP 46-47, 54- 55. Specifically, C.C. attended Treatment Mall, and participated in trips to the library and job site. RP 54.

Dr. Olegar concluded that C.C. could not care for herself because she rubbed salt on her body to address her chronic skin problems, she was verbally abusive and believed she was being persecuted for being a disciple of Jesus, and was homeless. RP 49-51. Dr. Hill agreed that C.C. was not aggressive towards others, just towards objects. RP 52. C.C. explained that she used salt to address her skin problems because it was more effective than creams. RP 58.

C.C. has a plan for a least restrictive alternative. She has Apple Insurance for follow up mental health treatment, she has enough money from SSI to rent a room or can reside in the Nativity House or the Mission where she can also obtain meals. RP 56, 59-60. C.C. also agreed that she would live in an adult home if necessary and seek outpatient care. RP 56, 61. C.C. takes her medication. RP 58.

The trial court's findings following the January 2018 hearing are as follows:

### **Findings of Fact**

#### **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 Paranoid Schizophrenia.

#### **Is/Continues To Be Gravely Disabled and Respondent:**

As a result of a mental disorder is in danger of serious physical harm resulting from 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.

### **Conclusions of Law**

**1. Jurisdiction.** The Court has jurisdiction over the parties and subject matter of this mental health proceeding.

**2. Detention Criteria.** The Respondent as a result of a mental disorder:

Is/continues to be gravely disabled.

CP 50-53.

### **C. ARGUMENT**

#### **1. THE STATE FAILED TO PROVE THAT C.C. WAS GRAVELY DISABLED.**

The state bears the burden of proving grave disability by clear, cogent and convincing evidence. *In re Detention of R.H.*, 178 Wn. App. 941, 945-46, 316 P.3d 535 (2014). To make this determination the reviewing court determines “whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court’s conclusions of law and judgment.” *In re Detention of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986).

In general, an individual may be involuntarily committed for mental health treatment if, as a result of a mental disorder, the individual either (1) poses a substantial risk of harm to him or

herself, others, or the property of others, or (2) is gravely disabled. *LaBelle*, 107 Wn.2d at 201-02 (*citing* former RCW 71.05.020(1), (3), .150, .240, .280, .320)). Here, the trial court indicated that it was ordering C.C.'s involuntary commitment solely under the gravely disabled standard. CP 50-53. RCW 71.05.020(20) defines "gravely disabled" as

(20) "Gravely disabled" means a condition in which a person, as a result of a mental disorder, or as a result of the use of alcohol or other psychoactive chemicals: (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;

Former RCW 71.05.020(17) provides:

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.

Id. To support an involuntary civil commitment petition based on ground of grave disability, the state must present recent, tangible

evidence that the respondent has a mental illness that creates a failure or inability to provide for basic human needs as food, clothing, shelter, and medical treatment, which also presents a high probability of serious physical harm within the near future unless adequate treatment is afforded. *R.H.*, 178 Wn. App. at 945-46.

In *M.K.*, this Court addressed the same challenge presented in C.C.'s case. WSH staff determined that M.K. suffered from schizoaffective disorder bipolar type and that he exhibited antisocial personality traits. *In re Detention of M.K.*, 168 Wn. App. 621, 623, 279 P.3d 897 (2012). M.K. was committed to 180 days after a prior 90 day commitment under RCW 71.05.320 after the trial court determined that M.K. was gravely disabled under RCW 71.05.020(17). *M.K.*, 168 Wn. App. at 623.

This Court reversed M.K.'s involuntary commitment order on grounds that the state did not provide findings to support the conclusion that M.K. was gravely disabled under either prong of prior RCW 10.71.020(17). *M.K.*, 168 Wn. App. at 630. The state did not prove that M.K. was unable to make a rational decision regarding his need for treatment or that he in danger of serious harm because he could not take care of his basic needs. *M.K.*, 168

Wn. App. at 630.

Here, the court checked the box on the order indicating C.C. was gravely disabled under both prongs of RCW 71.05.020(2) but as in M.K., the findings are not supported by substantial evidence. Dr. Hill believed that if C.C. was released she would “revert to old destructive habits” and that this meant that she was unable to meet herself and safety needs, but this finding contravenes the fact that C.C. has been homeless and managing on her own, in addition to C.C.’s testimony about the availability of resources and her willing to access those resources. RP 56-61.

The evidence indicated that C.C. was homeless, aware of the adverse effects of medication on her sleep and requested a reduction in dosage, used salt to treat skin rashes instead of prescription medication, had SSI funds to purchase housing, and was at times oriented and at other times somewhat delusional. RP 30, 35-36. C.C. also struck items at times but was not assaultive. RP 37. There was however no evidence that C.C. was unable to provide for her own basic care.

Drs. Olegar and Hill seemed to believe that the fact that C.C. had been homeless and used salt on her skin was adequate to

determine that she was gravely disabled despite her ability to attend the job fair, maintain Apple Insurance, manage SSI funds, describe where she could live and obtain meals, and where she agreed to seek outpatient care. RP 49-52, 58-61.

While C.C. has significant mental health issues, the findings do not support the conclusion that C.C. is gravely disabled as defined under either prong of RCW 71.05.202(20). Accordingly, this Court must reverse the order of commitment and remand for the trial court to vacate findings and conclusions.

a. Issue Not Moot

Although C.C.'s period of involuntary commitment may have ended by the time this Court considers this appeal, this appeal is not moot. An appeal is moot if the court can no longer provide effective relief. *Orwick v. Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). "An individual's release from detention does not render an appeal moot where collateral consequences flow from the determination authorizing such detention[]" because prior commitments impact the decision making on all new commitments. *M.K.*, 168 Wn. App. at 626.

Under chapter 71.05 RCW “the trial court is directed to consider, in part, a history of recent prior civil commitments ... each order of commitment entered up to three years before the current commitment hearing becomes a part of the evidence against a person seeking denial of a petition for commitment.” *M.K.*, 168 Wn. App. at 626 (footnote omitted) (citing RCW 71.05.012, .212, and .245).

Accordingly, because each commitment order has collateral consequences in subsequent petitions and hearings, the issue is not moot. *M.K.*, 168 Wn.App.at 626; accord, *In re Detention of H.N.*, 188 Wn. App. 744, 749-50, 255 P.3d 294 (2015).

## 2. NO STATUTORY AUTHORITY FOR 180-DAY COMMITMENT.

The trial court exceeded its jurisdiction by imposing a 180 day commitment under RCW 71.05.320(1) based on the grounds that C.C. was gravely disabled. RCW 71.05.320(1) provides:

(1)(a) Subject to (b) of this subsection, if the court or jury finds that grounds set forth in RCW 71.05.280 have been proven and that the best interests of the person or others will not be served by a less restrictive treatment which is an alternative to detention, the court shall remand him or her to the custody of the department or to a facility certified for ninety day treatment by the department for a further

period of intensive treatment **not to exceed ninety days** from the date of judgment.

(Emphasis added) Id.<sup>1</sup> Under RCW 71.05.320(1)'s plain language, the trial court may order an individual to be involuntarily committed for up to 180 days only if "the grounds set forth in [former] RCW 71.05.280(3) are the basis of commitment." RCW 71.05.280(4) provides for an involuntary commitment if a person is "gravely disabled". Id. C.C. was committed under RCW 71.05.280(4).

Under RAP 2.5(a), this Court may review this issue not raised in the trial court, because the trial court exceeded its lawful authority. *R.H.*, 175 Wn. App. at 948 (this Court considered this same issue despite trial counsel's failure to raise the issue before the trial court).

The construction of a statute is a question of law that this Court reviews de novo. *R.H.*, 178 Wn. App. at 948. When construing a statute, this Court gives effect to the plain and ordinary meaning of the language used by the legislature. Id. "As civil commitment statutes authorize a significant deprivation of liberty, they must be strictly construed." Id.

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<sup>1</sup> RCW 71.05.320. Remand for additional treatment--Less restrictive alternatives--Duration--Grounds--Hearing (Effective until July 1, 2026),

In *R.H.* the trial court committed R.H. for 180 days based solely on grounds that he was gravely disabled. *R.H.*, 178 Wn. App. at 948. After applying the principles of statutory construction this Court held that under RCW 71.05.280(4), the trial court did not have authority to commit R.H. for 180 days exceeded its statutory authority when it ordered him involuntarily committed for up to 180 days. *R.H.*, 178 Wn. App. at 948-49. This Court reversed the 180 day commitment order. *R.H.*, 178 Wn. App. at 950.

*R.H.* is on point. Here, the trial court ordered C.C.'s initial 14 day commitment on grounds that she was a danger to self and others and was gravely disabled. CP 15-18. The following 90 day petition and the 180 day petition requested involuntary commitment solely on grounds that she was gravely disabled under former RCW 71.05.280(4) (unchanged in 2018 amendment). CP 30-33, 50-53. The state did not request commitment under former RCW 71.05.280(3). Further, because the trial court did not order C.C. involuntarily committed under former RCW 71.05.280(3), it did not enter any factual finding indicating that she "presents a substantial likelihood of repeating similar acts constituting a felony." RCW 71.05.280(3).

Here as in *R.H.*, because the trial court ordered C.C. committed based on former RCW 71.05.280(4), which does not authorize a 180 day commitment, the trial court exceeded its jurisdiction by imposing a 180 day involuntary commitment. *R.H.*, 178 Wn. App. at 948-49. The remedy is to reverse the 180 day commitment order. C.C. was never committed for restoration of competency under RCW 10.77.2

D. CONCLUSION

C.C. respectfully requests this Court vacate the 180 day

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2. RCW 10.77.086(4) provides:

(4) For persons charged with a felony, at the hearing upon the expiration of the second restoration period or at the end of the first restoration period in the case of a defendant with a developmental disability, if the jury or court finds that the defendant is incompetent, or if the court or jury at any stage finds that the defendant is incompetent and the court determines that the defendant is unlikely to regain competency, the charges shall be dismissed without prejudice, and the court shall order the defendant be committed to a state hospital as defined in RCW 72.23.010 for up to seventy-two hours starting from admission to the facility, excluding Saturdays, Sundays, and holidays, for evaluation for the purpose of filing a civil commitment petition under chapter 71.05 RCW. The criminal charges shall not be dismissed if the court or jury finds that: (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time. In the event that the court or jury makes such a finding, the court may extend the period of commitment for up to an additional six months. The six-month period includes only the time the defendant is actually at the facility and is in addition to reasonable time for transport to or from the facility.

involuntary commitment order based on the trial court exceeding its lawful authority and based on the state's failure to prove by sufficient evidence that C.C. is gravely disabled.

DATED this 22<sup>nd</sup> day of June 2018.

Respectfully submitted,



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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Office of the Attorney General at ericn1@atg.wa.gov and shsappealnotification@atg.wa.gov and C.C., Western State Hospital, 9601 Steilacoom Blvd. S.W., Lakewood, WA 98498 a true copy of the document to which this certificate is affixed on June 22, 2018. Service was made by electronically to the AAG and C.C. by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

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