

FILED  
Court of Appeals  
Division II  
State of Washington  
8/2/2019 4:35 PM

NO. 53204-2-II

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

---

---

IN RE THE DETENTION OF:

B.L.R.,  
Appellant.

---

---

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

The Honorable Robyn A. Lindsay, Commissioner

---

---

BRIEF OF APPELLANT

---

---

LISE ELLNER, WSBA No. 20955  
SPENCER BABBIT, WSBA No. 51076  
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090

## TABLE OF CONTENTS

	<b>Page</b>
A. ASSIGNMENT OF ERROR.....	1
Issue Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	4
1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT B.L.R. CONTINUED TO BE GRAVELY DISABLED AT THE TIME OF HIS RECOMMITMENT HEARING AND THAT CONCLUSION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE .....	4
a. RCW 71.05.020(22)(a).....	6
b. RCW 71.05.020(22)(b).....	8
D. CONCLUSION.....	10

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

*Blackburn v. State*,  
186 Wn.2d 250, 375 P.3d 1076 (2016) ..... 5

*Hegwine v. Longview Fibre Co.*,  
162 Wn.2d 340, 172 P.3d 688 (2007) ..... 5

*In re Det. of LaBelle*,  
107 Wn.2d 196, 728 P.2d 138 (1986) .....5, 6, 8, 9, 10

*In re Det. of M.K.*,  
168 Wn. App. 621, 279 P.3d 897 (2012)..... 5, 6, 8, 9

### RULES, STATUTES, AND OTHERS

RCW 71.05.020 .....5, 6, 8, 9, 10

RCW 71.05.310 ..... 7

RCW 71.05.320 ..... 3

A. ASSIGNMENT OF ERROR

1. The trial court erred by concluding that B.L.R. remained gravely disabled at the time of his recommitment hearing when the state failed to present substantial evidence that he could not care for his essential needs or that his cognitive control was deteriorating.

Issue Presented on Appeal

1. Did the trial court err by concluding that B.L.R. remained gravely disabled at the time of his recommitment hearing when the state failed to present substantial evidence that he could not care for his essential needs or that his cognitive control was deteriorating?

B. STATEMENT OF THE CASE

B.L.R. is a 30-year-old man who suffers from schizoaffective disorder. RP 26, 51. B.L.R. has been admitted to Western State psychiatric hospital a total of five times. RP 53; CP 25, 38-39. After B.L.R. was discharged from his most recent commitment, he started living with his father on Vashon Island. RP 9-10. For the first few weeks, B.L.R. showed noticeable improvement in his psychological condition. RP 10. However, his condition began to

decompensate after about three weeks. RP 10-11.

On December 4, 2017, B.L.R. left several dirty dishes around the house and his father became angry. RP 12. B.L.R.'s father confronted him about the dishes and told B.L.R. to stop leaving them around the house. RP 12. B.L.R. shoved his father to the ground and began to hit him on the head. RP 12. B.L.R. put his father in a chokehold, but his father eventually freed himself and called 911. RP 12.

The state charged B.L.R. with one count of felony harassment and one count of assault in the second degree. RP 5; CP 24. B.L.R. was found incompetent to stand trial and both charges were dismissed without prejudice. CP 1-4. The state petitioned to have B.L.R. involuntarily committed due to grave disability and based on him being likely to repeat acts similar to those that led to the dismissed criminal charges. CP 6.

The trial court held a hearing on the state's petition on May 24, 2018 and concluded that B.L.R. is both gravely disabled and likely to repeat the type of acts that resulted in the dismissed felony charges. CP 23, 27. The trial court granted the state's petition and ordered that B.L.R. be involuntarily committed for a period of 180

days. RP 40-41; CP 27.

On October 26, 2018, he state filed a petition seeking to extend B.L.R.'s involuntary commitment by an additional 180 days under RCW 71.05.320(4)(c)(i) and RCW 71.05.320(4)(d) CP 34. Western State psychologist Dr. Shamyka Sutton testified that B.L.R. had shown improvement in several areas since being involuntarily committed. RP 51-52. At the time of B.L.R.'s recommitment hearing on January 31, 2019, he had not been involved in any documented incidents of aggression since June of 2018. RP 51-52. B.L.R.'s attendance in group meetings similarly improved and he began to voluntarily take medication. RP 53-54. By that point, B.L.R. was able to accomplish the activities of his daily life independently. RP 60.

Nevertheless, Dr. Sutton opined that B.L.R. remained gravely disabled and a risk to reoffend because he occasionally displayed paranoia about hospital staff and due to concerns that he would discontinue treatment once discharged. RP 51, 54-55. Dr. Sutton recommended continued detention at Western State. RP 54-56. Based on B.L.R.'s positive record, he requested a less restrictive alternative form of confinement. RP 49. B.L.R. testified

that he had a history of attending outpatient psychiatric treatment and was willing to take injectable medications. RP 69-71.

B.L.R.'s trial counsel cross-examined Dr. Sutton but elected not to call an expert witness to counter the state's petition. RP 49. The trial court concluded that B.L.R. continued to be gravely disabled and that there was still a substantial likelihood he would repeat the behaviors that led to the dismissed criminal charges. CP 65. The trial court granted the state's petition and extended B.L.R.'s involuntary commitment by another 180 days. RP 87-88; CP 68. The trial court also denied B.L.R.'s request for a less restrictive alternative form of commitment. CP 68. B.L.R. filed a timely notice of appeal. CP 72-78.

### C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT B.L.R. CONTINUED TO BE GRAVELY DISABLED AT THE TIME OF HIS RECOMMITMENT HEARING AND THAT CONCLUSION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

When reviewing an involuntary commitment order, appellate courts must determine whether substantial evidence supports the trial court's findings, and if so, whether those findings support the

trial court's conclusion and judgment. *In re Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986). "Substantial evidence" is evidence sufficient to persuade a rational person of the truth of the finding. *Blackburn v. State*, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016) (citing *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007)).

An individual may be involuntarily committed for mental health treatment if they pose a substantial risk of harm to themselves or others, or if they are gravely disabled. *In re Det. of M.K.*, 168 Wn. App. 621, 630, 279 P.3d 897 (2012) (citing *LaBelle*, 107 Wn.2d at 201-02). A person is gravely disabled if, as a result of a mental disorder, (a) they are 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. RCW 71.05.020(22). The trial court concluded that B.L.R. met both of these definitions. CP 65.

a. RCW 71.05.020(22)(a)

To prove that the respondent is gravely disabled under the first definition, the petitioner must present “recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment which presents a high probability of serious physical harm within the near future unless adequate treatment is afforded.” *M.K.*, 168 Wn. App. at 630 (quoting *LaBelle*, 107 Wn.2d at 204-05).

Substantial evidence does not support the finding that B.L.R. meets this definition of “gravely disabled” because the state failed to present “recent, tangible” evidence that B.L.R. was unable to provide for his essential human needs. The record shows that B.L.R. made significant progress by the time of his recommitment hearing. He was taking his medication, had not been involved in any violent or aggressive incidents for over six months, and hospital staff regularly described him as “respectful.” RP 51-53.

The state did not offer any evidence of B.L.R. failing to accommodate other essential needs such as food, clothing, or shelter. Instead, the state’s psychologist admitted that by the time of the recommitment hearing, B.L.R. could accomplish the activities

involved in his daily life independently. RP 60.

The state did not present any tangible evidence or specific incidents of B.L.R. failing to care for his essential needs since his first commitment hearing. Instead, the state relied on speculative testimony from Dr. Sutton suggesting that B.L.R. would have a more difficult time meeting his essential needs once discharged from the hospital. RP 52-54. This evidence runs counter to the evidence B.L.R. presented showing that B.L.R. has a history of attending outpatient psychiatric treatment and was willing to take medication if it was injectable. RP 69-71.

The trial court disregarded B.L.R.'s history of attending outpatient treatment and found that it is "not likely that [B.L.R.] would be able to meet his health and safety needs" and that he "would not voluntarily seek mental health treatment in the community." CP 66. Without substantial evidence in the record, the trial court erroneously concluded that the state established both of these conditions by clear and convincing evidence. CP 65; RCW 71.05.310. The findings are not supported by substantial evidence of recent, tangible incidents exhibiting B.L.R.'s inability to care for his essential needs.

For the sake of argument alone, even if true, having a more difficult time does not meet the standard for establishing “recent, tangible evidence of failure or inability to provide for such essential human needs . . . which presents a high probability of serious physical harm within the near future unless adequate treatment is afforded.” *M.K.*, 168 Wn. App. at 630 (quoting *LaBelle*, 107 Wn.2d at 204-05). Even if the state proved that B.L.R. could benefit from inpatient treatment, it failed to present substantial evidence that involuntary commitment is essential to B.L.R.’s wellbeing and therefore cannot meet the standard of grave disability articulated in *M.K.* and *Labelle*.

b. RCW 71.05.020(22)(b)

To satisfy the second definition of “gravely disabled” in RCW 71.05.020(17)(b)1, the state must establish with a factual basis that

---

1 Under 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.. *M.K.*, 168 Wn. App. at 630 (quoting *LaBelle*, 107 Wn.2d at 208).

B.L.R. has deteriorated in his routine functioning, and if he was not if released the consequences would be harmful. *Id. M.K.*, 168 Wn. App. at 630 (quoting *LaBelle*, 107 Wn.2d at 208). Furthermore, “the mere fact that an individual is mentally ill does not also mean that the person so affected is incapable of making a rational choice with respect to his or her need for treatment.” *M.K.*, 168 Wn. App. at 630.

The trial court frequently cited as a reason to doubt his ability to care for himself, the fact that B.L.R. did not want to pursue social security when he was discharged. CP 66. However, the evidence did not establish that B.L.R.’s reluctance to pursue social security was related to an ability to care for himself, rather than B.L.R.’s desire to work to support himself. RP 73-74.

Three months before his recommitment hearing, B.L.R. was still experiencing some paranoia toward hospital staff RP 59. This dated information established that three months earlier B.L.R. did not trust hospital staff. RP 62. But this information was neither “recent” nor “significant” and does not establish a deterioration adequate to prove “grave disability” under RCW 71.05.020(22)(b) and *LaBelle*. Instead, the record establishes that B.L.R. displayed increased cognitive and volitional control during his time at Western State. RP

51-53.

The evidence B.L.R. presented at the recommitment hearing establishes that B.L.R. was no longer “gravely disabled” at the time of his recommitment hearing under RCW 71.05.020(22)(b) and *LaBelle*. The trial court’s conclusion that B.L.R. manifested severe deterioration in functioning to the point where he required hospitalization is not supported by substantial evidence. The remedy is to vacate the recommitment order dated January 31, 2019.

D. CONCLUSION

The trial court erred when by concluding that B.L.R. remained gravely disabled at the time of his recommitment hearing and that conclusion is not supported by substantial evidence. B.L.R. respectfully requests that this court vacate the order recommitting him for an additional 180 days of involuntary detention.

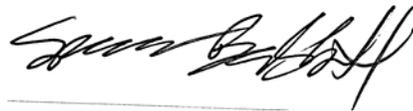
DATED this 2<sup>nd</sup> day of August 2019.

Respectfully submitted,



---

LISE ELLNER, WSBA No. 20955  
Attorney for Appellant



---

SPENCER BABBITT, WSBA No. 51076  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Office of the Attonrey General shsappealnotification@atg.wa.gov and B.L.R., c/o Western State Hospital, 9601 Steilacoom Blvd. S.W., Lakewood, WA 98498 a true copy of the document to which this certificate is affixed on August 2, 2019 Service was made by electronically to the prosecutor and B.L.R. by depositing in the mails of the United States of America, properly stamped and addressed.



---

Signature

**LAW OFFICES OF LISE ELLNER**

**August 02, 2019 - 4:35 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53204-2  
**Appellate Court Case Title:** Access to case information is limited  
**Superior Court Case Number:** 18-6-00474-8

**The following documents have been uploaded:**

- 532042\_Briefs\_20190802163336D2762901\_9738.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BLR AOB .pdf*
- 532042\_Other\_Filings\_20190802163336D2762901\_4139.pdf  
This File Contains:  
Other Filings - Appearance  
*The Original File Name was BLR Notice of Appearance.pdf*

**A copy of the uploaded files will be sent to:**

- MichelleR2@atg.wa.gov
- babbitts@seattleu.edu
- shsappealnotification@atg.wa.gov

**Comments:**

---

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net  
Address:  
PO BOX 2711  
VASHON, WA, 98070-2711  
Phone: 206-930-1090

**Note: The Filing Id is 20190802163336D2762901**