

FILED
Court of Appeals
Division II
State of Washington
1/28/2020 2:39 PM

NO. 53904-7-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 Terri S. Farmer, Commissioner

BRIEF OF APPELLANT

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

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

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR.....1

Issues Presented on Appeal.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....6

1. THE TRIAL COURT ERRED BY ORDERING B.L.R. TO BE COMMITTED WITH THE LEAST RESTRICTIVE ALTERNATIVE UNDER RCW 71.05.320(4)(d) WHERE THE STATE FAILED PROVE B.L.R. CONTINUES TO BE GRAVELY DIASABLED6

2. THE TRIAL COURT ERRED BY COMMITTING B.L.R. PURSUANT TO RCW 71.05.320(4)(c)(ii) WHERE THE STATE’S PETITION FAILED TO MAKE A PRIMA FACIE CASE THAT B.L.R. IS LIKELY TO ENGAGE IN ACTS SIMILAR TO CHARGED CRIMINAL BEHAVIOR IF RELEASED11

D. CONCLUSION.....13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>Blackburn v. State</i> , 186 Wn.2d 250, 375 P.3d 1076 (2016)	11
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 172 P.3d 688 (2007)	11
<i>In re LaBelle</i> , 107 Wn.2d 196, 728 P.2d 138 (1986)	6, 7, 11
<i>In re Det. of M.W. v. Dep't of Soc. & Health Servs.</i> , 185 Wn.2d 633, 374 P.3d 1123 (2016)	10, 12
<i>In re Detention of R.H.</i> , 178 Wn. App. 941, 316 P.3d 535 (2014)	7
<i>In re M.K.</i> , 168 Wn. App. 621, 279 P.3d 897 (2012)	7, 8, 9
<i>Morris v. Blaker</i> , 118 Wn.2d 133, 821 P.2d 482 (1992)	6

FEDERAL CASES

<i>Murphy v. Immigration & Naturalization Serv.</i> , 54 F.3d 605 (9th Cir. 1995)	12
--	----

RULES, STATUTES, AND OTHERS

RCW 71.05	7
RCW 71.05.020	7, 8
RCW 71.05.320	1, 3, 5, 6, 10, 11, 13

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered B.L.R. to be recommitted under RCW 71.05.320(4)(c)(i) where the state's petition failed to make a prima facie case that B.L.R. is likely to engage in acts similar to charged criminal behavior if released.
2. The trial court erred when it concluded that B.L.R. continued to be gravely disabled at the time of his recommitment hearing where that conclusion is not supported by substantial evidence.

Issues Presented on Appeal

1. Did the trial court err when it ordered B.L.R. to be recommitted under RCW 71.05.320(4)(c)(i) where the state's petition failed to make a prima facie case that B.L.R. is likely to engage in acts similar to charged criminal behavior if released?
2. Did the trial court err when it concluded that B.L.R. continued to be gravely disabled at the time of his recommitment hearing where that conclusion is not supported by substantial evidence?

B. STATEMENT OF THE CASE

B.L.R. is a 30-year-old man who suffers from schizoaffective disorder. RP 112. B.L.R. has been admitted to Western State psychiatric hospital a total of five times. RP 114. B.L.R.'s most recent commitment stems from a physical altercation between B.L.R. and his father that resulted in the state filing felony harassment and assault charges against B.L.R. RP 5, 11-12. The trial court found B.L.R. incompetent to stand trial and both charges were dismissed without prejudice. CP 3. The state petitioned to have B.L.R. involuntarily committed due to grave disability and based on the likelihood he would repeat acts similar to those that led to the dismissed criminal charges. CP 5-15.

The trial court granted the state's petition and ordered that B.L.R. be involuntarily committed for a period of 180 days on May 24, 2018. RP 40-41; CP 31. The state filed a petition to have B.L.R. recommitted for an additional 180 days on October 26, 2018. CP 32. The trial court granted this petition on January 31, 2019. CP 59-64.

On July 16, 2019, before B.L.R.'s second 180-day commitment expired, the state filed another petition seeking to

extend B.L.R.'s commitment for an additional 180 days under RCW 71.05.320(4)(c)(ii) and RCW 71.05.320(4)(d). CP 76-92. This petition outlined the progress B.L.R. had made during his time at Western State, but also noted that he still exhibited some symptoms of schizoaffective disorder, specifically delusional thoughts and poor insight into his own mental illness. CP 82-88. The petition also noted that B.L.R. had maintained cognitive and volitional control throughout the most recent commitment period. CP 88.

On August 27, 2019, the trial court held a hearing to determine whether the state's most recent petition presented a prima facie case for recommitment under RCW 71.05.320(4)(c)(ii) and whether B.L.R. remained gravely disabled under RCW 71.05.320(4)(d). RP 108-09; CP 144. During this hearing, Dr. Jordan Charboneau of Western State testified that B.L.R. had shown the ability to care for himself in daily activities and had not engaged in any violent or aggressive behavior since his last commitment. RP 117-18. The state questioned Dr. Charboneau about B.L.R.'s cognitive and volitional control and he reported significant improvement during B.L.R.'s time at Western State:

[THE STATE]: How would you assess B.L.R.'s cognitive controls at this time?

[DR. CHARBONEAU]: Generally intact. I think his thinking can be rigid as I stated earlier and somewhat circumstantial. But I think he's generally able to maintain cognitive control.

[THE STATE]: And how about volitional controls? Any concerns about that?

[DR. CHARBONEAU]: I think he's -- he's been able to maintain volitional control from what I've seen. There haven't been violent or assaultive episodes.

[THE STATE]: In regard to the cognitive controls, the sematic delusions and (indiscernible) comments, do you -- do you consider that any type of impairment on his -- on his cognitive organization?

[DR. CHARBONEAU]: I think -- I think there is but to the degree that it affects his behavior on the ward I think is limited. His persecutory beliefs, as I referenced are -- did reference the treatment team holding him within the hospital, but it's not directed at other patients. He's not becoming aggressive because of it. He doesn't think that other patients are out to -- out to harm him and such.

RP 117-18. The state's petition similarly stated that "[B.L.R.] has generally maintained cognitive and volitional control throughout the last 180 days. His thinking is circumstantial at times and he had minor incidents of mood lability in May 2019." CP 87-88.

However, Dr. Charboneau also testified that B.L.R. refused to acknowledge that he has a mental illness and did not believe medication benefited his mental state. RP 115. Dr. Charboneau

opined that B.L.R. would likely decompensate if released from Western State. RP 118-20. Because of this concern, Dr. Charboneau opined that B.L.R. remained gravely disabled. RP 118-19.

B.L.R. testified that if released, he planned to live in a homeless shelter and find a job so he could apply for Section 8 housing. RP 134. He also planned to apply for food stamps until he had housing and committed to continuing his medications so long as they were injectable. RP 136-38.

The trial court granted the state's petition and found that it presented a prima facie case for recommitment under RCW 71.05.320(4)(c)(ii). RP 108. The trial court also concluded that B.L.R. remained gravely disabled

- 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.

CP 142. The court, however, authorized a less restrictive alternative to commitment at Western State. RP 148-50. B.L.R. filed a timely notice of appeal to challenge the 180-day LRA commitment

ordered on August 27, 2019. CP 152-59.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ORDERING B.L.R. TO BE COMMITTED WITH THE LEAST RESTRICTIVE ALTERNATIVE UNDER RCW 71.05.320(4)(d) WHERE THE STATE FAILED PROVE B.L.R. CONTINUES TO BE GRAVELY DIASABLED

The state failed to prove, by clear, cogent and convincing evidence, the need for the LRA based on grave disability. The state bears the burden of proving a person is gravely disabled by clear, cogent and convincing evidence. *Morris v. Blaker*, 118 Wn.2d 133, 137, 821 P.2d 482 (1992).

This standard means that it must be highly probable that the person is gravely disabled. *In re LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986). The appellate court reviews the findings and conclusions to determine if substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *LaBelle*, 138 Wn. App. at 209.

“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.**

(Emphasis added) RCW 71.05(22). The court determined B.L.R. was gravely disabled under prong (b). CP 142.

When the state attempts to involuntarily commit a person under the gravely disabled standard of RCW 71.05.020(22)(b), the state must provide “a factual basis for concluding that an individual “manifests severe [mental] deterioration in routine functioning”. *LaBelle*, 107 Wn.2d at 208 (quoting former RCW 71.05.020(1)(b)); Accord, *In re Detention of R.H.*, 178 Wn. App. 941, 946, 316 P.3d 535 (2014).

In other words. this means the person is “*unable* because of severe deterioration of mental functioning, to make a rational decision with respect to his need for treatment.” *In re M.K.*, 168 Wn. App. 621, 630, 279 P.3d 897 (2012) (Emphasis in original). “This requirement is necessary to ensure that a causal nexus exists between proof of ‘severe deterioration in routine functioning and proof that the person so affected ‘is not receiving such care as is

essential for his or her health or safety”. *M.K.*, 168 Wn. App. at 630.

In *M.K.*, the evidence was insufficient to support the finding of grave disability. M.K. was diagnosed with the same illness that B.L.R. has except that M.K. also has Antisocial Personality traits. *M.K.*, 168 Wn. App. at 624. The findings provided that M.K. was gravely disabled based on M.K.:

seemed to be responding to internal stimuli, impulsive, grandiose themes, threatening to peers[,] went on unauthorized leave. Assaultive on return, impaired judgment [and] insight, continues with grandiose themes, intrusive, rambling speech.

Id. This Court reversed the order of civil commitment under grave disability, because the state’s evidence was insufficient to establish grave disability under either prong of former RCW 71.05.020(17).

Specifically, there was no evidence that M.K. was unable to “make a rational decision with respect for his need for treatment.” *M.K.*, 168 Wn. App. at 630. Rather, the court used a check-the-box form after considering evidence from a psychiatrist and psychologist to find grave disability-wherein fact, the decision appeared based on a best interest consideration. *M.K.*, 168 Wn. App. at 623, 630. This Court specifically explained that although remaining at Western State might be in M.K.’s best interests, this

was insufficient to establish grave disability under subsection (b). *M.K.*, 168 Wn. App. at 630.

B.L.R.'s case is comparable to *M.K.* Both parties recognize that B.L.R. has made substantial progress during his commitments. The state presented evidence that B.L.R. had gained control over his volitional functioning, that he had no violent incidents, and that he agreed to take his medication if released. RP 136-38. The fact that B.L.R. suffers from mental illness does not provide substantial evidence that B.L.R. remains gravely disabled. "[T]he 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 state speculated that B.L.R. would not receive necessary care if he was released because he would stop taking his medication. RP 118-19. This is pure speculation and contrary to B.L.R.'s promise to take his medication if released. The state's petition simply outlines the symptoms B.L.R. continues to experience as a result of his mental illness. CP 90. Those include the delusional belief that he suffers from a seizure disorder, the delusional belief that his parents are petitioning to have him

involuntarily committed, and a lack of insight into his own mental health issues. CP 82-87.

These symptoms do not manifest in behavior that can be considered gravely disabled. Both Dr. Charboneau and the state's petition indicate that B.L.R. has maintained cognitive and volitional control over his behavior during the course of his most recent commitment, with only "minor incidents of mood lability in May 2019." CP 88.

The evidence establishes that B.L.R. is currently capable of caring for himself and reentering society, something he has repeatedly expressed a willingness to pursue in proceedings related to civil commitment petitions. RP 37-38, 65, 137. The state failed to establish by clear and convincing evidence that B.L.R. continues to be gravely disabled. The trial court's conclusion that B.L.R. should be committed pursuant to RCW 71.05.320(4)(d) is not supported by substantial evidence. This court should vacate the commitment order dated August 27, 2019. *In re Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 644, 374 P.3d 1123 (2016).

2. THE TRIAL COURT ERRED BY COMMITTING B.L.R. PURSUANT TO RCW 71.05.320(4)(c)(ii) WHERE THE STATE'S PETITION FAILED TO MAKE A PRIMA FACIE CASE THAT B.L.R. IS LIKELY TO ENGAGE IN ACTS SIMILAR TO CHARGED CRIMINAL BEHAVIOR IF RELEASED

When reviewing an involuntary commitment least restrictive alternative (LRA) 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. *LaBelle*, 107 Wn.2d at 209. "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)).

RCW 71.05.320(4)(c)(ii) controls the process for seeking recommitment under the LRA provision for someone who has already been committed due to dismissed criminal charges. Under RCW 71.05.320(4)(c)(ii), the trial court must hold a preliminary hearing to determine whether the state's petition presents prima facie evidence that the respondent "continues to suffer from a mental disorder or developmental disability that results in a

substantial likelihood of committing acts similar to the charged criminal behavior.” *M.W.*, 185 Wn.2d at 644.

If the state fails to present prima facie evidence that there is a substantial likelihood of repeating criminal behavior in its petition, the respondent should be released unless the state can proceed on another basis for recommitment. *M.W.*, 185 Wn.2d at 644. Prima facie evidence is evidence sufficient to sustain a judgment. *M.W.*, 185 Wn.2d at 657 (citing *Murphy v. Immigration & Naturalization Serv.*, 54 F.3d 605, 610 (9th Cir. 1995)). The state bears the burden of proving grounds for recommitment by clear, convincing, and cogent evidence at the prima facie stage and after a full evidentiary hearing. *M.W.*, 185 Wn.2d at 657.

Here, the state’s petition fails to make a sufficient showing that B.L.R. is likely to engage in acts similar to those that resulted in him being criminally charged. The state’s petition outlines the symptoms B.L.R. continues to experience as a result of his mental illness, but those symptoms do not manifest in violent behavior. CP 82-87, 90. To the contrary, both Dr. Charboneau and the state’s petition explained that B.L.R. has maintained cognitive and volitional control over his behavior during the course of his most

recent commitment, with only “minor incidents of mood lability in May 2019.” CP 88.

The state’s petition fails to make a prima facie showing that B.L.R. will act violently if released. While B.L.R.’s commitment stems from an allegedly violent incident, his track record at Western State demonstrates his ability to control his behavior and manage social interactions. B.L.R. continues to experience symptoms of schizoaffective disorder, but the state’s petition establishes that he can manage these symptoms without acting violently. The state failed to make a prima facie case that B.L.R. should be committed under RCW 71.05.320(4)(c)(ii), therefore the commitment order dated August 27, 2019 should be vacated.

D. CONCLUSION

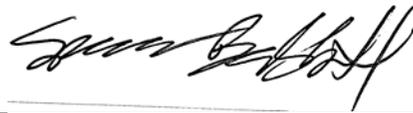
The trial court erred when it found that the state’s petition for recommitment presented a prima facie case that B.L.R. is likely to engage in further criminal behavior if released. Furthermore, the trial court erred in concluding that B.L.R. remains gravely disabled. For these reasons, B.L.R. respectfully requests that this court vacate the civil commitment order dated August 27, 2019.

DATED this 28th day of January 2020.

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 Attorney 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 January 28, 2020. Service was made by electronically to the AAG 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

January 28, 2020 - 2:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53904-7
Appellate Court Case Title: Access to case information is limited
Superior Court Case Number: 18-6-00474-8

The following documents have been uploaded:

- 539047_Briefs_20200128143711D2983091_9683.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BLR AOB .pdf
- 539047_Other_Filings_20200128143711D2983091_2752.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:

- babbitts@seattleu.edu
- ericn1@atg.wa.gov
- 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 20200128143711D2983091