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NO. 54047-9-II

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

IN RE THE DETENTION OF:

E.F.,
Appellant.

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

The Honorable Terri Farmer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. E.F.'s appeal is not moot because involuntary commitment orders have adverse consequences on future commitment determinations.
2. The state failed to prove by clear, cogent, and convincing evidence that E.F. is gravely disabled when the evidence demonstrates he is able to make a rational decision regarding his treatment.

Issues Presented on Appeal

1. Is E.F.'s appeal moot when the involuntary commitment order entered in this case will have adverse consequences on his future commitment determinations?
2. Did the state fail to prove that E.F. is gravely disabled when the evidence demonstrates that he is able to make a rational decision regarding his treatment?

B. STATEMENT OF THE CASE

E.F. is a 24-year-old man who suffers from schizophrenia. RP 30, 54; CP 11. The state charged E.F. with two counts of assault in the third degree based on an incident where he allegedly

assaulted another patient and a nurse while being treated at Western State Psychiatric Hospital. CP 21-22. The criminal court found that E.F. was not competent to stand trial and dismissed the assault charges. CP 21-22. The criminal court then referred E.F. for possible civil commitment. CP 22.

The state petitioned to have E.F. civilly committed for 180 days pursuant to RCW 71.05.280(3) and based on grave disability under RCW 71.05.280(4). CP 2. A trial court commissioner held a hearing on the state's petition and heard testimony from the nurse E.F. allegedly assaulted, Valinda Roehl, and Dr. Virginia Klophause, who is a psychologist at Western State. RP 20-37.

Ms. Roehl testified that she is a registered nurse and was working at Western State at the time of the alleged assaults. RP 20. Ms. Roehl was sitting in the Western State dining hall with two other patients when E.F. entered the room. RP 22-23. As Ms. Roehl was going over paperwork with one of the patients, E.F. came up behind the other patient and punched him in the back of the head. RP 22-23. The patient fell to the floor and E.F. continued to try to kick him while he was on the ground. RP 22-23. Ms. Roehl attempted to intervene by grabbing E.F.'s arms. RP 23. E.F. turned

around and punched Ms. Roehl in her side. RP 23. She turned away from him and he continued to punch her in the head and back before turning his attention back to the patient on the floor. RP 23. Hospital staff entered the room and separated E.F. from Ms. Roehl and the other patients. RP 23-24.

Dr. Klophause testified that E.F. suffers from schizophrenia and experiences hallucinations, delusional beliefs, and disorganized thinking as a result of his illness. RP 30-32. She also reported that he had been involved in multiple physical fights with other patients during his time at Western State, but that these incidents had become less frequent the longer he was hospitalized. RP 30-33. Dr. Klophause opined that E.F. would likely repeat the types of behaviors that led to his criminal case based on his history of violent incidents at Western State and his continued denial of the need for psychotropic medication. RP 33-34.

Dr. Klophause also reported that E.F. exhibited poor hygiene and insight into his own wellbeing outside of the hospital. RP 34-35. When questioned about his plans once released from Western State, E.F. reported that he was willing to attend outpatient treatment in Skagit County, that he would stay with friends, and that

he would receive \$2,000 per week. RP 34-35. However, E.F. would not identify the friends or source of income. RP 34-35. Dr. Klophause ultimately opined that E.F. was gravely disabled and should remain hospitalized at Western State. RP 36.

The commissioner found that E.F. committed acts constituting assault in the third degree when he assaulted Ms. Roehl but did not find that he had committed acts constituting a felony with respect to the other patient. RP 46-47. The commissioner also found that E.F. was likely to repeat similar behavior in the future based on E.F.'s history of incidents at Western State. RP 48-49; CP 26. Finally, the commissioner concluded that E.F. was gravely disabled due to a lack of cognitive or volitional control. RP 47-48. Based on these findings, the commissioner granted the state's petition and ordered a 180-day commitment under both RCW 71.05.280(3) and RCW 71.05.280(4). CP 25-26.

E.F. filed a timely motion to revise the commissioner's decision pursuant to RCW 2.24.050. CP 37. E.F.'s motion alleged that the state failed to prove he committed acts constituting a felony and that he was gravely disabled. CP 37-38. The Superior Court

held a hearing on E.F.'s motion to revise and denied it after finding that the state had presented sufficient evidence to prove both bases for commitment under RCW 71.05.280. 8/30/19 RP 18-21; CP 143-44. E.F. filed a timely notice of appeal. CP 156-58.

C. ARGUMENT

1. E.F.'S APPEAL IS NOT MOOT BECAUSE INVOLUNTARY COMMITMENT ORDERS HAVE ADVERSE CONSEQUENCES ON FUTURE COMMITMENT DETERMINATIONS

E.F.'s civil commitment under the order entered on August 9, 2019 has already ended. Appellate courts generally decline to review cases where they can no longer provide effective relief. *In re Det. of M.K.*, 168 Wn. App. 621, 625, 279 P.3d 897 (2012) (citing *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983)). However, an individual's release from detention does not render an appeal moot when there are collateral consequences stemming from the determination justifying the detention. *M.K.*, 168 Wn. App. at 626 (citing *Born v. Thompson*, 154 Wn.2d 749, 762-64, 117 P.3d 1098 (2005)).

Washington's civil commitment statutes direct trial courts to consider a history of recent prior civil commitments whenever

determining whether to recommit someone pursuant to a new petition. *M.K.*, 168 Wn. App. at 626 (citing RCW 71.05.012). Thus, any petition that is granted becomes evidence against the respondent in future civil commitment proceedings. *M.K.*, 168 Wn. App. at 626. By vacating a previous petition, appellate courts can still provide respondents with effective relief because that petition can no longer be used as evidence in future commitment hearings. *M.K.*, 168 Wn. App. at 629-30.

While E.F.'s period of treatment under the granted petition has already expired, the petition may still be used against him in future proceedings if the state files a petition recommit him for another 180 days. This court can provide E.F. with relief by vacating the petition, therefore his case is not moot. *M.K.*, 168 Wn. App. at 630.

2. THE SUPERIOR COURT ERRED BY DENYING E.F.'S MOTION TO REVISE WHEN THE STATE FAILED TO PROVE BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT HE IS GRAVELY DISABLED

When evaluating a motion to revise under RCW 2.24.050, the superior court reviews the commissioner's findings of fact and conclusions of law de novo. *State v. Ramer*, 151 Wn.2d 106, 113,

86 P.3d 132 (2004) (citing *In re Marriage of Moody*, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999)). Once the superior court rules on a motion to revise, any subsequent appeal is of the superior court's decision. *Ramer*, 151 Wn.2d at 113 (citing *State v. Hoffman*, 115 Wn. App. 91, 101, 60 P.3d 1261 (2003)).

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. The term "gravely disabled" is defined by statute:

"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.

RCW 71.05.020(22) (emphasis added). The court determined E.F. was gravely disabled under prong (b). RP 47; CP 25-26. Here, the state failed to prove, by clear, cogent and convincing evidence the need for civil commitment based on grave disability. Thus, the superior court erred when it denied E.F.'s motion to revise.

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." *M.K.*, 168 Wn. App. at 630 (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.* suffered from schizoaffective disorder, which combines the symptoms of schizophrenia with those of bipolar personality disorder. *M.K.*, 168 Wn. App. at 622. The trial court's unsupported findings provided that *M.K.* was gravely disabled based on *M.K.*'s symptoms, including:

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.

M.K., 168 Wn. App. at 630. 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). *M.K.*, 168 Wn. App. at 630. The court held that experiencing symptoms is insufficient to find grave disability and instead there must be a nexus between *M.K.*'s mental disorder and the inability to provide for his own health and safety. *M.K.*, 168 Wn. App. at 630.

In *M.K.*, the court used a check-the-box form after

considering evidence from a psychiatrist and psychologist to find grave disability that was based 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.

As in *M.K.*, the evidence in E.F.'s case is insufficient to conclude that E.F. is gravely disabled. Specifically, the evidence related to E.F.'s alleged grave disability is limited to testimony about his poor hygiene, his belief that he does not need psychotropic medication, and his refusal to identify exactly where he would live or how he would generate income if released from Western State. RP 34-35. Even if civil commitment might be in E.F.'s best interest, that is insufficient to civilly commit him under RCW 71.05.280(4). *M.K.*, 168 Wn. App. at 630.

While Dr. Klophause's testimony establishes her opinion that that she believes it is in E.F.'s best interest to remain at Western State, this alone is insufficient to order commitment under RCW 71.05.280(4). The state must prove by clear, cogent, and convincing evidence that E.F. is actually incapable of making a

rational decision regarding his own care.

Dr. Klophause's testimony establishes that E.F. did indicate he would be willing to seek outpatient psychiatric treatment in Skagit County. RP 34. E.F.'s acknowledgement that treatment would be beneficial to his mental state demonstrates that he is capable of making a rational decision regarding his mental health once released from Western State.

The state failed to prove by clear, cogent, and convincing evidence that E.F. is gravely disabled. The commissioner's findings and conclusions on this point were erroneous and the superior court erred when it denied E.F.'s motion to revise that ruling. E.F. requests that this court reverse the superior court and vacate the commitment ordered under RCW 71.05.280(4).

D. CONCLUSION

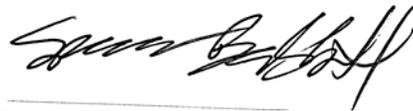
The state failed to prove by clear, cogent, and convincing evidence that E.F. is gravely disabled. For this reason, E.F. respectfully requests that this court reverse the superior court's denial of his motion to revise the commitment order dated August 9, 2019.

DATED this 11th day of March 2020.

Respectfully submitted,



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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 E.F., 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 March 11, 2020. Service was made by electronically to the AAG and E.F. by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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