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No. 54362-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IN RE THE DETENTION OF
N.G., Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Commissioner Diana L. Kiesel
No. 20-6-00105-8

REPLY BRIEF OF APPELLANT
N.G.

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I. ARGUMENT

1. *N.G. has the Right to Raise a Timeline Violation Under Cause Number 20-6-00105-8 and has Properly Preserved That Objection at Both Her 14-day and 90-day Hearings; to Find Otherwise Would be to Allow the Issue to Evade Review.*

- a. N.G. could not file a motion to dismiss under 14-6-00862-7, because the Department's petition was filed under 20-6-00105-8; no action was being taken under 14-6-00862-7.

Respondents argue in their brief that N.G. has “not alleged any error that is related to...cause number 20-6-00105-8.” Presumably they are suggesting that N.G. should have filed a motion to dismiss under cause number 14-6-00862-7. That is the same argument that was tendered by Respondents (who were previously petitioners) at the superior court level, where they asked the court to dismiss N.G.’s motion on that very basis. RP1 11-12. N.G. asserted that this argument cannot succeed as it would permit the Department to evade review of timeline violations and effectively thwart the legal system, simply by filing a petition under a new cause number anytime there was a timeline violation. RP1 11-12. The superior court agreed that this argument could not succeed and heard the motion on the merits. RP 12. Respondents did not assign error to the superior court’s decision.

N.G. asserts that the superior court was correct in ruling that this motion regarding timeline violations could be brought under the 20-6-00105-8 cause number. At the time that was the only active cause number as the Department had willfully abandoned the 14-6-00862-7 cause number

by not filing a 180-day petition, timely or at all. They also declined to file the 14 day petition under that cause number, although they continued to detain N.G.'s based on that cause number, despite the fact that that order expired on December 24, 2019. N.G.'s counsel had no obligation to object under cause number 14-6-00862-7, when the state was no longer proceeding under that cause number and had re-filed a new petition under a new cause number; objecting under the previous cause number would have been both futile and ineffective.

If this Court were to adopt Respondents' argument that this is not properly in front of the court, it would permit any DCR, MHP or doctor to wait to refer a patient for a 72-hour hold until they felt it was convenient for them (perhaps 30 days late), and then comply with the timelines thereafter, without repercussion. According to Respondents, that would comply with RCW 71.05.010(2) or 71.05.050(3). Such a conclusion clearly does not comply with the timeline requirements set forth in RCW 71.05.010(2) or 71.05.050(3). This court should consider N.G.'s challenge to the timeliness of the petition under 20-6-00105-8 because it is the only way for a person unlawfully held beyond the expiration of a civil commitment order to effectively request relief.

The Department created a legal farce by refileing a petition for N.G. under 20-6-00105-8. The Department never released N.G. from detention. 20-6-00105-8 is simply a continuation of 14-6-00862-7. They assert this is

a righteous loophole that permits them to detain, without release, *any patient*, and in this case, N.G., contrary to the timeline requirements of RCW 71.05.

- b. N.G. objected to the 90-day petition by taking exception to the court's prior ruling, denying N.G.'s motion to dismiss for "total disregard" of RCW 71.05.

N.G. properly preserved the record at her 90-day hearing, taking exception to the court's prior ruling, where the court denied N.G.'s motion to dismiss for a "total disregard" of the statutory rights and requirements of RCW 71.05. "I believe it was Your Honor presiding, at the 14 day...hearing...there was a respondent's motion for dismissal which was heard by the Court. I'm referring to the respondent's motion for dismissal that was filed January 28, 2020, that did deal with an issue with regard to [N.G.] being held here at Western State Hospital for approximately 35 days after expiration of a prior 180-day order." RP2 3. N.G. clearly raised the issue of "total disregard" and went on further to say, "just for the record so that it is clear for any type of appeal purposes – I did just want to incorporate that by reference...the respondent does take exception to the ruling on that motion." RP2 3-4.

N.G. did all she could to preserve a very specific issue without re-litigating the exact same issue in front of the exact same commissioner. The ruling had occurred just 14 days prior. N.G. acknowledged the court's decisions on the motion to dismiss filed January 28, 2020, asked to incorporate by reference (to which there was no objection from Respondent-

Petitioner), and also took *exception* to the court's ruling. The court and the department were clearly on notice that N.G. maintained her objection.

“[F]or all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action the party desires the court to take or the party's objection to the action of the court and grounds therefor. ” CR 46. It is true that exceptions are generally an antiquated way to formally object, specifically, to jury instructions. 14A Douglas J. Ende, *West's Wash. Prac.* § 31:6 n. 6. Washington State Court Rule 46 abolished the requirement of taking formal exception “to rulings or orders of the court.” CR 46. However, N.G. clearly informed the court of her objection to the prior ruling, denying her motion to dismiss, and her objection to her continuing detention under 20-6-00105-8 at the 90-day hearing. Therefore, this court should consider the lawfulness of N.G.'s detention under 20-6-00105-8.

2. *When There has Been a Total Disregard of the Statutory Requirements of RCW 71.05, the Court Should not Reach the Merits of the Petition; the Only Appropriate Remedy is Dismissal.*

- a. Under the statute, dismissal is the remedy for a “total disregard” of the statute.

The Department argues that the violation of N.G.'s rights is irrelevant, because N.G. is gravely disabled. However, it is clear that the legislature intended for these rights and requirements to apply to those who

are “gravely disabled.” The court must first determine if there has been a “total disregard;” if there is a “total disregard,” then the court does not reach the merits of the petition.

Respondents also rely on *In re the Detention of V.B.*, 104 Wn.App. 953, 19 P.3d 1062 (2001) to argue that this Court should decide N.G.’s case on the merits. In *In re V.B.*, the issue was whether the officer who detained V.B. needed to be present for her hearing and if the State needed to prove that he had reasonable cause to believe she met detention criteria at the time of her initial detention. *In re V.B.*, 104 Wn.App. at 960. With regard to that issue, the court stated, “because the purpose of civil commitment is not punitive, but instead to benefit the detainee as well as to protect the public, strict construction of the statutory scheme may not be appropriate in all cases.”¹ In the same paragraph the court stated, “Although we must strictly construe statutes that impact on liberty interests, in the civil commitment context we also consider the intent of the statute.” *Id.*

In re V.B., cites to *Swanson* for the proposition that strict reliance may not be appropriate in all cases. *Id.* at 960, citing *In re Detention of Swanson*, 115 Wash.2d 21, 24, 793 P.2d 962 (1990). *Swanson* held:

In light of the clear language of the statute and Washington case law concerning statutes impacting liberty interests the time limits at issue must be strictly construed. However, we hold that, in the civil

¹ Only one case cites this headnote: a division III sexually violent predator case: *In re Rogers*, 117 Wn.App. 270, 275, P.3d 220, 222-223 (2003). No other civil commitment cases cite this headnote from *In re the Detention of V.B.* N.G. asks the court to consider that when determining what weight to allot to the holdings of that case.

commitment context, a hearing begins when the court calendar begins and the parties' attorneys are ready to proceed.

Id.

However, *In re Swanson* dealt with interpreting when a hearing began and when the 72 hours for the initial hearing began, not with someone being held for 30 days without a court order. *Id.* In *Swanson*, the client's case was called at 4:50 p.m. instead of 9:30 a.m. on the day that his 72-hour detention expired. *Id.* at 23. *Swanson* limited its holding, stating, "[w]e take care to note, however, that our holding is expressly limited to this context." *Id.* at 31.

In re V.B. does not apply to this case for several reasons. First, the statute specifically addresses a remedy when there is a "total disregard," which is dismissal. "Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *Human Rights Comm'n v. Cheney Sch. Dist.* 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982). Statutory interpretation of intent is unnecessary when the plain language of the statute is clear. Second, the violation in this case was egregious; not a minor delay or technicality. Finally, the intent of the statute is to prevent exactly this type of situation. The statutory intent includes, "[t]o prevent inappropriate, indefinite commitment of mentally disordered persons . . .;" "[t]o provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders;" "[t]o safeguard individual rights;" "[t]o provide continuity of care for persons with serious

mental disorders” RCW 71.05.010. Third, *In re V.B.* relies on *Swanson* to support this concept that strict construction may not be appropriate in all cases “*See Swanson*, 115 W[n].2d at 31, 793 P.2d 962.” However, *Swanson* does not appear to stand for this proposition even at the pin cite it reads:

In light of the clear language of the statute and Washington case law concerning statutes impacting liberty interests the time limits at issue must be strictly construed. However, we hold that, in the civil commitment context, a hearing begins when the court calendar begins and the parties’ attorneys are ready to proceed.

Id.

Respondents further cite to a sexually violent predator case under RCW 71.09, which states, in part, “[a] state has a legitimate interest in treating the mentally ill and protecting society from their actions.” *In re Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002). N.G. is not a sexually violent predator; she was not found to be a danger to self or others. CP 28-32, 53-56, 83-86. *In re Albrecht* has no relevance to this case. The remedy under RCW 71.05 for a “total disregard” of the statute is clearly dismissal.

b. *The possibility of a civil remedy is irrelevant*

Respondents place much emphasis on the fact that N.G. can seek financial remuneration for her unlawful detention by pursuing civil damages; certainly that is the case pursuant to RCW 71.05.510. That is, however, not relevant to whether or not she is entitled to a statutory remedy under RCW 71.05.010(2) or RCW 71.05.050(3) and (4) in the ITA case. If she cannot seek dismissal, she has no remedy in the ITA case. She is entitled

to both because the legislature created both remedies to protect N.G. and deter this behavior. Similarly, when a law enforcement officer makes an unlawful entry into an individual's home, remedies may include both suppression of evidence in a criminal case and civil damages. One remedy does not exclude the other.

c. There was a "total disregard" for N.G.'s rights in this case.

Respondents argues that "'disregard' connotes more than an oversight, more than mere negligence. It involves willful or intentional negligence. In short, something must be regarded to be disregarded. It appears that Respondents agree that little or no regard was given to N.G. as she sat on that ward for 30 full days before someone even noticed she was being held unlawfully. The extreme negligence for N.G. in this case is a perfect example of the Respondent's definition, "to treat as unworthy of regard or notice," and also, "to treat without fitting respect or attention." A concerning lack of attention was paid to N.G.'s case and treatment when the Department unlawfully held her in a mental health unit for 30 days with no court order and with no knowledge that the order had expired. A unit where N.G. was held against her will in order to get prompt evaluations and individualized treatment pursuant to RCW 71.05.010 (c) and *In re the Detention of D.W.*, 181 Wn.2d 201, 332 P.3d 423 (2004). No one was keeping track of N.G.'s evaluations or treatment. This is exactly the kind of

situation that constitutes a “total disregard,” even by the Respondent’s own definition.

RCW 71.05.050 (4) should be enforced in N.G.’s case, even if she is “gravely disabled.” This is not a sufficiency of the evidence appeal. It is an appeal with respect to what constitutes a “total disregard,” under RCW 71.05.010(2) and 71.05.050 (4). RCW 71.05.050(4) states, “dismissal is not the appropriate remedy...except in the few cases where the facility staff or designated crisis responder has totally disregarded the requirements of this section.” Certainly, the only persons who are subject to RCW 71.05 are gravely disabled, danger to self or danger to others, anyone else should not be subject to any provisions of RCW 71.05.

Respondents mistakenly interpret N.G.’s argument to be that she could never be subsequently committed based on a timeline violation prior to the filing of cause number 20-6-00105-8. That is not N.G.’s argument. N.G. is arguing that 20-6-00105-8 should be dismissed because it is directly linked to her being unlawfully held under 14-6-00862-7, in “total disregard” of the statute. N.G. does not argue that she is not re-detainable at any future point. If N.G. was released, the Department could transport her to a shelter or other appropriate facility and refer her for mental health care in the community. If she exhibits signs of grave disability in the community, N.G. could be re-detained and recommitted if she meets criteria for civil commitment. The appropriateness of any future detention should be

determined after she is released, and not simply a continuation of her unlawful detention. The 14-day petition, which is an extension of N.G.'s unlawful detention under 14-6-00862-7, should have been dismissed for the Department's "total disregard" of RCW 71.05.

It is imperative that RCW 71.05 and all of its provisions are complied with and enforced, especially in cases where individuals are the most vulnerable. These are the individuals who need the most advocacy, the most prompt and timely individualized treatment, and the most care. Yet, N.G. was entirely ignored. This is not a typical case of a minor inconvenience to the client. This is a "total disregard," so egregious in nature that it does not often reoccur. This is one of the "few cases" that RCW 71.05.050(4) contemplated.

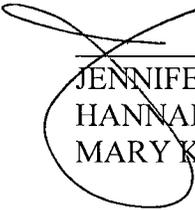
II. CONCLUSION

For the reasons stated above, this court should reverse the involuntary commitment order entered in this case. N.G. properly preserved her record for this appeal at her 90-day hearing. Due to the "total

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disregard” of the statute and N.G.’s rights, this is one of the “few cases” where the 14-day petition must be dismissed and any subsequent involuntary treatment orders under this cause number must be vacated.

RESPECTFULLY SUBMITTED this 31st day of August 2020.



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CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this Reply Brief of Appellant were delivered electronically to the following:

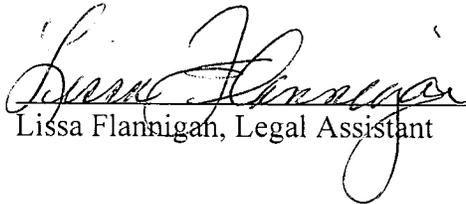
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This statement is certified to be true and correct under penalty of perjury of the laws of the state of Washington.

DATED: 8/31/2020


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