

FILED

FEB 19 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 27419-5-III

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STATE OF WASHINGTON

DIVISION III

In Re the Detention of

JOHN LAWRENCE ROBINSON,

Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

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ASSIGNMENT OF ERROR

1. The trial court erred in entering Finding of Fact 5 and Conclusions of Law 4, 5 and 6. (CP 1695; Appendix "A")

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Is John Lawrence Robinson's case moot under the facts and circumstances presented?

STATEMENT OF CASE

On August 2, 2007 the State filed a motion to show cause in connection with Mr. Robinson's first annual review under Chapter 71.09 RCW. The State sought to retain Mr. Robinson in custody at the Special Commitment Center for sexually violent predators. (CP 1; CP 2)

The petition is based upon an evaluation conducted by Regina Harrison at the Special Commitment Center. The evaluation is dated March 26, 2007 and indicates that Mr. Robinson continues to be classified as an sexually violent predator (SVP). (CP 8)

On November 5, 2007 Mr. Robinson filed a motion for new trial under CR 60(b)(3), (11). The motion was based upon a declaration from Dr. Richard Wollert who had been appointed as an expert witness on behalf of Mr. Robinson. (CP 64; CP 68; CP 361)

Multiple scheduling hearings were conducted and the actual review hearing was not held until May 9, 2008. (05/23/07 RP; 08/27/07 RP; 10/05/07 RP; 12/21/07 RP; 02/08/08 RP)

Mr. Robinson conceded that the State had established a *prima facie* case based on the annual review conducted by Ms. Harrison. However, he argued that his current health condition, age and a change in the underlying science constituted a basis to grant him a new trial. (05/09/08 RP 110, l. 19 to RP 111, l. 1; RP 128, l. 2 to RP 131, l. 19; RP 135, ll. 1-3)

The trial court entered an order denying the new trial motion on August 20, 2008. (CP 1695)

Mr. Robinson filed a Notice of Appeal on September 5, 2008. (CP 1708)

The Court of Appeals stayed the proceedings by a Commissioner's Ruling entered on December 11, 2008 pending decision in the case of *In re Detention of McCuiston*, 174 Wn.2d 369 (2012). (Appendix "B")

On September 19, 2012 the Court of Appeals lifted the stay after the *McCuiston* decision was entered and a mandate issued. (Appendix “C”)

During the interim additional annual reviews were conducted. (RP 1793; RP 2070; RP 2203)

Mr. Robinson filed a demand for an evidentiary hearing on October 8, 2010. This was based upon the fact that he had suffered a stroke, would attain the age of fifty-eight (58) on December 2, 2010, as well as a change in the underlying scientific basis for declaring him an SVP. (CP 1954; 10/08/10 RP 14, l. 4 to RP 21, l. 7; RP 21, ll. 8-17; RP 23, ll. 4-5)

An order granting Mr. Robinson’s motion was entered on November 10, 2010. It granted him a new trial. The new trial has not yet been held. (CP 2043)

The trial court granted a stay of proceedings, as to the trial, on August 26, 2011 pending the *McCuiston* decision. An order granting the stay was entered on September 9, 2011. (08/26/11 RP 6, ll. 4-9; CP 2194)

SUMMARY OF ARGUMENT

Even though the issue in the case may be moot, Mr. Robinson is still entitled to relief. The Court of Appeals should order the trial court to immediately schedule a new trial pursuant to the order granting a new trial dated November 10, 2010.

ARGUMENT

The question is whether “probable cause exists,” warranting a hearing on the merits. RCW 71.09.090(2). The standard of proof is “probable cause.” *In re Detention of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). There are two ways for a court to conclude that “probable cause exists”: (1) the failure of the State to show that the petitioner’s condition has not changed, or (2) the petitioner’s affirmative showing that it has. *Id.* at 798.

In re Detention of Savala, 147 Wn. App. 798, 802-03, 199 P.3d 413 (2008); *see also State v. McCuiston, supra*, 382.

The trial court determined that Mr. Robinson failed to establish probable cause at the initial annual review. However, at a subsequent review hearing the trial court ordered a new trial. Thus, the issue is whether or not Mr. Robinson’s appeal is moot.

When Mr. Robinson was granted a new trial the underlying facts were his advanced age, physical condition as a result of a seizure/stroke, and the impact of changes in the scientific community concerning SVP determinations.

When the trial court initially denied Mr. Robinson a new trial, it ruled that there was insufficient evidence of a significant change in order to grant the trial.

Legislative findings in connection with an amendment to RCW 71.09.090 include:

... The legislature finds, although severe medical conditions like stroke, paralysis, and some types of dementia can leave a person unable to commit further sexual violent acts, that a mere advance in age or a change in gender or some other demographic factor after the time of commitment does not merit a new trial proceeding under RCW 71.09.090. ...

In re Detention of Fox, 138 Wn. App. 374, 394, *fn.* 12, 158 P.3d 69 (2007).

The *Fox* decision went on to note that

... Nothing in amended RCW 71.09.090 limits the court's ability to weigh and to analyze actuarial risk assessments during probable cause hearings. Rather, the amended statute simply states that in order to present expert testimony on this subject, the SVP must demonstrate that his condition has

changed beyond more than a single demographic factor.

In re Detention of Fox, supra, 395.

It appears that Mr. Robinson succeeded on his subsequent motion for a new trial due to the change in his medical condition plus the other two (2) factors which had been at issue in the first proceeding.

In re Detention of Savala, supra, 805-06 appears to address the difference noted by the trial court. The *Savala* Court stated: “The showing simply cannot be based on a single demographic factor.”

Mr. Robinson takes the position that there is an ambiguity between the *Fox* and *Savala* decisions. The *Fox* Court stated at 405:

... [P]rogress in the SVP treatment program *in conjunction with a change in a single demographic factor* can support probable cause for a new evidentiary hearing under the SVP statute.

In re Detention of Fox, supra, 405.

Even though both cases post-date the trial court’s order denying a new trial, Mr. Robinson contends that Finding of Fact 5 is contrary to the preceding Findings of Fact 1 through 4 (CP 1696-97; Appendix “D”) and Conclusions of Law 4, 5 and 6 are not supported by the underlying factual findings.

As the *McCuiston* Court noted at 384-85:

civil commitment is entitled to release upon a showing that he is no longer mentally ill or dangerous. [Citations omitted.] However, once a fact-finder has determined that an individual meets the criteria for a commitment as a SVP, the court accepts the initial conclusion as a verity in determining whether an individual is mentally ill and dangerous at a later date. [Citations omitted.] Accordingly, where an individual was found beyond reasonable doubt to be mentally ill and dangerous at the time of his commitment trial, a showing that he no longer satisfies the constitutional criteria for confinement necessarily requires a showing of change.

It is Mr. Robinson's position that he did present to the trial court, at the first annual review, a sufficient showing of change in connection with his treatment progress, increased age and underlying scientific changes.

The question of whether or not the issue(s) is/are moot appears to be controlled by *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983):

A case is moot if the issues it presents are "purely academic." *Grays Harbor Paper Co. v. Grays Harbor Cy.*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968). It is not moot, however, if a court can still provide effective relief. *Pentagram Corp. v. Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981).

Even though the trial court eventually granted Mr. Robinson a new trial, the new trial has not been held. Thus, relief can still be granted.

CONCLUSION

Relief can be granted by directing the trial court to immediately schedule a new trial so that Mr. Robinson can present the necessary evidentiary basis for being released from the Special Commitment Center.

The trial court's failure to schedule a new trial as of this date cannot be condoned.

DATED this 16TH day of February, 2013.

Respectfully submitted,



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APPENDIX "A"

5. The vast majority of the "evidence" now offered by Respondent on these topics was presented in some form at his initial commitment trial. None of this information relates to the required change in physical or mental condition required by RCW 71.09.090.

II. CONCLUSIONS OF LAW:

4. RCW 71.09.090 (2), as amended in 2001, requires a very specific showing of a positive change in condition resulting from treatment or a permanent decline in the physical ability to reoffend in order to justify a new trial that reopens Respondent's indefinite commitment.
5. Dr. Woller's opinion fails to adequately address the statutory standard that requires a "substantial change" in Respondent's physical or mental condition in order to merit a new trial. As such, it does not form the basis for a finding of probable cause that an unconditional release trial is now warranted pursuant to RCW 71.09.090.
6. None of the materials submitted by Respondent by other mental health experts adequately address the statutory standard that requires a "substantial change" in Respondent's physical or mental condition in order to merit a new trial. As such, they do not form the basis for a finding of probable cause that an unconditional release trial is now warranted pursuant to RCW 71.09.090.

APPENDIX "B"

FILED

The Court of Appeals
of the
State of Washington
Division III

DEC 11 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

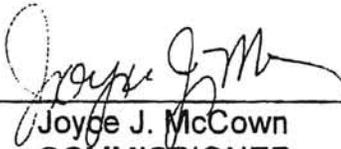
| | | |
|-------------------------|---|-----------------------|
| In re the Detention of: |) | COMMISSIONER'S RULING |
| |) | No. 25061-0-III |
| JOHN L. ROBINSON, |) | CONSOLIDATED WITH |
| |) | No. 27419-5-III |
| Petitioner. |) | |

Having considered the State of Washington's motion to (1) sever these two cases, (2) re-designate portions of Mr. Robinson's most recent filing with this Court as a "Motion for Discretionary Review," and (3) stay consideration of issues related to the denial of a new trial and the constitutionality of the 2005 amendments to RCW 71.09.090, and being of the opinion that since the parties have agreed to the severance of these two cases, that portion of the motion is granted; the parties having also agreed and therefore Cause No. 27419-5-III is hereby stayed pending the Washington State Supreme Court decision and mandate of *In re the Detention of McCuiston*, No. 81644-1; finally, in light of the stay and the fact this Court does not bifurcate matters, no

No. 25061-0-III

decision will be made at this time with regard to whether Cause No. 27419-5-III should be considered as discretionary review or as a matter of right.

December 11, 2008.



Joyce J. McCown
COMMISSIONER

APPENDIX "C"

Renee S. Townsley
Clerk/Administrator

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of the
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Division III*



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September 13, 2012

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CASE # 274195
In re the Detention of John Lawrence Robinson
YAKIMA COUNTY SUPERIOR COURT No. 972031493

Dear Counsel:

The decision and mandate having been issued in Supreme Court #816441, the following notation was entered:

September 18, 2012
State v McCulliton, Case #81644-1, has been decided and mandated.
Therefore, the stay of these proceedings is lifted.
Renee S. Townsley
Clerk

A Motion to Supplement the Record (RAP 9.10), filed October 28, 2010 was held in abeyance pending the stay; the stay having been lifted, the following notation was entered:

September 18, 2012
The Motion to Supplement the Record is granted. The report of proceedings in case #250610 are hereby transferred to pending case #274195.
Renee S. Townsley
Clerk

The time periods for compliance with the Rules of Appellate Procedure are as follows:

1. The designation of clerk's papers is due to be filed and served with the trial court, with a copy filed in this court, by October 19, 2012. RAP 9.6(a).

2. A **Supplemental Statement of Arrangements** if necessary, is due October 19, 2012. To comply with RAP 9.2(a), the statement should include the name of each court reporter, the hearing dates, and the trial court judge. Serve each court reporter and all counsel of record with a copy of the statement of arrangements, and provide this court with proof of service.

If the party seeking review arranges for less than all of the report of proceedings, all parties must comply with RAP 9.2(c).

If a verbatim report of proceedings will not be filed, you must notify this court, in writing, by October 19, 2012. RAP 9.2(a).

3. The **verbatim report of proceedings** must be filed with the clerk of the trial court no later than 60 days after service of the statement of arrangements. The court reporter's notice of filing and proof of service must be filed in this court the same day. RAP 9.5(a).

Please note:

- 1) The Court will post public accessible briefs to the Washington Courts website.
- 2) All parties filing a brief must serve one copy of the brief on every other party and on any amicus curiae and must file proof of service with this court. RAP 10.2(h).
- 3) When preparing your brief and referring to clerk's papers, use the page numbers assigned on the index to clerk's papers. Do not refer to the Superior Court docket numbers.

4. **Appellant's brief** is due in this court 45 days after the report of proceedings is filed in the trial court. RAP 10.2(a).

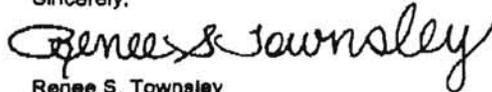
If the record on review does not include a report of proceedings, the appellant's brief is due 45 days after the designation of clerk's papers has been filed. RAP 10.2(a).

5. **Respondent's brief** is due in this court 30 days after service of the appellant's brief. RAP 10.2(c).

If a **Motion on the Merits** is to be filed in lieu of the respondent's brief, the motion is due the same date as the respondent's brief. If the motion is denied, respondent's brief is due 30 days after the date of the order. See RAP 18.14 and Division III General Order Re: Restrictions on Motion on the Merits Practice.

6. A **reply brief**, if any, is due 30 days after service of respondent's brief. RAP 10.2(d).

Sincerely,



Renee S. Townsley
Clerk/Administrator

RST:sd

c: Yakima County Superior Court
Joan Anderson, Court Reporter

APPENDIX "D"

I. FINDINGS OF FACT

A. New Trial Pursuant to RCW 71.09.090:

1. The State submitted a report by Dr. Regina Harrington, dated March 26, 2007, stating that Respondent continues to suffer from a mental abnormality and/or personality disorder that makes him likely to commit predatory acts of sexual violence if not confined to a secure facility. Specifically, Dr. Harrington diagnosed Respondent as suffering from, *inter alia*, Paraphilia NOS: Nonconsent and Personality Disorder NOS with Antisocial traits.
2. In response to the State's Motion to Show Cause, Respondent moved for a new trial and submitted a number of declarations by Dr. Richard Wollert.
3. Dr. Wollert's Declarations do not discuss or identify any "substantial change" Respondent has undergone due to treatment. Dr. Wollert notes Respondent's "consistent record of participation in treatment" and the fact that he "has progressed to Phase 4 of the SCC treatment program," failing to

note that Respondent was in Phase 4 at the time of his initial commitment trial.

4. Respondent also submitted various additional declarations by Dr. Wollert as well as other mental health professionals that purport to show that a) the diagnosis of Paraphilia NOS: Nonconsent is improper; and/or b) Respondent's likelihood to reoffend, when properly calculated, and when his age is properly considered, is below the "more likely than not" threshold of RCW 71.09.