

31648-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
APR 30, 2014
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

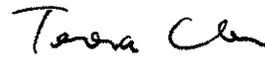
CHARLOTTE DELENE BERGEN,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the sentence of the Appellant.

III. ISSUES

1. Is the challenge to the pre-treatment detention moot where the Defendant is no longer detained such that no relief can be granted?
2. Did the court abuse its discretion in detaining the Defendant pending the start date of her treatment program when detention furthered the purposes of the DOSA sentence and assisted the Defendant in keeping in compliance with DOSA terms so as to avoid revocation and an 18 month term of incarceration?
3. Will the Court review unpreserved challenges to imposition of LFO's after *State v. Duncan*, 2014 WL 1225910 (Wn. App. filed Mar. 25, 2014) (No. 29916-3-III)?

IV. STATEMENT OF THE CASE

On December 3, 2012, the Defendant Charlotte Bergen was charged with possessing methamphetamine. CP 5-6. On January 22, 2013, the court issued a bench warrant when the Defendant failed to maintain contact with her attorney. CP 7-8. When the Defendant was before the court next, the court ordered that she be held on \$25,000 bail or bond to ensure her presence. CP 9.

She pled guilty as charged the next month. CP 29; I RP¹ 3-8. The judge observed that the Defendant had a “terrible” offender score. I RP 4. She had seven prior drug convictions between 1995 and 2010, at least five of which regarded methamphetamine. CP 20.

At sentencing the following month, the Defendant informed the court that she was hoping to be given the opportunity to go to long term treatment. I RP 9. Defense counsel explained that his client wanted the court to impose the longer treatment term, six months rather than three months. I RP 6, 10. The chemical dependency evaluation indicates that the Defendant suffers from PTSD and multiple personality disorder and “will continue to engage in criminal behaviors to support addiction.” CP 21-22. The Defendant acknowledged daily use of injectable drugs to an

¹ I RP refers to the transcript for 3/18/2013 and 4/18/2013 prepared by Court Reporter Linda Lathim.

extent that cessation in use caused withdrawal. CP 24-26. She acknowledged that her drug abuse caused her social, emotional, and physical problems and negatively affected important work, school, home, or social activities. CP 24-25.

The court imposed the residential DOSA, indicating that the Defendant's failure to do the treatment should result in the DOSA revocation and 18 months incarceration. I RP 12-13.

The court also imposed legal financial obligations (LFO's) to be paid at \$100 a month following completion of her treatment. I RP 13-14.

THE DEFENDANT: You're Honor, I'm on SSI. Do you think I could pay 50?

THE COURT: I'll reduce it to 50 on that basis.

THE DEFENDANT: Thank you.

THE COURT: But we're going to start that say November 1, that should be after six months. You need to make those payments.

I RP 14.

Defense counsel then explained that although the DOC tries to get bed dates before the sentencing hearing, there was no bed date yet for the Defendant's inpatient treatment. I RP 15, 16-17. While noting that pre-treatment release may result in the Defendant using drugs, nevertheless

counsel asked whether the Defendant could be released pending the scheduling of a bed date. I RP 15-16. The prosecutor agreed that relapse was the concern, if the Defendant relapsed before entering treatment “that doesn’t do a whole lot of good.” I RP 16.

The judge explained “I’m not inclined to release her today, but what I would like to have you guys do -- how do you -- is there any way of finding out when the possible bed date might be?” I RP 16. The judge asked the parties to revisit the question of release the next morning before Judge Wolfram. I RP 17-18.

A few days later, defense revisited the question of release pending treatment. CP 40-41; II RP² 1-3. Counsel argued that there is no provision for indeterminate incarceration pending a bed date. CP 41.

The prosecutor explained that the treatment facility would require a patient to be “clean” before entering treatment. II RP 3. If the Defendant was released without treatment and immediately began using illegal substances again, because of her untreated addiction, the DOSA would be undermined. Not only would the Defendant be ineligible for the treatment program, but she would have violated the DOSA terms and be revoked before she could even get started. II RP 3. The prosecutor

² II RP refers to the transcript for 4/22/2013 prepared by Court Reporter Tina Driver.

suggested that defense counsel was not really acting in the interest of the client, but setting her up for failure and 18 months of incarceration. II RP 3-4. The DOC representative Ms. McHie agreed with the prosecutor that the statute was silent on pre-treatment release in a DOSA. II RP 4.

Ms. McHie explained that there was a possible bed date of June 13 (in less than two months), however, "I'm very confident we'll be able to get her in sooner than that." II RP 4.

The court determined that it had discretion to effectuate the intent of the DOSA statute to detain the Defendant until her bed date. II RP 5.

The findings related to the court's order note that:

- the Defendant had been held for two months pending her sentencing hearing for the reason that she could not abide by the court's previous order to maintain contact with her attorney;
- the Defendant had a fifteen year history of illegal substance abuse with seven prior felony convictions; and
- the Defendant would likely enter treatment in two months if not sooner.

CP 56. The Defendant appeals this detention order and the imposition of LFO's.

V. ARGUMENT

A. THE CHALLENGE TO THE DETENTION ORDER IS MOOT WITH NO RELIEF POSSIBLE.

In oral argument on the Motion on the Merits, Defendant's counsel informed the Court that the Defendant was released, went to her treatment, and completed treatment. She is no longer detained pending treatment.

The Defendant provides the legal standards on mootness. Brief of Appellant at 13 (explaining that a case is moot and generally dismissed when a court can no longer provide effective relief). She argues that the issue is not moot, because it is the sort of error that may be repeated but could not otherwise be reviewed. Appellant's Brief at 13 (citing *In re Marriage of Irwin*, 64 Wn. App. 38, 60, 822 P.2d 797 (1992)). The State disagrees both that there is error and that this minimal delay in finding a bed date is likely to be repeated.

According to the Defendant's own trial counsel, this is not an issue that is likely to be repeated, because the DOC is taking pains to arrange bed dates for DOSA applicants even before a DOSA has been granted. "I know DOC in response to this and my complaint was trying to get bed dates set up before sentencing *and I know they have been doing that.*" I RP 16-17 (emphasis added).

In the instant case, the Defendant pled guilty to her eighth felony a month after her incarceration. She was sentenced after another month. At that time, DOC explained that they had a definite bed date reserved in two months time but were confident that a sooner bed date would become available from the wait list. The complication or rarity in this case then was the *rapidity* of the Defendant's decision to plead guilty. The DOC did not delay and the likelihood of quick placement is apparently satisfactorily high.

There can be no relief here. There is no evidence on the record that this detention is likely to be repeated. The matter is moot.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN DETAINING THE DEFENDANT PENDING TREATMENT IN ORDER TO BETTER EFFECTUATE THE GOALS OF THE DOSA.

The Defendant argues that sentencing is not a judicial power. Appellant's Brief at 6, (citing *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980)). This is poorly phrased. Sentencing is most definitely a judicial power. RCW 9.94A.505. What the Defendant apparent intends, as interpreted from the citation, is that the defining of sentences is a legislative power. However, what the Defendant complains of in this regard is not the judgment and sentence, but the order of detention. Detention is most certainly a judicial power. CrR 3.2. [A court may also delay sentencing for

good cause. RCW 9.94A.500. In other words, the trial court could have reached the same result by delaying imposition of the sentencing hearing in order to determine that the Defendant's rehabilitation would be well planned with a waiting treatment bed.]

In oral argument on the Motion on the Merits, the Defendant argued that CrR 3.2 does not apply after conviction. The superior court has this explicit authority even before a finding of guilt, when there is a presumption of innocence, when a defendant is only accused, and when the only finding is one of probable cause. CrR 3.2(b) and (c). After a conviction then, when there is a guilty plea which waives the State's burden to prove the elements of the offense beyond a reasonable doubt (CP 11), how much more inherent authority does a court have to detain?

The court may delay release when the detainee suffers substance abuse and when release will jeopardize the accused's safety or the safety of others. CrR 3.2(f)(1). Here the Defendant admitted daily use that she had been struggling with for fifteen years and could not control on her own. The chemical dependency evaluation stated that the Defendant "will continue to engage in criminal behaviors to support addiction." CP 21-22. Her continued use threatens her health, her relationships, and her freedom. CP 24-26.

The court may also delay release when a person's mental condition renders her a danger to herself or others or gravely disabled and when she should be considered for commitment mental health treatment. CrR 7.2(f)(2). Here the Defendant was not just considered for commitment for treatment, she was entering treatment. Here the evaluation stated that the Defendant had several mental health diagnoses: substance abuse, PTSD, and MPD. CP 22. The Defendant indicated grave disability, i.e. substance abuse which resulted in social dysfunction, physical dysfunction, and disruption of important work, school, or home activities (e.g kept her from doing work, going to school, or caring for children). CP 24-25. Her use threatens her own safety and puts others at risk of her repeated criminal behavior.

The Defendant argues that the Order of Detention was an unauthorized modification of the sentence. Appellant's Brief at 9. But the order is quite separate from the judgment and sentence. There is no appearance that it modifies the sentence at all. It is merely a detention to effectuate the goals of all parties, i.e. the Defendant's successful treatment and reduced incarceration.

No statute is required to empower a superior court to exercise its jurisdiction. *In re Hayes*, 93 Wn.2d 228, 233, 608 P.2d 635 (1980). As

the parties stated below, the statute is silent on the court's authority to plan the details of a DOSA in order to best effectuate the legislative intent. II RP 2-4. When there is a lack of guidance, this "does not in any event derogate from the judicial power of the court which includes the power to authorize such procedure where necessary." *In re Hayes*, 93 Wn.2d at 233; WASH. CONST. art. 4, sec. 6.

To release the Defendant untreated with the threat of 18 months incarceration is to set the Defendant up for failure just as her salvation is within reach. The purpose of the DOSA is to allow an offender a reduced term of incarceration when treatment is more likely to rehabilitate an offender and, therefore, protect the public from repeated criminal behavior. RCW 9.94A.660(5).

It is the intent of the legislature to increase the use of effective substance abuse treatment for defendants and offenders in Washington in order to make frugal use of state and local resources, thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons. The legislature recognizes that substance abuse treatment can be effective *if it is well planned* and involves adequate monitoring, and that substance abuse and addiction is a public safety and public health issue that must be more effectively addressed if recidivism is to be reduced. The legislature intends that sentences for drug offenses accurately reflect the adverse impact of substance abuse and addiction on public safety, that the public must have protection from violent offenders, and further intends that such sentences be based on policies

that are supported by research and public policy goals established by the legislature.

Laws of 2002, ch. 290, sec. 1 (emphasis added).

Contrary to the Defendant's argument, the court's action did not usurp a legislative power, but effectuated the legislative intent through proper exercise of the court's power and discretion.

In oral argument on the Motion on the Merits, defense counsel argued that the detention was paternalistic. Such claim is not a cognizable legal challenge. Nor does it take into account the realities of addiction including the fact that an addict cannot overcome the problem alone without structure and the support of others, including the courts.³ By asking for a DOSA, the Defendant was asking for two things. She wanted to avoid the longer term of incarceration – which would be imposed were she to violate any provision of the DOSA. And she wanted successful treatment. She asked for the longer treatment term, six months rather than three months. I RP 6, 10. The court's detention order assisted the Defendant in her goals.

³ See Cara Solomon, *King County Court Helps Drug Addicted Parents*, THE SEATTLE TIMES, Aug. 23, 2005, at B1 (“I’ve had them yell at me. I’ve had them curse me out,” said Judge Patricia Clark, the founding judge in the King County court [Family Treatment Court]. ‘And then I’ve had them standing there in six weeks, crying, saying “Thank you.”’”).

This was a discretionary act well within the authority of the superior court. The court did not abuse its discretion in delaying release.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Defendant challenges the court's imposition of legal financial obligations. She acknowledges that she did not challenge the LFO's at the sentencing hearing. Recently, this Court issued a published opinion deciding that it would decline to address unpreserved challenges to the imposition of legal financial obligations. *State v. Duncan*, 2014 WL 1225910 (Wn. App. filed Mar. 25, 2014) (No. 29916-3-III). There is no good reason to review the matter at this time under RAP 2.5(a). A defendant may petition for remission of all or part of the costs at the time of their collection. RCW 10.01.160(4).

Not only did the Defendant fail to object, but she (separate from her counsel) negotiated the payment plan with the court. She is a high school graduate (CP 10) without any apparent language, citizenship, or competency barriers and with the presence or comportsment to negotiate with a judge on her own behalf. Her history of convictions suggests a familiarity with LFO procedures. All of this indicates her ability to pay \$50/mo and is sufficient to uphold the court's finding. *State v. Lundy*, 176

Wn. App. 96, 106, 308 P.3d 755 (2013) (“The State’s burden for establishing whether a defendant has the present or future ability to pay discretionary legal financial obligations is a low one.”).

In *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), the sentencing court made a finding that the defendant Bertrand had the present or future ability to pay. The court of appeals found no evidence in the record to support the finding and, therefore, held that the finding was clearly erroneous. *State v. Bertrand*, 165 Wn. App. at 404. However, the court also noted that the question was not ripe under *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991). *State v. Bertrand*, 165 Wn. App. at 405. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO’s. *State v. Bertrand*, 165 Wn. App. at 405.

This is not the *Bertrand* case. There is evidence on the record to support the court’s finding. Because, unlike *Bertrand*, there is evidence on the record demonstrating the Defendant’s ability to pay \$50/mo after she completes treatment, there is no cause to grant to the Defendant’s request to asks to strike finding 2.5. CP 34-35.

Note that even if the finding were without basis in the record (which is not the case here), the Defendant’s request to strike not just the

finding but also the imposition of fines is not the holding in *Bertrand*, contrary to Defendant's suggestion (Appellant's Brief at 22, 24 (arguing remedy is to strike both the finding and imposition of costs)). Rather the *Bertrand* court struck the finding, but affirmed the imposition of LFO's, noting that the proper time to address the question is "when the government seeks to collect the obligation." *State v. Bertrand*, 165 Wn. App. at 405, *citing State v. Baldwin*, 63 Wn. App. at 310.

The Defendant points out that she informed the court that she was receiving SSI. SSI is supplemental income for aged, blind, or disabled persons with little or no income. Whether the Defendant's precise disability is partial or full, temporary or permanent, or related to her substance abuse, for which she will be treated before her payments become due, is not demonstrated on the record. A person who has the wherewithal to supply herself with illegal substances on a daily basis over many years has the wherewithal to pay \$50 a month toward her fines.

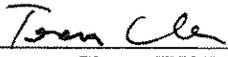
This record is sufficient to sustain the finding that the Defendant has the present and future ability to pay \$50 a month. The court did not abuse its discretion in imposing the legal financial obligations.

VI. CONCLUSION

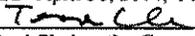
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: April 30, 2014.

Respectfully submitted:



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<p>Susan Marie Gasch gaschlau@msn.com</p> <p>Charlotte Bergen c/o 310 South 10th Ave. Walla Walla, WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 30, 2014, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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