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Supreme Court No. _____
Court of Appeals No. 65537-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BAO DINH DANG,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Bao Dang, the appellant below, asks this Court to accept review of the published Court of Appeals opinion, No. 65337-0-I. The opinion was originally filed on March 12, 2012. An order granting a motion to publish was filed on June 14, 2012. Copies of the Court's slip opinion and the order granting the motion to publish are attached as Appendices A and B.

B. ISSUES PRESENTED FOR REVIEW

1. The Fourteenth Amendment requires that in order for an individual to be confined against his will in a mental institution, he must be proven to be mentally ill and dangerous. Insanity acquittees may only be conditionally released from confinement if they are not dangerous. In its published opinion, Division One construed RCW 10.77.190, pertaining to the modification or revocation of conditional release for insanity acquittees, to permit revocation based solely upon proof of a violation of a term of release, and without any predicate finding of dangerousness. Should this Court grant review and hold proof of dangerousness is constitutionally required? Was the evidence insufficient to prove petitioner Dang was dangerous? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Should this Court review the important constitutional question and question of substantial public interest of the standard of proof at a

revocation hearing, and conclude that in light of the liberty interest an insanity acquittee has in his conditional release, the standard should be clear and convincing evidence? RAP 13.4(b)(3); RAP 13.4(b)(4).

3. Although there is no Sixth Amendment right to confrontation at a probation modification hearing, the Supreme Court and this Court hold that the Fourteenth Amendment requires confrontation absent a showing of good cause, so as to ensure that the evidence presented is reliable. Should this Court review Division One's opinion refusing to follow this Court's decisions and holding that this standard is inapplicable when the evidence is hearsay from live witnesses rather than documentary evidence? RAP 13.4(b)(1); RAP 13.4(b)(3); RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Bao Dang is a Vietnamese native who suffers from a severe major depressive disorder with psychosis. CP 45, 48. On November 7, 2006, not long after he was released from a civil commitment to Western State Hospital ("WSH"), Dang attempted to set fire to a gas station in south King County. CP 2. Based on this event, he was charged by the King County Prosecuting Attorney with one count of Attempted Arson in the First Degree. CP 1.

Dang filed an unopposed motion for acquittal by reason of insanity, pursuant to RCW 10.77.080. CP 12-16. On April 17, 2007, the

court entered an order finding Dang not guilty by reason of insanity and directing his conditional release. CP 6-11. The court made the following pertinent findings:

- That Dang committed the act charged;
- That at the time of the act charged, Dang was suffering from a mental disease or defect affecting his mind to the extent that he was unable to appreciate the nature and quality of the act or tell right from wrong with reference to the act charged;
- That Dang “is not a substantial danger to other persons and does not now present a substantial likelihood of committing felonious acts jeopardizing public safety or security but . . . is in need of further control by the court or other persons or institutions;” and
- That it was in Dang’s best interest and in the best interest of others that Dang be placed in treatment that is less restrictive than detention in a state mental hospital.

CP 7-8.

The court ordered Dang’s release, subject to multiple conditions, including that he “shall be in a state of remission from the effects of mental disease or defect and have no significant deterioration of mental condition or other significant sign of decompensation.” CP 10.

In a subsequent order modifying the conditions of Dang’s conditional release, the court authorized Dang’s Department of Corrections (“DOC”) Community Corrections Officer (“CCO”) to detain Dang and take him into custody for hospitalization and evaluation if the

CCO reasonably believed that Dang was failing to adhere to the conditions of his supervised release, and that as a result might become a substantial danger to other persons or present a substantial likelihood of committing criminal acts. CP 18-19. The order also provided for semiannual reports to the court, as required by statute. Id.

For the next 15 months, Dang did very well on conditional release. He complied with his treatment plan and medication regimen. RP 16. He showed up for all of his doctor appointments and appointments with his case manager at Harborview Mental Health Services (“HMHS”), Eric King. RP 24; CP 31. Although he initially was required by King to come in person to Harborview to pick up his medications five times per week, Dang did so well on conditional release that this requirement was reduced to three times per week. RP 25.

By June 2008, Dang was permitted without any objection from the State or DOC to travel to Vietnam for one month. CP 29-30. Dang’s psychiatrist at HMHS, Anna Holen, concurred in Dang’s travel request. CP 31. Holen noted that Dang had been attending regular appointments with her and his case manager and had reported stable symptoms. Id. Dang had informed Holen of his plans for coping with any increase in symptoms and to take his prescribed medications as required, and Holen

indicated that she would be willing to provide Dang with one month's supply of medications to accommodate Dang's proposed travel. Id.

When Dang returned from Vietnam, however, he was very depressed. RP 16, 40, 50. He asked his mother to buy him a ticket to return to Vietnam, and when she said she would not he became upset. RP 95-96, 104-05, 108. Both King and Dang's CCO, Randall Vanzandt, were concerned by Dang's emotional condition. RP 17, 40. Dang told them that he believed his mother controlled his legal proceedings and influenced whether the court would allow him off supervision. RP 17-19, 40. He said that he wanted to move out of her house. RP 19, 45. Vanzandt telephoned King to confirm that Dang was taking his prescribed medications as required. RP 40. King told Vanzandt that Dang appeared to him to be depressed, but that Dang was showing up to pick up his medications. Id.

At one point, shortly after Dang's return, Dang went to the Harborview Emergency Room allegedly to report that he was going to blow up a gas station.¹ RP 44. He asked the County Designated Mental Health Professional ("CDMHP") for help finding a new apartment. RP 44-45. When the CDMHP explained that he could admit Dang to the hospital, but could not help him find a new place to live, Dang assured

¹ Dang objected to this testimony and similar testimony from King as hearsay. RP 32, 44.

him that he would not do anything dangerous. RP 45. Dang was released from Harborview and was not civilly committed.

Upon learning of this incident, Vanzandt went to Dang's home with another CCO to conduct a search. RP 45. Dang had just picked up his medications and had a two-day supply there. Id. Although they conducted a thorough search, the CCOs could not find any indication that Dang was not taking his medications as prescribed or any other evidence that would explain Dang's transformation in mood. Id.

On August 19, 2008, Dang had a meeting with Vanzandt. RP 48. Dang's affect was flat and blunted. Id. Dang told Vanzandt that he was going to do "something big" and that he wanted to go to WSH. Id. Upon further discussion, Dang retracted this statement, and indicated that he simply wished to find a new place to live. RP 55, 59-60. Vanzandt brought Dang to Harborview and arranged for Dang to get a bed in the psychiatric ward. RP 49.

The CDMHP who evaluated Dang at Harborview, however, found no grounds to detain Dang. RP 51. When Harborview informed Vanzandt of their intention to release him, Vanzandt decided to detain Dang himself. Id. Dang was cooperative when Vanzandt took him into custody. RP 60-61. He did not struggle or offer any verbal objection to his arrest. Id.

Dang remained at WSH for the next 21 months.

Based upon these events, the State moved to revoke Dang's conditional release. CP 36-71. Hearings on the motion were held on May 24, 25, and 26, 2010 before the Honorable Michael J. Fox. Both King and Vanzandt testified on the State's behalf. The State also called as a witness Dr. Norma Martin, a clinical psychologist in the forensic unit at WSH. RP 60-63. Martin pointed to an episode before Christmas 2009, when Dang was depressed and expressed a desire to harm himself. RP 67-68. Martin believed that Dang should not be rereleased, as he needed to show more mood stability over time. RP 78.

Martin admitted that Dang's condition was greatly improved since Dang's admission to WSH in August 2008. RP 79-85. Dang exhibited diminished signs of anxiety, in particular about court dates, which previously had been a trigger for him. RP 79. Dang not only took his prescribed medications faithfully, he had insight into when he needed his medications and their purpose. RP 81. He knew to ask staff for a "PRN" – anxiety medication that he was not regularly prescribed – whenever anxiety might be an issue for him. RP 85.

According to the leader of Dang's medical education class, Dang participated in class, met group goals, and offered self-disclosure. RP 83. He attended 23 out of 23 sessions with his therapist. RP 88. His therapist reported that Dang was being more assertive than in the past and

contributing during his sessions. Id. In a letter to his support team, Dang said that he felt he had been “sick,” and that in the future he would bring his symptoms to the attention of staff. RP 85. In fact, it was because of a self-report and request to be placed into seclusion that staff became aware of Dang’s suicidal ideation in December. RP 67-68.

Although Dang submitted to Martin a relapse prevention plan which he did not seem to fully understand, Martin worked with him on preparing a new plan. RP 87. Together, they conducted a master file review, and after that was completed they created a new relapse prevention plan. Id. In the plan, Dang identified strategies for dealing with stressful situations. For example, when asked what was the best way to deal with aggressive people, Dang responded, “walk away and let them cool down.” RP 89. When asked about dealing with his own anger, Dang said that he would talk to his family, or take a walk. RP 90.

A source of concern for the State’s witnesses was the fact that Dang proposed, as part of his release plan, that he would live with his mother. RP 79. But Dang’s family was an important support for him during his confinement at WSH. RP 94-95. His mother and brother visited him weekly and he spoke with his mother on the telephone nearly every day. Id. In fact, although initially Dang would not accept visits

from his mother, as his condition improved he visited with her regularly.

RP 84.

Dang's mother testified at the hearing. She said that when Dang returned from Vietnam in 2008, he appeared very depressed, but that in the past several months Dang had returned to normal. RP 95. She asked the court to allow Dang to come home so that she could take care of him. RP 97-98. She said that Dang had told her he would not stop taking his medication, as he recognized that it was very important for him. RP 97.

Dang's mother lived a five-minute walk from Harborview. Apart from the times that Dang would be at Harborview or in appointments with his therapist or CCO, Dang's mother said that he would be with her and her other son, Wu. RP 98. She said that she would personally remind Dang to take his medication, and that if he ever started acting strange, her other son would notify Dang's CCO or case manager. RP 99.

Dang also testified at the hearing. He said that if he was released, he would ask his friends and his mother to help him, because he did not want to do anything wrong anymore. RP 100. He promised to attend all of his medical appointments and take his medications, as he understood that the medications were necessary to stabilize his mood. RP 100-01. He also understood that the warning signs of decompensation included confusion, thinking too much, and feelings of anxiety. RP 103.

Dang explained that when he came back from Vietnam in 2008, he felt strongly that he wanted to return. RP 104. He asked his mother to buy a ticket so that he could go back, and she said no, explaining that he had just come home and should wait a little while before returning. RP 104-05. This made Dang feel “sad inside.” RP 105, 108. He was homesick for Vietnam. RP 108. Dang said that he did not want to leave his mother’s home. RP 106. He told the court, “I want to be home. I want to be surrounded with family members.” RP 108.

At the conclusion of the hearing, the court acknowledged that Chap. 10.77 RCW is silent on the question of the burden of proof on a motion to revoke conditional release. The court concluded that the standard of proof should be a preponderance of the evidence, on the basis that preliminary issues in criminal cases are generally decided under a preponderance of the evidence standard. RP 142. The court commented, however, that the question of what was the correct standard of proof was “academic” because the “proof [was] strong” that Dang’s conditional release should be revoked. RP 143. The court noted that Dang’s mental condition had deteriorated and that many of his problems involved his mother, and concluded there was no placement that would satisfy the court that he could maintain himself without further deterioration. RP 144. The court entered a written order following its ruling. CP 79-80. Neither the

court's oral ruling nor the written order made any finding of dangerousness.² Division One affirmed, finding that dangerousness was not a statutory predicate for revocation of conditional release and that this statutory construction was constitutional. The Court also held that the standard of proof at a hearing to revoke conditional release was a preponderance of the evidence and, despite this Court's decisions to the contrary, that there was no due process impediment to the introduction of hearsay at the hearing. As set forth below, this Court should grant review.

D. ARGUMENT

1. THE PUBLISHED COURT OF APPEALS OPINION WRONGLY HOLDS THAT THE STATE NEED NOT PROVE AN INSANITY ACQUITTEE IS DANGEROUS BEFORE REVOKING HIS CONDITIONAL RELEASE, CONTRARY TO DUE PROCESS AND MERITING REVIEW UNDER RAP 13.4(b)(3) AND RAP 13.4(b)(4).

a. An individual may not be confined against his will in a mental institution except upon proof that he is both mentally ill and dangerous.

“[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Addington dealt with involuntary civil commitment, however in Jones v. United States,

² The State moved to supplement the record nearly two years later with findings of fact entered by a different judge who did not preside over the initial hearings. The Court of Appeals granted the State's motion over Dang's objection.

463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), the Supreme Court evaluated the constitutionality of a statutory scheme that provided for automatic commitment to a mental hospital following an acquittal by reason of insanity. The Court noted that a judgment of not guilty by reason of insanity establishes two facts: (1) that the acquittee committed the crime with which he was charged, and (2) that he engaged in the criminal acts because of insanity. Id.

The Court reasoned that the fact that a person has been found beyond a reasonable doubt to have committed a criminal offense is indicative of dangerousness. Id. at 364. The Court concluded that “a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society.” Id. at 366. Distinguishing Addington, the Court also rejected arguments that principles of due process required the proof of insanity be by clear and convincing evidence, on the basis that the fact that a criminal offense has been committed “eliminates the risk that [the acquittee] is being committed for mere ‘idiosyncratic behavior.’” Id. at 367.

Nevertheless, the Court stipulated that both mental illness and dangerousness must be present to justify continued commitment of an insanity acquittee. Foucha v. Louisiana, 504 U.S. 71, 80, 85-86, 112 S.Ct.

1780, 118 L.Ed.2d 437 (1992); Jones, 463 U.S. at 370 (“when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government . . . to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society”); see also id. at 368 (“The purpose of commitment following an insanity acquittal . . . is to treat the individual’s mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous”).

In Washington, an insanity acquittee is not subject to commitment unless there is a specific finding that he or she is a “substantial danger to other persons or . . . present[s] a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions.” RCW 10.77.010(4); see also RCW 10.77.040; RCW 10.77.080; RCW 10.77.110; Born v. Thompson, 154 Wn.2d 749, 761, 117 P.3d 1098 (2005). This emphasis accords with the constitutional concerns underscoring the

opinion in Foucha. Absent a finding of dangerousness, an insanity acquittee must be released from custody. RCW 10.77.110(1).³

b. Division One's opinion upholding an interpretation of RCW 10.77.190 that permits revocation of conditional release – i.e., commitment – without a predicate finding of dangerousness allows unconstitutional commitment of non-dangerous people, meriting review under RAP 13.4(b)(3) and RAP 13.4(b)(4). Dang argued on appeal that RCW 10.77.190⁴ is ambiguous and, to the extent the statute could be construed to permit revocation of conditional release without a finding of dangerousness, unconstitutional. Br. App. at 22-27. Division One disagreed and went a step further: the Court found that the statute unambiguously does not require a finding of dangerousness, and, with minimal analysis, held the statute was constitutional. Slip Op. at 3-5.

But in order to be conditionally released, a person must be determined to be not dangerous. Thus, under the court's published

³ RCW 10.77.110(1) provides:

If a defendant is acquitted of a crime by reason of insanity, and it is found that he or she is not a substantial danger to other persons, and does not present a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, the court shall direct the defendant's release. If it is found that such defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, the court shall order his or her hospitalization, or any appropriate alternative treatment less restrictive than detention in a state mental hospital, pursuant to the terms of this chapter.

⁴ RCW 10.77.190 is attached as Appendix C.

opinion, in Washington a person can be confined based solely on his violation of a term of his conditional release, without the court ever finding that he is dangerous. Such a result creates an unacceptable risk of involuntary confinement based upon mental illness alone, which violates due process. Foucha, 504 U.S. at 80, 85-86; Jones, 463 U.S. at 368. Pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), this Court should grant review.

c. The evidence was insufficient to prove Dang was dangerous.

Because the Court of Appeals concluded the State was not obligated to prove dangerousness under the statutory scheme, the Court deemed Dang's challenge to the sufficiency of the evidence to support a finding of dangerousness "not relevant," and instead considered only the question of whether the State proved Dang violated a condition of his release. Slip Op. at 6-7. The court thereby deliberately permitted a potentially unconstitutional order to stand.

In the two weeks leading up to Vanzandt's decision to arrest Dang, he was presented to Harborview as a psychiatric emergency on two occasions. RP 30-32. On both occasions, the CDMHP declined to confine him because there was no basis to do so. Under RCW 71.05.150 a person must be committed if there is probable cause to believe he "presents a likelihood of serious harm." Despite his depression, therefore,

the evidence strongly suggests Dang was not dangerous. Further, the fact that Dang evidenced exacerbated symptoms of depression after his return from Vietnam must be weighed against his near perfect compliance with the other terms of his conditional release.

Simply put, although Dang's heightened depression was a legitimate source of concern for Vanzandt, Vanzandt had nothing more than a hunch that Dang could become dangerous as a consequence. Two mental health professionals tasked with the specific duty of evaluating mentally ill persons for signs of dangerousness did not even find probable cause to believe Dang posed a likelihood of serious harm. Under any standard of proof, the evidence was insufficient to prove that Dang was dangerous.

2. THIS COURT SHOULD REVIEW THE COURT OF APPEALS OPINION HOLDING AN INSANITY ACQUITTEE'S CONDITIONAL RELEASE MAY BE REVOKED BASED UPON A MERE PREPONDERANCE OF THE EVIDENCE.

As a matter of first impression, the Court of Appeals held that Dang's conditional release could be revoked based upon a preponderance of the evidence standard. Slip Op. at 5-6. This was erroneous and this Court should grant review.

In the analogous instance of involuntary commitment for mental health treatment, MPR 4.5, pertaining to the burden of proof, provides:

Before entering an order returning any person for involuntary treatment on an inpatient basis as a result of failure to adhere to the terms and conditions of conditional release pursuant to RCW 71.05.340 or less restrictive treatment under RCW 71.05.320, the court shall find at the hearing that there is clear, cogent, and convincing evidence that such person did not adhere to the terms and conditions of release or less restrictive treatment, that the terms of such release or treatment should not be modified, and that the person should be returned to inpatient treatment.

MPR 4.5.

Division One conceded that Chap. 10.77 RCW is silent on the burden of proof, and adopted a preponderance of the evidence standard. Slip Op. at 5-6. The court explained it considered “the statutory scheme as a whole,” Slip Op. at 5, but did not elaborate as to why the statute requires a mere preponderance standard.

An insanity acquittee has been found to have committed a crime but has not suffered a criminal conviction. An insanity acquittee on conditional release also has affirmatively been found not dangerous.⁵ Because an insanity acquittee (1) has not suffered a criminal conviction; (2) has been found not to be dangerous; and (3) stands outside of the criminal justice system with respect to the nature of the liberty interest he enjoys in his conditional release, the standard of proof at a hearing on a

⁵ The Sentencing Reform Act of 1981 (SRA) does not speak to the question of the standard of proof at a hearing on a motion to revoke an insanity acquittee’s conditional release. Indeed, it is notable that the procedure for revoking the conditional release of insanity acquittees does not appear in the SRA, but rather in Chap. 10.77 RCW, which provides substantial due process protections to insanity acquittees.

motion to revoke conditional release should be that articulated in MPR 4.5: clear and convincing evidence. Division One incorrectly resolved this important question of first impression, meriting review.

3. THIS COURT SHOULD REVIEW DIVISION ONE'S OPINION REFUSING TO APPLY THE DUE PROCESS "GOOD CAUSE" STANDARD ADOPTED BY THIS COURT IN DAHL AND ABD-RAHMAAN TO THE ADMISSION OF TESTIMONIAL HEARSAY AT THE REVOCATION HEARING.

At the hearing on the motion to revoke Dang's conditional release, the trial court repeatedly permitted the State to introduce hearsay. In particular, in lieu of obligating the State to call the CDMHPs who examined Dang at Harborview to testify, both King and Vanzandt testified to their out-of-court statements. RP 32, 44. On appeal, the Court rejected Dang's arguments that the admission of this testimony was improper, concluding that the Fourteenth Amendment does not require a finding of "good cause" before a court may admit testimonial hearsay, distinguishing live witnesses from documents, affidavits, and the like. Slip Op. at 7-8.

While there is no Sixth Amendment right to confront witnesses at probation modification and similar hearings, the Fourteenth Amendment supplies a due process right to confrontation. U.S. Const. amend. XIV; Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157

(2005). Although the due process rights afforded at a particular proceeding are “flexible” and depend upon what the situation demands, Morrissey, 408 U.S. at 481, the admission of hearsay testimony requires, at a minimum, “the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).” 408 U.S. at 489 (emphasis added).

This Court has applied Morrissey to the revocation of a special sex offender sentencing alternative (“SSOSA”) and to probation modification hearings, on the basis that due process requires loss of liberty be based upon “verified facts” to ensure the decision is reliable. State v. Dahl, 139 Wn.2d 678, 687, 990 P.2d 396 (1999); Abd-Rahmaan, 154 Wn.2d at 289. Hearsay thus may be considered “only if there is good cause to forgo live testimony.” Dahl, 139 Wn.2d at 686. “Good cause is defined in terms of ‘difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ evidence.’” Id. (citation omitted).

Here, likewise, due process necessitates that modification or revocation of conditional release be based upon “verified facts” and an “accurate knowledge” of Dang’s behavior. Morrissey, 408 U.S. at 484; Abd-Rahmaan, 154 Wn.2d at 287. Divison One arbitrarily differentiated live witnesses from documentary evidence, holding “[t]he requirement of

good cause ... is not applicable here.” This holding eviscerates this Court’s decisions in Dahl and Abd-Rahmaan. Further, in this case, as argued in Dang’s brief on appeal, Br. App. at 34-35, the hearsay testimony was not reliable evidence, and denial of confrontation prevented a decision on “verified facts” and an “accurate knowledge” of Dang’s behavior. Pursuant to RAP 13.4(b)(1); RAP 13.4(b)(3), and RAP 13.4(b)(4), this Court should grant review.

E. CONCLUSION

The Court of Appeals’ published opinion wrongly sanctions the confinement of people who are mentally ill but not dangerous, adopts an erroneous standard of proof, and flouts this Court’s precedent regarding the due process right to confrontation. Pursuant to RAP 13.4(b)(1), RAP 13.4(b)(3), and RAP 13.4(b)(4), this Court should grant review.

DATED this 16th day of July, 2012.

Respectfully submitted:

 #39042

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APPENDIX A

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CASE #: 65537-0-I
State of Washington, Respondent v. Bao Dinh Dang, Appellant
King County, Cause No. 06-1-10797-3 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Accordingly, we affirm the order revoking Dang's conditional release."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived. Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

lls

Enclosure

c: The Honorable Michael J. Fox
Bao Dinh Dang

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 65537-0-1
)
 v.) DIVISION ONE
)
 BAO DINH DANG,) UNPUBLISHED OPINION
)
 Appellant.) FILED: March 12, 2012

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR 12 AM 11:20

GROSSE, J. — A trial court may revoke the conditional release of a person acquitted of a crime by reason of insanity if the court determines that the person did not adhere to the terms or conditions of his or her release or that the person presents a threat to public safety. Here, the trial court revoked Bao Dinh Dang's conditional release based on its determination that Dang violated a condition of his release. Given this determination, the trial court was not required to find that Dang was a substantial danger to other persons or presented a substantial likelihood of committing criminal acts jeopardizing public safety and security. Accordingly, we affirm the order revoking Dang's conditional release.

In April 2007, Bao Dinh Dang was acquitted on grounds of insanity of one count of first degree attempted arson. The court entered a judgment of acquittal by reason of insanity pursuant to RCW 10.77.080 and conditionally released Dang from custody. Among the conditions for Dang's release was that he "shall be in a state of remission from the effects of mental disease or defect and have no significant deterioration of mental condition or other significant sign of decompensation." Other conditions of Dang's release included that he be supervised by the Department of Corrections (DOC) and report as directed to a Community Corrections Officer (CCO).

In June 2007, the trial court entered an order modifying the conditions of Dang's release to include a requirement that his CCO submit reports as to his progress in treatment, any substantial change in treatment plan, and any substantial change in or significant deterioration of his condition. In the order, the court also allowed the CCO to order that Dang be apprehended and taken into custody for hospitalization and evaluation if the CCO reasonably believed Dang was failing to adhere to the conditions of his release and because of that failure may become a substantial danger to other persons or present a substantial likelihood of committing criminal acts jeopardizing public safety or security.

In January 2008, the court again modified the conditions of Dang's release. The court removed the requirement of DOC supervision and also allowed Dang to reside with his sister.

In April 2008, the court modified the conditions of Dang's release once again. The court reimposed the requirement of DOC supervision and again ordered that Dang report as directed to a CCO. The court also reimposed the condition that Dang "[b]e in a state of remission from the effects of mental disease or defect and have no significant deterioration of mental condition or other significant sign of decompensation." The court again authorized the CCO to order Dang apprehended and taken into custody for hospitalization and evaluation under the same circumstances as previously ordered.

In July 2008, the court entered an order permitting Dang to travel to Vietnam from July 3, 2008 to no later than August 3, 2008.

In late August 2008, the State sought a bench warrant for Dang's arrest on the ground that he violated the terms and conditions of his release by exhibiting significant

signs of decompensation since August 5, 2008. The court granted the State's motion and entered an order directing the issuance of a bench warrant and requiring that Dang be transported to Western State Hospital for evaluation and treatment pending a hearing on revocation or modification of his conditional release. Dang's CCO arrested Dang and took him to Western State Hospital.

In May 2010, the State moved for revocation of Dang's conditional release, alleging that Dang violated the terms and conditions of his release and needed further treatment and that his continued release without further inpatient treatment was a threat to the public. After a hearing, the trial court entered an order revoking Dang's conditional release pursuant to RCW 10.77.190 and ordering Dang committed for hospitalization and treatment. For reasons unknown, the court's findings of fact and conclusions of law were not filed in the trial court following the hearing. Because the judge who presided at the revocation proceedings had since retired, the parties presented agreed findings of fact and conclusions of law to the presiding criminal judge. The presiding criminal judge noted on the findings of fact and conclusions of law that they accurately reflected the prior judge's oral ruling. The State filed the findings of fact and conclusions of law in this court.¹

Dang appeals the order revoking his conditional release on several grounds. First, he argues that the revocation of his conditional release deprived him of due process of law because, in ordering revocation, the trial court did not make a specific finding that Dang was a substantial danger to other persons or presented a substantial likelihood of committing criminal acts jeopardizing public safety and security. But the

¹ We deny Dang's motion to strike and grant the State's motion to supplement the record pursuant to RAP 9.11.

statute pursuant to which the trial court revoked Dang's conditional release, RCW 10.77.190, does not require such a finding:

The court, upon receiving notification of the apprehension [of the conditionally released person believed to be failing to adhere to the terms or conditions of his or her conditional release], shall promptly schedule a hearing. The issue to be determined is whether the conditionally released person did or did not adhere to the terms and conditions of his or her release, or whether the person presents a threat to public safety. Pursuant to the determination of the court upon such hearing, the conditionally released person shall either continue to be conditionally released on the same or modified conditions or his or her conditional release shall be revoked and he or she shall be committed subject to release only in accordance with the provisions of [chapter 10.77 RCW].^[2]

The statute plainly allows revocation of a conditional release upon a determination either that Dang did not adhere to the terms and conditions of his release or that he presented a threat to public safety. Given that the trial court found that Dang did not adhere to the terms and conditions of his release, revocation of his conditional release based on that finding alone was proper. Moreover, we note that the trial court did in fact make a finding as to dangerousness.³

Next, Dang argues that if proof of dangerousness is not a prerequisite to the revocation of a conditional release pursuant to RCW 10.77.190, then the statute is unconstitutional. A statute is presumed constitutional, and the party challenging the constitutionality of a statute has the burden of proving its unconstitutionality beyond a

² RCW 10.77.190(4) (emphasis added). In arguing that the trial court was required to enter a finding of dangerousness, Dang ignores RCW 10.77.190 and erroneously relies on other statutes instead. These statutes are not, however, relevant to a proceeding to modify or revoke a conditional release.

³ Conclusion of Law No. 5 provides: "The defendant cannot be conditionally released without presenting a substantial danger to other persons, and he presents a substantial likelihood of committing criminal acts jeopardizing public safety and security."

reasonable doubt.⁴ Where possible, we must interpret a challenged statute in a manner that upholds its constitutionality.⁵ The presumption in favor of a statute's constitutionality should be overcome only in exceptional cases.⁶

Here, Dang has failed to prove the unconstitutionality of RCW 10.77.190 beyond a reasonable doubt. Indeed, he fails to cite any authority involving the revocation of a conditional release, and instead relies on statutes and cases involving other determinations and proceedings. Dang fails to meet his heavy burden of proving that RCW 10.77.190 is unconstitutional.

Dang raises several arguments relating to the hearing on the State's motion to revoke his conditional release. He argues that the standard of proof at the hearing should have been clear and convincing evidence, rather than a preponderance of the evidence as the trial court concluded. RCW 10.77.190 is silent as to the standard of proof required to revoke a conditional release. To resolve the issue of the burden of proof, we look not only to the text of the statute, but also to related provisions as well as the statutory scheme as a whole.⁷ The relevant statutory scheme is chapter 10.77 RCW.⁸ The preponderance of the evidence standard is the appropriate standard for a

⁴ Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991).

⁵ City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

⁶ City of Seattle v. Eze, 111 Wn.2d 22, 28, 759 P.2d 366 (1988).

⁷ State v. Hurst, No. 85549-8, 2012 WL 243675, at *3 (Wash. Jan. 26, 2012).

⁸ Hurst, 2012 WL 243675, at *3 ("Provisions addressing defendants who are not competent to stand trial are set forth in chapter 10.77 RCW.") We reject Dang's argument that the standard of proof set forth in MPR 4.5 applies here. By its explicit terms, that standard applies to conditional releases and less restrictive treatment under RCW 71.05.340 and RCW 71.05.320, respectively, not proceedings under chapter 10.77 RCW.

number of determinations under provisions of chapter 10.77 RCW.⁹ Had the legislature intended to impose the more stringent clear and convincing evidence standard for proceedings to revoke a conditional release, it knew how to do so.¹⁰ The trial court did not err in applying the preponderance of the evidence standard. Further, we agree with the trial court that even under a stricter standard of proof, revocation of Dang's conditional release was proper.¹¹

Next, Dang argues that the evidence was insufficient to prove that he was dangerous under any standard of proof and that, therefore, "the order committing him" must be vacated. But the order committing Dang is not at issue. The order on appeal is the order revoking Dang's conditional release. The issue to be determined at the hearing on a petition to revoke a conditional release is "whether the conditionally released person did or did not adhere to the terms and conditions of his or her release, or whether the person presents a threat to public safety."¹² Here, Dang's CCO alleged that Dang violated the condition of his release that he exhibit no significant signs of decompensation, and the trial court did not err in finding such violation. The issue at the hearing was not whether the State proved Dang's dangerousness. Dang's argument

⁹ See e.g., RCW 10.77.086(3) (determining competency at the hearing following the first mental health treatment and restoration period); RCW 10.77.200(3) (final discharge proceedings); State v. Paul, 64 Wn. App. 801, 805, 828 P.2d 594 (1992) (holding that the standard for determining a petition for conditional release is the preponderance of the evidence standard); Hurst, 2012 WL 243675, at *3 (holding that the standard of proof required to commit an incompetent criminal defendant charged with a felony to a third mental health treatment and restoration period is the preponderance of the evidence standard).

¹⁰ See Hurst, 2012 WL 243675, at *3.

¹¹ The trial court stated that "[f]or purposes of this case the standard of proof is largely academic because the proof here is very strong that the conditional release should be revoked."

¹² RCW 10.77.190(4).

that the evidence was insufficient to show he was dangerous is, therefore, not relevant to whether the trial court properly revoked his conditional release.

Dang argues that the trial court denied him his due process right to confrontation by admitting hearsay evidence at the hearing on the State's motion to revoke his conditional release. "[T]he due process rights afforded at a revocation hearing are not the same as those afforded at the time of trial."¹³ For example, in a parole revocation proceeding, the level of process due is flexible and allows for the admission of evidence that would not be admitted in an adversary criminal trial, such as letters and affidavits.¹⁴ Similarly, sex offenders who face the revocation of a Special Sex Offender Sentencing Alternative (SSOSA) sentence are entitled to only those minimal due process rights afforded in a parole revocation proceeding.¹⁵ Reports, affidavits, and documentary evidence are admissible in those proceedings if there is good cause to forego live testimony.¹⁶

Here, Dang objected to the testimony of Dang's case manager and of his CCO that Dang told others that he was going to set something on fire or blow up a gas station. The court overruled Dang's objections to this testimony, reasoning that the testimony was based on each witness's familiarity with the case and, although hearsay, was "admissible in hearings of this nature." The trial court's allowance of hearsay at the hearing is not the same as the admission of reports, affidavits, and documentary evidence in lieu of live testimony. Thus, the requirement of good cause for the admissibility of reports, affidavits, and documentary evidence in lieu of live testimony

¹³ State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

¹⁴ State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005).

¹⁵ State v. Badger, 64 Wn. App. 904, 907, 827 P.2d 318 (1992).

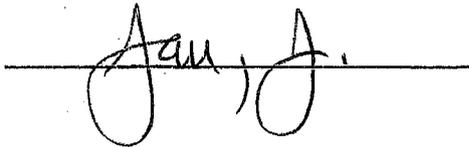
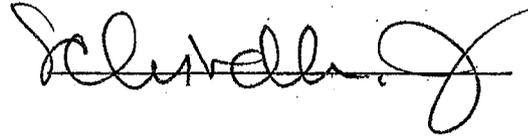
¹⁶ Dahl, 139 Wn.2d at 686.

outlined in Dahl¹⁷ and Abd-Rahmaan¹⁸ is not applicable here. Dang was afforded the due process rights to which he was entitled at the hearing.¹⁹

We affirm the order revoking Dang's conditional release.

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WE CONCUR:

A handwritten signature in black ink, appearing to be "Jau, J.", written over a horizontal line.A handwritten signature in black ink, appearing to be "Schubert", written over a horizontal line.

¹⁷ 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

¹⁸ 154 Wn.2d 280, 286, 111 P.3d 1157 (2005).

¹⁹ Because we affirm the trial court's order revoking Dang's conditional release, we need not and do not address his argument that if the matter is remanded for a hearing, the trial court should be barred from considering hearsay.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
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June 14, 2012

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CASE #: 65537-0-1
State of Washington, Respondent v. Bao Dinh Dang, Appellant

Counsel:

Enclosed please find a copy of the order entered by this court in the above case today.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

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enclosure

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 BAO DINH DANG,)
)
 Appellant.)

No. 65537-0-1

ORDER GRANTING MOTION
TO PUBLISH

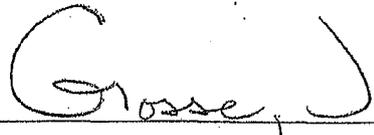
The respondent, State of Washington, has filed a motion to publish herein. The court has taken the matter under consideration and has determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the motion to publish the opinion filed in the above-entitled matter on March 12, 2012 is granted. The opinion shall be published and printed in the Washington Appellate Reports.

Done this 14th day of June, 2012.

FOR THE PANEL:



Judge

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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APPENDIX C

RCW 10.77.190

Conditional release — Revocation or modification of terms — Procedure.

(1) Any person submitting reports pursuant to RCW 10.77.160, the secretary, or the prosecuting attorney may petition the court to, or the court on its own motion may schedule an immediate hearing for the purpose of modifying the terms of conditional release if the petitioner or the court believes the released person is failing to adhere to the terms and conditions of his or her conditional release or is in need of additional care and treatment.

(2) If the prosecuting attorney, the secretary of social and health services, the secretary of corrections, or the court, after examining the report filed with them pursuant to RCW 10.77.160, or based on other information received by them, reasonably believes that a conditionally released person is failing to adhere to the terms and conditions of his or her conditional release the court or secretary of social and health services or the secretary of corrections may order that the conditionally released person be apprehended and taken into custody. The court shall be notified of the apprehension before the close of the next judicial day. The court shall schedule a hearing within thirty days to determine whether or not the person's conditional release should be modified or revoked. Both the prosecuting attorney and the conditionally released person shall have the right to request an immediate mental examination of the conditionally released person. If the conditionally released person is indigent, the court or secretary of social and health services or the secretary of corrections or their designees shall, upon request, assist him or her in obtaining a qualified expert or professional person to conduct the examination.

(3) If the hospital or facility designated to provide outpatient care determines that a conditionally released person presents a threat to public safety, the hospital or facility shall immediately notify the secretary of social and health services or the secretary of corrections or their designees. The secretary shall order that the conditionally released person be apprehended and taken into custody.

(4) The court, upon receiving notification of the apprehension, shall promptly schedule a hearing. The issue to be determined is whether the conditionally released person did or did not adhere to the terms and conditions of his or her release, or whether the person presents a threat to public safety. Pursuant to the determination of the court upon such hearing, the conditionally released person shall either continue to be conditionally released on the same or modified conditions or his or her conditional release shall be revoked and he or she shall be committed subject to release only in accordance with provisions of this chapter.

[2010 c 263 § 7; 1998 c 297 § 43; 1993 c 31 § 10; 1982 c 112 § 2; 1974 ex.s. c 198 § 15; 1973 1st ex.s. c 117 § 19.]

Notes:

Effective dates--Severability -- Intent -- 1998 c 297: See notes following RCW 71.05.010.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 65537-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent David Hackett, DPA
King County Prosecutor's Office-SVP Unit
- petitioner
- Attorney for other party

grnd
MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 16, 2012

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