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No. 65537-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BAO DANG,

Appellant.

STATE'S RESPONSE BRIEF

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTS 1

III. LEGAL ARGUMENT 13

A. DANG'S APPEAL IS FRIVOLOUS 13

B. THERE IS NO CONSTITUTIONAL REQUIREMENT FOR A DANGEROUSNESS FINDING PRIOR TO REVOKING A STATUTORY CONDITIONAL RELEASE 17

1. The Initial Civil Commitment Cases Cited By Dang Do Not Apply 18

2. The Statutory Revocation Process 20

3. Due Process Allows Revocation Based On a Violation Alone Without Reproving the Grounds for the Underlying Civil Commitment 23

C. THE PROPER EVIDENTIARY STANDARD IS BY A PREPONDERANCE OF THE EVIDENCE 26

D. HEARSAY IS ADMISSIBLE 28

IV. CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Bergstein v. State, 322 Md. 506, 518, 588 A.2d 779, 785 (1991) 27

People v. DeGuzman, 33 Cal. App. 4th 414, 419-20, 39 Cal. Rptr. 2d 137, 139-40 (Cal. Ct. App. 1995) 27

Crawford v. Washington, 541 U.S. 36 (2004) 28

In re Det. of C.W., 147 Wn.2d 259, 277, 53 P.3d 979 (2002) 23

In re Detention of Bergen, 146 Wash.App. 515, 523-524, 195 P.3d 529, 533 (2008) 20, 25, 26

In re Matter of J.S., 124 Wash.2d 689, 700, 880 P.2d 976, 982 (1994) ... 25

In re Personal Restraint Petition of McKay, 127 Wash.App. 165, 168, 110 P.3d 856, 857 (2005) 26

In re the Detention of Audett, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) 17

In re the Marriage of Crosetto, 101 Wn.App. 89, 1 P.3d 1180 (2000) 16

In re Wrathall, 156 Wn. App. 1, 232 P.3d 569 (2010), ... 23, 24

In re Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) 19

Parham v. J.R., 442 U.S. 584 (1979) 30

People v. Rodriguez (1990) 51 Cal.3d 437, 443, 272 Cal.Rptr. 613, 795 P.2d 783.) 27

State v. Abd-Rahmaan, 154 Wash.2d 280, 290, 111 P.3d 1157, 1161 (2005) 28

State v. Dahl, 139 Wash.2d 678, 683, 990 P.2d 396, 399 (1999) 28

State v. Dupard, 93 Wn.2d 268, 271, 609 P.2d 961 (1980) 26

State v. Guloy, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986) 17

State v. Keller, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983) 22

State v. Paul, 64 Wn.App. 801, 804-806, 828 P.2d 594 (1992) 27

Other Authorities

53 Am. Jur. 2d Mentally Impaired Persons § 58..... 28

I. INTRODUCTION

Appellant Dang is civilly committed as a criminally insane person under RCW 10.77. He challenges revocation of his conditional release based on the supposed absence of a danger finding in the record below. The trial court should be affirmed because a dangerousness finding is not a necessary precondition of revocation under RCW 10.77.190, and in any event, the trial court actually made a dangerousness finding. Dang's other challenges to the proceedings below also find no support in the law and should be rejected. The trial court's decision to revoke Dang's conditional release should be affirmed.

II. FACTS

In late 2006, appellant Boa Dang was charged with Attempted Arson in the First Degree. CP 1. According to the certification for probable cause, on November 7, 2006, Dang walked up to a gas pump, pulled the pump nozzle and laid it directly at his feet. CP 2. He then ignited a rolled up newspaper. *Id.* While holding the flaming newspaper in his hand, Dang attempted to operate the pump to ignite the gas. *Id.* Fortunately, the gas station pumps at this location would not operate unless a customer pre-payed, or it is likely that Dang's actions would have caused substantial injury to person and damage to property. *Id.*

An employee of the gas station was successful in knocking the burning news paper from Dang's hands, while a patron called 911. *Id.* Dang was arrested near the scene after fleeing on foot. *Id.*

Dang had been civilly committed at Western State Hospital until October 2006.1 CP 3. Following the effort to blow up the gas station (and possibly himself), he was sent to WSH for additional civil commitment confinement. *Id.* After charges where filed, WSH found that Dang was competent. CP 4-5.

The criminal case against Dang for Attempted Arson was resolved through a plea to not guilty by reason of insanity. CP 6-11. Dang moved for an acquittal on the basis of insanity, which the prosecutor accepted. CP 12. The court found that Dang committed the act of attempted arson described in the certification for probable cause, but "lacked the capacity to understand that his conduct was wrong." CP 7. The court entered a not guilty by reason of insanity (NGRI) judgment. CP 8. The maximum term for Dang's commitment under RCW 10.77 is 10 years. CP 12.

The court civilly committed Dang under the authority of RCW 10.77. *Id.* at 7. As permitted by statute, the court found that Dang did not

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1Following a plea of NGRI, a person is subject to civil commitment under the provisions of RCW 10.77. *See State v. Reid*, 144 Wash.2d 621, 627, 30 P.3d 465, 468 (2001)(Noting that RCW 10.77.110 "provides for the *civil commitment* of insanity acquittees who present a substantial danger to others or a substantial likelihood of committing future criminal acts which

require in-patient commitment, but found that Dang "is in need of further control by the court or other persons or institutions.." *Id.* at 7. The court determined to conditionally release Dang to a less restrictive alternative setting than Western State Hospital.

In order to maintain public safety, the court ordered a number of conditions for Dang's release, including a provision that he be subject to the oversight of a community corrections officer. *Id.* at 8. Dang was required to continue outpatient psychiatric services. *Id.* at 9. He was required to reside with his mother. *Id.* at 10. the court provided that his conditional release would continue only so long as Dang "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.

Following Dang's conditional release, the court held a review hearing. an order entered on June 11, 2007 modified his conditions of release to require periodic reports from the CCO assigned to supervise Dang in the community. CP 17-18. The order also recognized the CCO's statutory authority to arrest and detain Dang in the event of any violations, including any substantial change in or significant deterioration of Dang's condition. *Id.*

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would jeopardize public safety.").

After some apparent success in the community, the court modified the conditional release order in late January 2008 to remove DOC supervision. CP 20-22. Dang was allowed to move in with his sister and change treatment providers. *Id.* The court re-imposed a number of conditions, including DOC supervision, in a conditional release order entered on April 1, 2008. Id. at 24-28. During the summer, the court allowed Dang to travel to Vietnam for a month. *Id. at 29-30.*

On August 22, 2008, shortly after Dang's return from Vietnam, the State sought a bench warrant due to Dang's violations of the conditional release order. Supp. CP ___ (Sub. No. 65).2 A Notice of Violation (NOV) attached to the State's motion for a bench warrant states that Dang violated his conditional release order by "exhibiting significant signs of decompensation since 8/05/2008." *Id.* The NOV detailed Dang's "increasing depression and a growing delusional system," including a belief that his mother was god. Initially, the CCO developed a plan of more frequent contact with Dang in order to monitor the situation. *Id.* However, on August 13, 2008, Dang reported to his mental health case manager that he wasn't taking his medications and he was feeling like setting a gas station on fire. *Id.* Dang was immediately taken to Harborview, where he recanted both claims, explaining that he was merely

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2 The State has submitted a Supplemental Designation of Clerk's Papers

trying to get into the hospital. *Id.* The CCO did not retain Dang in custody and transported him to his house the next day. *Id.*

Dang continued to engage in erratic behaviors. *Id.* On August 19, 2008, he reported to his CCO that he needed a new residence and was "afraid that he might do something big." *Id.* He back off the statement, but the CCO again took him to Harborview for further evaluation. *Id.* His family confirmed his odd behavior. *Id.* His mental health case worker, following interviews with Dang also noted that Dang changed his mind about his own needs rapidly, as if he were unaware of the reality of his situation." *Id.*

The CCO concluded the NOV by recommending Dang's placement at Western State Hospital for further evaluation and treatment. *Id.* The CCO noted that "the sudden rise is observable mood and psychotic symptoms combined with his anger toward being on supervision, his blaming this on his mother, with whom he resides, his admission that his initial offense was to get back at a doctor who he perceived had lied to him, and his threats, serious or not, to set fire to a gas station create an unacceptable community risk." *Id.*

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with this brief.

The court entered a Bench Warrant and order requiring Dang's transfer to Western State Hospital for evaluation and treatment. CP 33-34. In this order, the court finds that:

> 2.1 Dangerousness. The defendant has failed to adhere to the terms and conditions of the conditional release ordered in the criminal insanity proceeding and because of that failure the defendant has become a substantial danger to others and presents a substantial likelihood of committing criminal acts jeopardizing public safety and security.
>
> 2.2 Hospitalization. The defendant requires care, control, and treatment in a secure hospital because of his dangerousness and for evaluation of his condition and the appropriate treatment regime.

CP 33-34. Dang has not assigned error to these factual findings. Based on these findings of fact, the court ordered Dang to be apprehended and placed in the custody of DSHS for evaluation and treatment pending revocation/modification proceedings. *Id.*

After a period of continued hospitalization, on May 3, 2010, the State moved for revocation of the conditional release. CP 36-43. The State supported its request for revocation with various letters from DSHS outlining Dang's progress following his placement in the hospital. In December 2008, after being placed at WSH, Dan demonstrated "erratic and potentially dangerous behavior" . . . . "he reported he wanted 'to die' and said voices were telling him to kill someone, 'anybody.'" *Id.* at 68.

Because "his behavior has been erratic and sometimes threatening . . . . . he requires the care of a highly structured secure setting." *Id.*

A December 2009 letter from WSH notes that "Mr. Dang does not understand his mental illness." CP 62. He "cannot discuss or appear to recognize his warning signs and symptoms." *Id.* The report notes that paranoia is a "major risk fact for Mr. Dang and has not been resolved." *Id.* WSH indicates that "we are not supporting his return to the community or a less restrictive alternative as part of his Conditional Release at this time." CP 64.

WSH provided an update to the court just before the revocation hearing. On December 22, 2009, Dang told WSH staff that his "mind is made up" and he wanted his conditional release revoked. CP 46. A few days later, he indicated that he felt like hurting himself. *Id.* He later indicated that he wanted to kill himself. *Id.* WSH notes that he continues to have a limited understanding of his mental illness or his danger signs. *Id.* His plan was to return to live with his mother even though "his prior criminal and otherwise risk-related behavior has occurred while living or visiting his mother." CP 47.

Although Dang engaged in no overtly violent behavior in the controlled environment of the hospital, he continued to demonstrate

"volatility in his mood and has shown a pattern of instability in handling stressful situations." CP 47. WSH concluded that:

> At this time, Mr. Dang has not yet adequately addressed his factors of risk and remains at substantial risk for future violent reoffending and criminal behavior if released to a less restrictive setting. We are not supporting his return for the community or less restrictive alternative as part of his conditional release.

CP 49.

The trial court convened a revocation hearing on May 24-26, 2010.[3] VRP 1. The court heard testimony from Randal Vanzandt, who was Dang's CCO, Erik King, who was his mental health treatment provider in the community, and Dr. Norma Martin from WSH. The defense called no expert witnesses to provide an opinion supporting Dang's release back into the community. The defense witnesses were limited to Dang's mother Dang himself, and a social worker employed by Dang's attorney.

The testimony largely mirrored the prior submissions to the court. Mr. Vanzandt, who has special training supervising mentally ill offenders, further elaborated that Dang had developed a paranoid delusion about his mother controlling Dang's custody status:

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3 There was significant delay in bringing the revocation proceedings before the court. VPR 4. The defense explained that it had "no issue with the delay in proceedings. VRP 130. In general, both parties in these types of proceedings are often content to see if the patient's condition stabilizes through hospitalization, thereby obviating the need for a revocation proceeding.

> He stated that his mother had control over this legal proceeding and over him being supervised and the court not being willing to terminate his supervision. He made statements about his mother being God or having some sort omniscient sort of presence like that.

VRP 40. The CCO also pointed out that Dang looked "markedly depressed." *Id.* at 41. He noted that Dang's behaviors were different from their prior interactions and that "his affect and his presentation [were] markedly different." *Id.* Mr. Vanzandt was especially concerned about Dang's "notions about his mother, particularly given the fact that he lives with his mother." *Id.*

The State also presented testimony from Dr. Martin. Dr. Martin noted that Dang had little understanding of his mental condition or the warning signs necessary to avid reoffense. During his placement in the hospital pending revocation, Dang continued to demonstrate "severe warning sign[s]" of his mental illness and danger to others. CP 68. The Hospital did not recommend any change in Dang's placement. "We feel that he needs to be in the hospital and continue to be involved in the treatment that available for him." *Id. at 77.* In order to manage Dang's risk, Dr. Martin noted that Dang needed to demonstrate increased mood stability, develop the ability to recognize his "warning signs," and intervene early when his is decompensating. *See* CP 78.

The court convened on May 26, 2010 to announce its ruling. VRP 139. Applying RCW 10.77.190, the trial court determined to revoke Dang and continue his placement in the hospital. The trial court crafted its Findings of Fact and Conclusions of Law (FFCL) based on a draft order submitted by the State. VRP 143. The court noted additions and word changes to the State's draft order. *Id.* at 143-44. The court then indicated that it "would make all of the other findings that are set forth in the draft order." VRP 144. The court directed the prosecutor to redraft the order in accord with the court's findings and work out any phrasing issues with the defense. *Id.* at 146-47.

The prosecutor and the defense acted in accord with the court's direction and submitted Findings of Fact and Conclusions of Law (FFCL) to the trial court in an agreed format. For some reason, the final signed copy of these FFCL were not filed by the court.

The State sought a continuance of its briefing in order to correct the record. State's Motion for Extension of Time, No.65537-0-I. The State's motion was accompanied by a declaration from Senior Deputy Prosecutor Robin Fox, who was trial counsel. In her declaration, Ms. Fox explained that she submitted a proposed order to the court prior to the court's ruling. Decl. Re Missing FFCL (Fox) at 1.[4] Following the court's

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4 The original of this declaration is on file at the Court of Appeals, Div. I,

oral ruling, Judge Fox (no relation) asked the parties to agree on wording and submit the agreed findings and conclusions. *Id.* at 2; RP 146. DPA Fox and defense counsel, Mike De Felice exchanged edits and agreed upon final wording. *Id.*

DPA Fox later checked to the court record and noticed that the FFCL had not been filed. *Id.* She contacted the Bailiff to confirm entry of the final signed order. *Id.* The Bailiff represented that the FFCL had been filed, but this appears to have been a miscommunication. *See Id.*

After this Court granted the extension, the State worked with defense counsel De Felice to enter the order. Unfortunately, entry of the final order was complicated by the fact that the original trial judge, Judge Fox, had retired and was now traveling outside the country for an extended period. In her Second Declaration, which is on file with this court, DPA Fox indicates that her and defense counsel agreed to submit the FFCL to presiding criminal Judge Kessler, rather than waiting for Judge Fox's return. Second Decl. at 2. Defense counsel provided the State with a copy of the order containing the prior agreed language that reflected the trial court's ruling. *Id.* Judge Kessler originally declined to sign the order because of concerns regarding whether the findings were "agreed" for purposes of CR 52. *Id.* Ms. Fox indicated that this matter would be

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under this cause number.

resolved with defense counsel's return to work. *Id.* This Court granted a further extension, without opposition from Dang, to allow entry of the FFCL.

The FFCL were finally signed by Judge Kessler on April 1, 2011. CP 85. Defense counsel indicated that he agreed to the form of the order. Judge Kessler noted that "Judge Fox has retired. This court concludes that the findings and conclusions reflect accurately Judge Fox's oral ruling of 3/24/10." *Id.*

The trial court made the following key findings. Dang has assigned error to none off the court's findings and they are verities on appeal:

> No. 2. While in the community, Mr. dang began to exhibit symptoms of deterioration of his psychiatric condition such as: a change in his affect and demeanor; he made contradictory statements about medication compliance; he made contradictory statements about setting a gas station on fire and that he might do something "big", i.e. harmful, but shortly after recanted these statements; he made contradictory statements about wanting to be in the hospital; he made delusional, paranoid statements about his mother, i.e. that she was God and that she had control over his legal situation; he was seen twice in the span of a week at the Harborview Emergency Department due to decompensation; he made statements regarding his mental state to arrange housing more to his liking and then withdrew them.
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> No. 3. While in the community, Mr. Dang had paranoid, delusional beliefs about his mother, which resulted in his telling Mr. Van Zandt and Dr. King that he needed to get away from his mother and told Mr. Van Zandt he needed a new place to live and "might do something big", although he was unable to explain what he would do.

> No. 4. Based on these behaviors, Mr. Dang did not remain in a state of remission.
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> * * *
>
> No. 6. The acts the defendant committed in 2007 that resulted in his not guilty by reason of insanity plea involved violence and threats of violence similar to his threats to burn down a gas station made after conditional release, and his arrest in 2008 was a result of the deterioration of his mental state.
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> No. 7. The testimony presented to the court from those involved in his care in the community and at Western State Hospital (WSH) indicate the defendant has not made improvements during his hospitalization to a degree as to warrant release from the hospital setting where he is now placed.
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> * * *
>
> No. 9. The court rejects the request to modify the existing conditional release because Mr. Dang's symptoms have not resolved such that the WSH staff believes it is safe and in Mr. Dang's best interest to be released to the community.

CP 86-87. Based on these findings, the court concluded that "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." *Id.* at 88.

III. LEGAL ARGUMENT

A. DANG'S APPEAL IS FRIVOLOUS

Due to a clerical error, the trial court did not enter its findings of fact and conclusions of law until after appellant submitted his opening

brief. Dang has declined to file a brief accounting for the trial court's FFCL. *See* Response to State's Motion to Require Amended Opening Brief or Strike Appeal, No. 65537-0-I. Because the FFCL resolve Dang's complaints, the court should dismiss his appeal as frivolous.

Dang's primary argument on appeal is that the trial court erred "[i]n revoking his conditional release, [because] the court did not find that he was dangerous." Opening Br. at 1. Although Dang incorrectly perceives this as a constitutional requirement in a revocation proceeding, he claims that Dang's resulting "confinement solely on the basis of his mental illness violated due process." *Id.* Dang also argued that insufficient evidence proved his danger.

His claims are quickly resolved by both the uncontested findings in the Bench Warrant and the uncontested findings in the FFCL. The trial court did find Dang's dangerousness in both orders. In the FFCL, the trial court concluded that "[t]he 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." CP 88.

As for sufficient evidence, the facts outlined above demonstrate that Dang was making threats of violence and suffering from paranoid

delusions regarding his mother.[5] Given his past action of attempting to blow up a gas station with other persons present, the mental health professionals and CCO charged with his care would be derelict if they had not acted for public safety by taking Dang into custody. Although Dang had the opportunity by statute to hire and present his own expert testimony contravening the State's proof, he did not. The only expert testifying – Dr. Martin from Western State Hospital – recommended Dang's revocation both for treatment and public safety purposes. The evidence on the record was sufficient to allow Dang's revocation.[6]

It is anticipated that Dang will contest the authority of a successor judge to enter the FFCL that Judge Fox approved. However, in the current case, the parties *agreed* to enter the FFCL with Judge Kessler rather than waiting for the return of retired Judge Fox from his overseas travel. Moreover, the parties agreed to the form and substance of the order, *i.e.*

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5 In reviewing a revocation under RCW 10.77,190, the record includes both the materials considered at the revocation hearing and any reports submitted to the court. *State v. Thompson*, 28 Wn. App. 728, 730, 626 P.2d 51 (1981).

6 Dang's argument for insufficient evidence relies on the claim that the County Mental Health Professionals declined to seek civil commitment under the Involuntary Treatment Act, RCW 71.05. Dang cannot prove "insufficient evidence" by citing contrary record evidence, especially when there was no testimony by the CDMHPs. Indeed, there was no need to address Dang's problems through commitment under RCW 71.05 when he was already committed under RCW 10.77. There was ample evidence actually on the record to support the judge's FFCL.

that the FFCL contained the substance of Judge Fox's ruling. In this situation, Dang cannot contest the FFCL on appeal.

First, the situation is similar to *In re the Marriage of Crosetto*, 101 Wn.App. 89, 1 P.3d 1180 (2000). In *Crosetto*, following a remand on appeal, the parties agreed that a successor judge could enter factual findings based on the prior record rather than requiring a new trial. Although a successor judge generally lacks authority to enter FFCL for a retired judge who heard the case, an agreement of the parties cures this issue: "The important difference in the instant case, however, is that the parties agreed to allow the successor judge to make findings of fact based upon the evidence in the record from the first trial. We find no Washington law that prohibits parties from so agreeing." 101 Wn.App. at 96. Here, counsel for Dang, Mr. De Felice, agreed to entry of the FFCL by affixing his signature to the document. CP 88.

Second, Dang cannot challenge on appeal a procedure that he encouraged in the trial court. Rather than wait for Judge Fox's return, Dang elected to have Judge Kessler enter the FFCL. Under RAP 2.5 (a), "the appellate court may refuse to review any claim of error not raised in the trial court." The basic policy behind this rule is simple: a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wash.2d 412,

421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986). "[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal." *In re the Detention of Audett*, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Teglund, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed. 2004)).

With the FFCL in place, Dang's appeal is clearly frivolous. His first three assignments of error relate exclusively to the supposedly missing trial court determination of dangerousness. Because the FFCL resolve this issue, Dang's decision to continue with an appeal of a missing FFCL that is present on the record is frivolous.

B. THERE IS NO CONSTITUTIONAL REQUIREMENT FOR A DANGEROUSNESS FINDING PRIOR TO REVOKING A STATUTORY CONDITIONAL RELEASE

Appellant argues that substantive due process requires a finding of both mental illness and dangerousness before Dang's conditional release can be revoked. However, substantive due process requirements that govern an initial commitment do not apply when the court considers revocation of a conditional release of a committed person. Even if the court had not made a dangerousness finding, there is no statutory or

constitutional requirement for the State to prove more than a violation of the conditional release order or the necessity for Dang to undergo more care, control and treatment before revocation may occur. The trial court committed no error by complying with the statutory revocation process.

1. The Initial Civil Commitment Cases Cited By Dang Do Not Apply

Dang's brief relies on the fundamentally incorrect premise that revocation of a conditional release is itself a "civil commitment." Dang was already *civilly committed* when the State initiated revocation proceedings. His civilly commitment started under RCW 10.77 once he entered a Not Guilty By Reason of Insantiy plea and the court entered its commitment order. CP 6. Because he has not availed himself to the statutory procedures for removing himself from civil commitment, *see* RCW 10.77.200, he remains committed under RCW 10.77 regardless of his conditional release status.

In his opening brief Dang repeatedly confuses the difference between civil commitment itself and the dispositional placement that results from the civil commitment. The civil commitment itself establishes the court's jurisdiction over the person based on his mental condition and dangerousness. Once the court has civil commitment jurisdiction, the statute provides three dispositional options -- including

confinement in a state hospital or conditional release to a less restrictive alternative. RCW 10.77.110.

The statutory definition of "commitment" makes it plain that a person is committed regardless of their inpatient or conditional release status. "'Commitment' means the determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient *or* less-restrictive setting." RCW 10.77.010(2). Indeed, "conditional release" means "modification of a court-ordered commitment, which may be revoked upon violation of any of its terms." *Id.* at (3). If a person were not "committed" while on conditional release, there would be no basis for the court's jurisdiction to place limitations on the person's behavior in the community.

In short, Dang confuses the case law and constitutional standards. The need for proof of a mental condition and dangerousness is a requirement solely applicable to the court's constitutional civil commitment jurisdiction. *See In re Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) (a person must be both mentally ill and dangerous for a civil commitment to be permissible under due process). Dang cites no case applying this constitutional standard to revocation of a conditional release *during* a civil commitment.[7] Cases setting out the substantive due process

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7 The analogy to criminal cases is helpful in this instance. In order for the

requirements for initial commitment have no application when determining the standards for conditional release. *See In re Detention of Bergen*, 146 Wash.App. 515, 524-525, 195 P.3d 529, 533 (2008) ("Bergen cites case law involving due process challenges to the initial SVP commitment, not to a post-commitment petition for an LRA, which is at issue here.").

2. The Statutory Revocation Process

Following issuance of a conditional release order, RCW 10.77.190 provides for revocation of the order following a violation or any concern that the person is in need of additional care control and treatment. There are two statutory avenues for revocation of an LRA and the State used both in the current case.

The first avenue for revocation is a revocation petition under RCW 10.77.190(1), which provides that:

> Any person submitting reports pursuant to RCW 10.77.160, the secretary, or the prosecuting attorney, or the court on its own motion may schedule an immediate hearing for the purpose modifying the terms of the person's 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

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court to obtain criminal jurisdiction, a person must be convicted by "beyond a reasonable doubt" before being sentenced to confinement under the court's criminal authority. A person remains convicted and under the authority regardless of the sentencing disposition. If a person is revoked from community custody, the burden of proof is much lower – by a preponderance – in recognition of the limited interest in liberty created by the initial conviction.

or is in need of additional care and treatment.

Under this statute, the court has the authority to modify the conditional release if Dang is violating the court's conditional release order, or if he is "in need of additional care or treatment." *Id.*

The State also sought to revoke Dang under the authority of RCW 10.77.190(2) because Dang was in violation of his conditional release as a result of his decompensation. This statute provides that Dang may be taken into custody based on a "reasonable belief" that he is violating the terms of his conditional release order:

> 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.

RCW 10.77.190(2).

The standards for a revocation under RCW 10.77.190(2) are set

forth in RCW 10.77.190(4). Under this statute, the court is required to decide "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." RCW 10.77.190(4).

Both subsection (1) and subsection (2) of RCW 10.77.190 provide the trial court with considerable discretion on revocation or modification. As quoted above, RCW 10.77.190(1) allows the trial court to opt for modification of the conditional release when the person is in need of additional care or treatment. Likewise, at a hearing held under subsection (2) , "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." RCW 10.77.190(4).

There is some case law interpreting RCW 10.77.190. Even before the Legislature amended the statute to allow revocation based on a showing of dangerousness ***or*** a violation of the conditional release order, the Washington Supreme Court interpreted the statute in this fashion. In *State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983), the court held that "a trial judge may revoke conditional release if the individual either

violates a condition of release *or* presents a substantial danger to other persons."8 The court approved revocation in *Keller* because the defendant's "paranoic fear reappeared, and once again she accused people of poisoning her. . . . Given these facts, revocation was necessary." *Id.* at 730.

3. Due Process Allows Revocation Based On a Violation Alone Without Reproving the Grounds for the Underlying Civil Commitment

A statute is presumed constitutional unless proven unconstitional beyond a reasonable doubt. *In re Det. of C.W.*, 147 Wn.2d 259, 277, 53 P.3d 979 (2002). Dang has failed in this burden. He has failed to cite any case where a revocation statute was required to meet the substantive due process protections of the initial civil commitment. Because a person facing revocation has only a conditional liberty interest, the high burdens applicable to an initial civil commitment are inapplicable.

The statutory provisions in RCW 10.77.190 are highly similar to those contained in the SVP conditional release revocation statute, former RCW 71.09.098. In the recent case of *In re Wrathall*, 156 Wn. App. 1, 232 P.3d 569 (2010), this court examined a due process challenge to proof

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8 The *Keller* holding is sideways to Dang's current argument. Given the Supreme Court's oft-stated mandate to interpret statutes in a manner that renders them constitutional, it is unlikely that the court would interpret RCW 10.77.190 in a way that – according to Dang – would render the statute unconstitutional. Consistent with the *Keller* holding, revocation is

requirements to the statutory provisions governing revocation of an SVP conditional release. This court held that conditional release from an RCW 71.09 civil commitment implicated a liberty interest similar to that afforded criminal parolees:

> Though his liberty was significantly curtailed by numerous conditions, this conditional liberty is analogous to that enjoyed by those on parole. The United States supreme court has long recognized that parolees are entitled to *procedural due process* when faced with revocation. Like a parolee, an SVP on conditional release enjoys liberty that, while "indeterminate," requires at least minimal due process protections in the face of revocation."

156 Wn. App. At 6. Thus, Dang's liberty interest is conditional and it is based in procedural due process.9 The *Wrathall* case does not identify revocation as a substantive due process issue.

The *Wrathall* decisions affirms the challenged statutory provisions. It also notes that even if it had granted Mr. Wrathall's due process challenge, the revocation still would have been affirmed under the separate grounds that he was in need of additional care and treatment. *Id.* at 9.

With Dang civilly committed under RCW 10.77, the Legislature has broad discretion to establish both the standards for allowing conditional release and the standards for revoking conditional release. Whereas substantive due process limits the Legislature's discretion in

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allowed based on the fact of a violation alone.
9 Dang raises no procedural due process issues.

establishing a civil commitment scheme, there is no substantive due process requirement for conditional release from a commitment. *In re Matter of J.S.*, 124 Wash.2d 689, 700, 880 P.2d 976, 982 (1994); *see also In re Detention of Bergen*, 146 Wash.App. 515, 523-524, 195 P.3d 529, 533 (2008) ("[T]he due process clause does not create a liberty interest when a sexually violent predator seeks release before the court has determined that he or she is no longer likely to reoffend or that he or she is entitled to conditional release to a less restrictive alternative.). Because conditional release is a discretionary program created by the Legislature without constitutional mandate, this court should defer to the Legislature's authority to establish revocation standards from the conditional release program.

In summary, Dang's substantive due process argument relies on application of the wrong case law to the revocation statute. Dang was already committed when the State sought to revoke his conditional release. Although the trial court made a dangerousness finding prior to revoking Dang's conditional release in this case, Dang has failed to identify applicable substantive due process doctrine that would mandate such a finding and operate to declare RCW 10.77.190 unconstitutional. The trial court should be affirmed.

C. THE PROPER EVIDENTIARY STANDARD IS BY A PREPONDERANCE OF THE EVIDENCE

Dang reaches the conclusion that clear and convincing evidence is required only by misapplying the case law applicable to the initial civil commitment. However, as held in *Bergen*, the case law regarding a person's initial commitment does not apply to define constitutional requirements for conditional release. 146 Wash.App. at 524-525.

Although the statute does not specify the standard of proof for revoking a RCW 10.77 conditional release, Washington courts typically apply a preponderance of the evidence standard in similar revocation contexts. For example, the revocation of a suspended sentence and the revocation of parole are considered to be a civil proceedings where proof is by a preponderance of the evidence. *See,* e.g., *In re Personal Restraint Petition of McKay*, 127 Wash.App. 165, 168, 110 P.3d 856, 857 (2005)(DOSA revocation); *State v. Dupard*, 93 Wn.2d 268, 271, 609 P.2d 961 (1980)(parole revocation). As in the current proceeding, a preponderance of the evidence standard is an appropriate burden when the State is seeking to revoke a defendant's conditional liberty interest in restricted release from total confinement.

Setting the burden at a preponderance of the evidence is consistent with the statutory conditional release scheme. The standard for granting or denying a conditional release is by a preponderance of the evidence. *State*

v. Paul, 64 Wn.App. 801, 804-806, 828 P.2d 594 (1992). It would make no sense to allow the initial conditional release decision to be decided by a preponderance of the evidence, but require clear and convincing evidence before revoking the conditional release.[10]

Application of a preponderance standard finds support in other jurisdictions. In California, similar to Washington, a connection between revocation of conditional release or outpatient treatment is drawn parallel to the revocation of parole. *People v. Rodriguez* (1990) 51 Cal.3d 437, 443, 272 Cal.Rptr. 613, 795 P.2d 783.) "Like revocation of probation, revocation of outpatient status under either section does not deprive a person of absolute liberty but rather deprives him of a conditional liberty to which he is entitled only if he observes special restrictions. Although revocation of outpatient status requires due process, it is not part of a criminal prosecution requiring the higher standard of proof." *People v. DeGuzman*, 33 Cal. App. 4th 414, 419-20, 39 Cal. Rptr. 2d 137, 139-40 (Cal. Ct. App. 1995). In Maryland, "the State has the burden of proving a violation of one or more terms of the conditional release by a **preponderance** of the evidence. . ." *Bergstein v. State*, 322 Md. 506, 518, 588 A.2d 779, 785 (1991). "The proper standard under one state's statute for revocation of an individual's conditional release has been determined to

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[10] Any error was harmless. As noted by the trial court, the proof standard

be the preponderance of the evidence." 53 Am. Jur. 2d Mentally Impaired Persons § 58."

D. HEARSAY IS ADMISSIBLE

Dang complains generally about the admission of hearsay evidence at his revocation proceeding, but does not specify the rulings to which he objects. It is well-established that reliable hearsay evidence is admissible in violation hearings. Moreover, the Court of Appeals has ruled that the record for an RCW 10.77.190 revocation proceeding includes all reports submitted to the court pursuant to statute and court order by DSHS and DOC. *Thompson*, 28 Wn.App. 730-31. Even if Dang properly objected to portions of the testimony, the same information was contained in the reports that were available for the court's consideration without objection.

The due process rights "afforded at a revocation hearing are not the same as those afforded at the time of trial." *State v. Dahl,* 139 Wash.2d 678, 683, 990 P.2d 396, 399 (1999). For example, the Sixth Amendment confrontation rights articulated in *Crawford v. Washington*, 541 U.S. 36 (2004) do not apply to post conviction revocation proceedings. *State v. Abd-Rahmaan*, 154 Wash.2d 280, 290, 111 P.3d 1157, 1161 (2005). Instead, the level of process due in a revocation proceeding is "flexible,"

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was "academic" because the State satisfied either burden.

requiring a minimum level protections commensurate with a deprivation of conditional liberty. *Id.* at 285.

As a result, courts may accept "substitutes for live testimony, such as reports, affidavits and documentary evidence," particularly when there is good cause to forgo live testimony. *Dahl*, 139 Wn.2d at 686. "Good cause has thus far been defined in terms of the difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence." *Abd-Rahmaan,* 154 Wash.2d at 290.

The reports and progress notes from Western State Hospital are the type of demonstrably reliable evidence appropriate for consideration in a revocation proceeding. These materials, which often fall squarely within the medical records hearsay exception, are created for the express purpose of reliably documenting a patient's progress and providing the institution's medical recommendations to the court.

In *Thompson*, the appellate court addressed the question of "whether the trial judge in making his [revocation] findings could properly consider all of the evidence adduced at the several hearings held while he had been sitting on the case." 28 Wn. App. at 728. The court noted that the statute required various reports be submitted to the court on the person's mental health and conditional release status. In addressing a challenge to the sufficiency of the evidence supporting revocation, the

appellate court determined that the record including both the materials submitted in connection with revocation and the prior reports considered by the court. *Id.* at 729-31. "Accordingly, the evidence including the reports submitted to the judge at Thompson's prior hearings were properly considered on September 24 [at the revocation hearing]." *Id.* at 730-31.

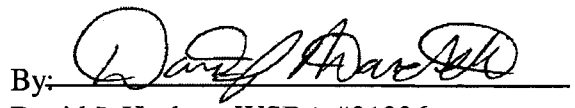
A broader ability to consider reports in mental health revocation proceedings is important. Good cause is present to accept these materials because the valuable time of medical professionals should be spent treating patients, not testifying in court. *See Parham v. J.R.*, 442 U.S. 584, 605-06 (1979)("Behavioral experts in courtrooms and hearings are of little help to patients.").

IV. CONCLUSION

For the foregoing reasons, the trial court should be affirmed.

DATED this 21st day of July, 2011.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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DIVISION I

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Shara Lozott, being first duly sworn on oath, deposes and says:

On this day, I arranged for service a copy of State's Response Brief and Supplemental Designation of Clerks Papers by ABC Messenger to the following:

Elaine Winters
Washington Appellate Project
1511 3rd Ave.
Seattle, WA 98101

DATED this 21st day of July 2011

Shara Lozott

ORIGINAL