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No. 91112-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

RICKEY ARELIOS BEAVER,

Appellant.

Filed *E*
Washington State Supreme Court
MAY 20 2015
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Clerk *bjk*

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON

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ORIGINAL

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INTRODUCTION

A court order authorizing involuntary confinement in the state hospital for mental health treatment implicates significant constitutionally protected liberty interests. This case involves application of that principle in the context of a person facing revocation of conditional release, when the person is an “insanity acquittee” previously found not guilty by reason of insanity in a criminal case.

Based on the “massive” deprivation of liberty which occurs with involuntary confinement in the state hospital, the courts have held that an insanity acquittee cannot be detained if s/he no longer meets the requirement for psychiatric confinement – current mental illness and current dangerousness due to that mental illness. *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983); *see State v. Reid*, 144 Wn.2d 621, 631, 30 P.3d 465 (2001) (“When an insanity acquittee demonstrates he has regained his sanity, the basis for his confinement in a mental institution vanishes and he must be released”). The lower court rulings in this case directly contradict this rule, by ordering Petitioner’s return to potentially lengthy confinement in the state mental hospital even though there was reason to believe that he no longer satisfied the commitment standard.

The negative impact of an individual's improper confinement in the state hospital is broad, extending to others who need access to the State's mental health institutions. Recent litigation confirms that Washington's mental health crisis systems are broken and in need of significant reform. Individuals found not guilty by reason of insanity ("insanity acquittee") are part of this overall system. In light of the State's failure to meet its duty to provide adequate psychiatric treatment to those who need and can benefit from it, it is especially critical that courts follow constitutional principles designed to limit the use of involuntary confinement. Insisting on unneeded and inappropriate psychiatric confinement not only impinges on the individual's liberty interest, but fails to serve the State's interest in furnishing adequate treatment, particularly given the availability of other appropriate options for responding to conditional release violations. For these reasons, the American Civil Liberties Union of Washington ("ACLU") submits the following legal authority and policy considerations lending additional support to reversal of the Court of Appeals' ruling.

INTERESTS AND IDENTITY OF *AMICUS*

Amicus ACLU is a statewide, non-partisan, non-profit organization with over 50,000 members and supporters, dedicated to the preservation and defense of constitutional and civil liberties. The ACLU strongly

supports the constitutional right to both substantive and procedural due process in psychiatric confinement proceedings, and it has participated in litigation and filed numerous *amicus* briefs in support of that right. *See, e.g., In re Detention of DW*, 181 Wn.2d 201, 332 P.3d 423 (2014) (psychiatric boarding) (hereinafter *DW*); *Harper v. State*, 110 Wn.2d 873, 759 P.2d 358 (1988), *rev'd, Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (forced psychiatric medication); *Trueblood v. Washington State Dep't of Social and Health Services*, No. 2:14-cv-01178 MJP (U.S. District Court W.D. Wash.) (defendants suffering prolonged confinement in jails while awaiting a bed in the state hospitals for competency evaluation and restoration). In addition, the ACLU is actively involved in legislative and rulemaking processes and other aspects of mental health policy at the state, county and city level. Thus, the ACLU has extensive expertise on the effects of psychiatric confinement and the current state of affairs of the mental health system in Washington.

STATEMENT OF THE CASE

As set forth in the Petitioners' briefs, Rickey Beaver is an insanity acquittee who violated the conditions of his conditional release from Western State Hospital ("WSH"). The violations of conditions consisted of driving while intoxicated and using cocaine. WSH questioned "what

benefit Mr. Beaver could derive from further inpatient hospitalization” in light of its previous conclusion that “Mr. Beaver has shown no signs or symptoms of mental illness.” Petitioner’s Op. Br. at 3-4. At Mr. Beaver’s revocation hearing on January 11, 2013, the trial judge acknowledged these observations and expressed serious reservations about revoking Mr. Beaver’s conditional release and reimposing psychiatric confinement. *Id.* at 5. The court characterized a revocation without a finding of mental illness as a troubling form of “preventative detention”. *Id.* However, despite the judge’s reservations, Mr. Beaver’s conditional release was revoked and he was returned to WSH.

On appeal, the Court of Appeals rejected Mr. Beaver’s allegations of procedural and substantive due process violations. While acknowledging the substantial liberty interests involved, the Court held that the State had an interest in avoiding costly and confusing proceedings and that the presence of other procedural safeguards was sufficient to protect the rights of insanity acquittees being ordered back to confinement in the state mental hospital.

ARGUMENT

A. A Massive Deprivation of Liberty Occurs with Psychiatric Confinement and Neither Substantive nor Procedural Due Process Allow It to Be Used when Confinement Criteria Are not Met.

State and federal case law has long recognized that civil commitment is a “massive” curtailment of liberty. *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012); *In re Detention of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010); *In re Detention of LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)); *Vitek v. Jones*, 445 U.S. 480, 491–92, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). *Accord, Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (“commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”) The significance of the constitutionally protected liberty interests involved compels state and local governments to comply with both substantive and procedural due process under U.S. Const. amend. XIV and Wash. Const. art. I, § 3. *McCuiston, supra*, 174 Wn.2d at 387.

Substantive due process requirements mandate that insanity acquittees may be psychiatrically confined only if they are both mentally ill and a substantial danger to the public as a result of that mental illness. *Reid, supra*, 144 Wn.2d at 631. The dangerousness finding required to

maintain psychiatric confinement is not dangerousness in general (as the lower courts here appeared to accept) but dangerousness caused by the defendant's mental illness. *Id.*; *LaBelle, supra*, 107 Wn.2d at 203 (commitment on the basis of grave disability "requires the State to show that an individual, **as a result of a mental disorder**, is in **danger** of serious physical harm) (emphasis added); *accord O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) ("there is still no constitutional basis for confining [mentally ill individuals] involuntarily if they are dangerous to no one").

Recognizing that confinement in the state hospital is only appropriate for individuals who are both currently mentally ill and currently dangerous as a result of that mental illness, state law requires the Secretary of the Department of Social and Health Services ("DSHS") to "provide adequate care and individualized treatment to persons found criminally insane." RCW 10.77.120 (1). Similarly, confinement under civil commitment is constitutional only if the State is required to periodically determine and confirm that the basis for psychiatric confinement – mental illness and dangerousness due to that condition – still exists. *McCustion, supra*, 174 Wn.2d at 387. Consistent with the above constitutional and statutory requirements, when the standard for

civil commitment is no longer met, the State has no authority to continue detaining the confined individual in the state mental hospital.

Although insanity acquittees on conditional release arguably have a diminished liberty interest for procedural due process purposes because they are still subject to ongoing court-ordered conditions, the lower court rulings still fail to satisfy the applicable standard for returning a defendant to confinement in the state hospital. This is true despite the statutory presumption that the mental illness that gave rise to the defendant's acquittal on the grounds of insanity continues while the defendant remains on conditional release. As Petitioner's supplemental brief explains at pages 8-10, there are numerous reasons why on this record the presumption alone does not justify returning Petitioner to WSH. The presumption likewise fails to justify confinement in the state hospital under a standard that is any less than the constitutional requirement of current mental illness and current dangerousness due to mental illness.

Procedural due process analysis requires a result similar to the above analysis of the civil commitment standard. Procedural due process requires the Court to consider the individual interest at stake, the State's interest, and the risk of error, pursuant to *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In weighing the *Mathews* factors, the Court of Appeals concluded the State's interest in

“avoiding unnecessarily costly and confusing” hearings outweighed the insanity acquittee’s significant liberty interests. In so holding, the Court reasoned there were other procedures available to insanity acquittees which adequately protected their individual interest and reduced the risk of error. This was erroneous because it would authorize lengthy wrongful confinements which are necessarily a significant liberty abrogation.

Erroneous confinements violate an individual’s liberty interests regardless of how long they last, but the length of time multiplies the infringement. Several applicable statutes, in conjunction with the Court of Appeals’ ruling here, would have the effect of authorizing prolonged wrongful confinement, increasing the weight the individual interest should be given under the *Mathews* test. Insanity acquittees may wait up to 45 days before they receive a hearing on a petition for unconditional release. RCW 10.77.200(3).¹ A mental condition evaluation is required for insanity acquittees only once every six months. RCW 10.77.140. A petition for conditional release depends on these evaluations occurring within these time frames. RCW 10.77.150(1). A conditional release hearing need only be scheduled with the Secretary’s approval; without it, the court can decline to schedule a hearing. RCW 10.77.150(3)(a). A confined

¹ The Court of Appeals took note of the courts’ disagreement regarding the allowed frequency for successive petitions, with at least one appellate court mandating a one year waiting period between each petition unless an affidavit showing improvement accompanies the petition. *State v. Beaver* at 10 n.43 (slip op.).

individual must wait six months before they can refile a conditional release petition. RCW 10.77.150(5). Based on these statutory timelines, an erroneous psychiatric confinement therefore has the potential to last for months.

While it is true that the State has an interest in reducing costs in conditional release revocation proceedings, in light of the above considerations the balance of interests should favor individual liberty. The risk of an unlawful and erroneous psychiatric confinement potentially lasting several months is a “massive” restriction of an individual’s liberty interest. Contrary to the State’s claims that a ruling in Petitioner’s favor would cause burdensome frequent evaluations and costs resulting therefrom, this case does not call for such a conclusion. Here, there was recent evidence from the State’s own agencies charged with determining who needs confinement in the state mental hospital indicating the defendant was no longer mentally ill and no longer dangerous due to mental illness. In other words, there was no longer a valid basis for his confinement in the state hospital. The state’s interest in cost savings cannot justify relegating the individual interest in avoiding wrongful confinement to functional worthlessness.

B. Without a Current Finding of Mental Illness, Scarce Psychiatric Beds and Services Are Used up to the Detriment of the State and the Mentally Ill Population.

Washington's mental health crisis systems are broken and have been chronically underfunded for years. Washington consistently ranks at the bottom relative to other states with regards to psychiatric bed capacity, despite ranking high with regards to mental illness prevalence.² DSHS, which operates the state hospitals, has a long history of delays in providing needed services to its constituency, which includes individuals committed under the involuntary treatment act, criminal defendants in need of competency evaluation and treatment services, and individuals in need of treatment who have been found not guilty by reason of insanity. Two recent lawsuits illustrate these problems.

In a class action suit brought to compel DSHS to provide timely competency evaluations and restoration at the state hospitals, the federal District Court in *Trueblood v. Washington State Dep't of Social and Health Services*, *supra*, found the state to be "violating the constitutional rights of some of its most vulnerable citizens." No. 2:14-cv-01178 MJP, Dkt. No. 131 at 2 (U.S. District Court W.D. Wash. Apr. 2, 2015) (Findings

² Washington State Institute for Public Policy, *Inpatient Psychiatric Capacity and Utilization in Washington State* (Jan. 2015), http://www.wsipp.wa.gov/ReportFile/1585/Wsipp_Inpatient-Psychiatric-Capacity-and-Utilization-in-Washington-State_Report.pdf; Mental Health America, *Parity or Disparity: The State of Mental Health in America 2015* (Nov. 2014), <http://www.mentalhealthamerica.net/sites/default/files/Parity%20or%20Disparity%202015%20Report.pdf>.

of Fact and Conclusions of Law). These delays for patients awaiting competency evaluation and restoration at the state mental hospital are a result of insufficient funding and staffing, and have been the focus of a long line of contempt of court rulings and hundreds of thousands of dollars in fines. *Id.* at 3, 11. DSHS is statutorily and constitutionally mandated to provide a competency evaluation within seven days of a court order yet on average misses the deadline by several weeks, with some individuals waiting in jails for several months for an evaluation with their mental condition worsening during that period of time. *Id.* at 8. As the federal court ruled this week: “Defendants [the State and DSHS] must work to improve the efficiency of the system and safeguard the constitutional rights of class members.” *Trueblood, supra*, Dkt. No. 153 at 3 (U.S. District Court W.D. Wash. May 6, 2015) (Ord. on Defs.’ Mot. for Clarification and Reconsideration).

In other recent litigation, this Court recognized that the State had been regularly resorting to “temporarily placing those it involuntarily detains in emergency rooms and acute care centers via ‘single bed certifications’ to avoid overcrowding certified facilities” in a practice otherwise known as “psychiatric boarding.” *DW, supra*, 181 Wn.2d at 204. DSHS was found to have unlawfully utilized the practice of psychiatric boarding and relegated mentally ill individuals to hospital

emergency rooms with no corresponding treatment. Those patients, like the plaintiff class in *Trueblood*, also suffered great harm to their mental condition while awaiting a bed in a facility adequate to meet their mental health treatment needs, as the State is obligated to provide. *See*, Brian Rosenthal, 'Boarding' Mentally Ill Becoming Epidemic in State, Seattle Times (Oct. 5, 2013), <http://www.seattletimes.com/seattle-news/times-watchdog/lsquoboardingsquo-mentally-ill-becoming-epidemic-in-state/>; Disability Rights Washington, *Lost and Forgotten - Conditions of Confinement While Waiting for Competency Evaluation and Restoration* at 3 (Jan. 2013), http://www.disabilityrightswa.org/sites/default/files/uploads/DRW_Report_Lost_and_Forgotten.pdf (describing the actual harm to the incarcerated mentally ill defendant which can occur due to delays waiting for a state hospital bed, including permanent worsening of their mental illness).

By returning Mr. Beaver to the state mental hospital when he did not meet the criteria for commitment, the State is transforming psychiatric treatment beds into illegal "preventative detention" beds as the trial court noted, when at the same time those beds are badly needed by other patients who do meet the criteria for commitment, whether it be under the involuntary treatment act, for competency evaluation and restoration, or not guilty by reason of insanity. DSHS should not be using scarce resources

for individuals who don't need confinement in the state hospital, when there is such a great need for those resources. The practice of confining insanity acquittees at state hospitals when they don't meet the standard for psychiatric confinement goes against the interests of the State and the interests of the constituency it is meant to serve.

C. Judges Have Discretion to Modify Release Conditions in Other More Appropriate Ways to Respond to Condition Violations that Do Not Relate to Dangerousness Due to Mental Illness.

Instead of authorizing the use of state hospital beds for preventative detention, judges have other options to deal with insanity acquittees who violate the terms of conditional release in ways that do not involve dangerousness due to mental illness. Conditional releases are inherently a discretionary judicial function. RCW 10.77.190(4) leaves it up to the court to decide whether to maintain or modify the release conditions, or revoke them entirely. The purpose of psychiatric confinement is to protect the public and the insanity acquittee while they are receiving necessary treatment for their mental illness. *Jones*, 463 U.S. at 368-69

Consistent with that purpose, conditional release provides a means of gradually reintroducing insanity acquittees to the community when "the conditions will reasonably mitigate the dangerousness." *Reid*, 144 Wn.2d at 630. Conditions can therefore include mandatory substance abuse

treatment and periodic mental health check-ins. *See, e.g., State v. Bao Dinh Dang*, 178 Wn.2d 868, 871-72, 312 P.3d 30 (2013) (trial court prohibited an insanity acquittee from possessing explosives or alcohol, and required him to periodically seek treatment and to relocate to a family member's home outside of the state). Similar conditions could have been imposed here, and were a far more appropriate response to the condition violations at issue here than returning Mr. Beaver to the state mental hospital when he no longer met the criteria for psychiatric confinement.

CONCLUSION

Ample authority supports the Petitioner's position and this Court should reverse the Court of Appeals' decision. All psychiatric confinement, even at revocation hearings, must follow constitutional obligations of a finding of mental illness. This is particularly essential given how overburdened the current system already is, and the fact that trial courts have other more appropriate options for responding to violations of conditions of release like the ones in this case.

RESPECTFULLY SUBMITTED this 8th day of May 2015.

BY:

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Good afternoon,

Attached above for filing in Case No. 91112-6, State v. Beaver, are the following documents:

- Motion for Leave to File Amicus Curiae Brief
- Brief of Amicus Curiae ACLU of Washington
- Certificate of Service

The documents are filed by Nacim Bouchtia, Bar No. 47993 (nbouchtia@aclu-wa.org / 206-624-2184). Counsel have previously agreed to service by email in this case and are copied above.

Sincerely,
Edward Wixler
Legal Assistant
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