63143-8

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COA NO. 63143-8-I

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

IN RE DETENTION OF DAVID WRATHALL;

STATE OF WASHINGTON,

Respondent,

v.

DAVID WRATHALL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass A. North, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHERS

A. ARGUMENT IN REPLY

1. DUE PROCESS REQUIRED THE TRIAL COURT TO FIND A WILLFUL VIOLATION BEFORE REVOKING WRATHALL'S LESS RESTRICTIVE ALTERNATIVE.

a. The Due Process Clause Protected Wrathall's Liberty Interest In Preserving His Less Restrictive Alternative.

"All individuals who are involuntarily committed are entitled to procedural and substantive protections." In re Pers. Restraint of Young, 122 Wn.2d 1, 45, 857 P.2d 989 (1993). The State nevertheless claims due process does not protect an individual's interest in preserving his less restrictive alternative (LRA). Brief of Respondent (BOR) at 20-26. In this regard, the State asserts In re Detention of Bergen, 146 Wn. App. 515, 195 P.3d 529 (2008) held offenders have no due process interest in an LRA. BOR at 22-23. The State misconstrues Bergen in particular and due process law in general.

Bergen appealed the trial court's order denying his petition for an LRA, contending a statutory provision violated his right to due process because it allowed the State to defeat a proposed LRA by showing that it was not in his best interests. Bergen, 146 Wn. App. at 520, 523-24. The issue was whether Bergen had "a liberty interest in a petition for an LRA once he has already been committed as an SVP." Id. at 525.

This Court recognized "[l]iberty interests may arise from either of two sources: the due process clause and state laws." Id. at 525. The Court reasoned "The due process clause does not, of its own force, create a liberty interest when an inmate seeks release before serving the full maximum sentence. Similarly, the 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*." Id. at 525 (emphasis added). Stated another way, "the due process clause does not create a liberty interest in a conditional release to a less restrictive alternative because an SVP offender does not have a liberty interest in being released before a court determines that the SVP is entitled to such a release." Id. at 526.

Having dispensed with the idea that the due process clause protected Bergen, this Court went on to determine whether Bergen had a due process interest arising from the statute itself. Id. at 525-26. In connection with this statute-based analysis, the Court recognized "laws that dictate a particular outcome based on particular facts can create liberty interests, but laws granting a significant degree of discretion cannot." Id. at 525. The Court concluded "the statutory provisions that allow an SVP to petition for an LRA dictate a particular outcome based on

particular facts and therefore create a liberty interest in a conditional release to an LRA." Id. at 527. The court ultimately held the statutory procedures involving petition for an LRA were narrowly tailored to serve a compelling state interest. Id. at 527-29.

Bergen supports Wrathall's argument that he has a liberty interest in maintaining his LRA based on the due process clause. The State, in arguing to the contrary, ignores the important distinction between those who are petitioning for an LRA and those who have already been granted an LRA. Bergen recognizes those who are petitioning for an LRA have no liberty interest protected by the due process clause, but that those who have already been determined to meet the LRA criteria and been granted such release do have a liberty interest in the LRA protected by the due process clause. Bergen, 146 Wn. App. at 525-26 ("the due process clause does not create a liberty interest in a conditional release to a less restrictive alternative because an SVP offender does not have a liberty interest in being released before a court determines that the SVP is entitled to such a release.").

The State dubiously analogizes Wrathall's position to those convicted prisoners seeking good time credit, citing Pullman[1] for the proposition that there is no constitutional right of a convicted person to be conditionally released before the expiration of a valid sentence. BOR at 21-22. The analogy fails and a careful reading of Bergen shows it. Bergen analogized criminal inmates seeking release before serving their full maximum sentence to those SVP offenders seeking release from a total confinement setting by petitioning for an LRA. Bergen, 146 Wn. App. at 525. In both cases, the due process clause does not recognize a liberty interest in obtaining the release at issue.

In contrast, Wrathall had already obtained his release. He obtained his release from a total confinement setting when the trial court granted his LRA. This is why the appropriate analogy, as set forth in the opening brief, is to probationers who have been released from prison but are subject to conditions they must follow in order to preserve their circumscribed liberty. Brief of Appellant (BOA) at 15-17. A probationer's liberty interest in preserving probationary status is protected by the due process clause itself, not by any statute. Morrissey v. Brewer, 408 U.S. 471, 481-82, 92 S. Ct. 2593, 33 L .Ed.2d 484 (1972) Wrathall's

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[1] In re Pers. Restraint of Pullman, __Wn.2d__, __ P.3d __, 2009 WL 3210403 (Slip op. filed Oct. 8, 2009) (holding DOC prisoner had no liberty interest in earning good time credits at a 50 percent rate)

liberty interest in preserving his conditional LRA is likewise protected by the due process clause.

The State emphasizes statutory procedures supposedly do not create a liberty interest in preserving an LRA. BOR at 23-24. The contention is irrelevant. The due process clause applies.

b. The Due Process Error Can Be Raised For The First Time On Appeal As An Error Of Constitutional Magnitude.

The State asserts Wrathall cannot raise a due process challenge for the first time on appeal because Wrathall's attorney agreed to the applicable law before the trial court. BOR at 17-20. Wrathall's attorney correctly agreed to the applicable statutory law. 3RP 4. Neither party addressed the applicability of constitutional law.

The State claims the doctrine of judicial estoppel precludes consideration of Wrathall's due process challenge on appeal. BOR at 19-20. The State is wrong. Judicial estoppel prevents a person from making assertions of fact inconsistent with a position that person previously took in litigation. 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.57 (2006). The doctrine of judicial estoppel applies only to inconsistent assertions of fact; it is not applicable to inconsistent positions taken on points of law. Id. (citing King v. Clodfelter, 10 Wn. App. 514, 521, 518 P.2d 206 (1974)); see also Holst v. Fireside Realty, Inc., 89 Wn.

App. 245, 259, 948 P.2d 858 (1997) (doctrine of judicial estoppel prevents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation). The doctrine is typically invoked in bankruptcy proceedings to prevent a debtor from misrepresenting the scope of assets potentially available from contingent or unliquidated claims and then later seeking to profit from those claims after the bankruptcy discharges. Johnson v. Si-Cor Inc., 107 Wn. App. 902, 906, 28 P.3d 832 (2001); Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 225, 108 P.3d 147 (2005); Garrett v. Morgan, 127 Wn. App. 375, 377-80, 112 P.3d 531 (2005), overruled by, Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 541, 160 P.3d 13 (2007).[2] Those cases all involve inconsistent positions taken on a point of fact: available assets. The cases cited by the State in support of its estoppel judicial argument all applied the doctrine because the party advanced an inconsistent position on a point of fact. See also Mastro v. Kumakichi Corp., 90 Wn. App. 157, 163, 951 P.2d 817 (1998) (factual concession involving adverse possession litigation).

Wrathall has not taken inconsistent positions on a point of fact: whether he willfully violated a condition of his LRA. He never claimed

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[2] The State quotes from Garrett without acknowledging the Supreme Court overruled that case in Arkison. BOR at 19.

he willfully violated a condition of his LRA. The doctrine of judicial estoppel does not apply for this reason alone.

Even if the doctrine could apply to inconsistent positions taken on a point of law, the doctrine would still not apply to this case. There is nothing contradictory in agreeing to the applicable statutory law before the trial court and arguing the applicable constitutional law on appeal. They are not the same points of law.

Indeed, by the State's logic, judicial estoppel would bar review of all constitutional claims that were not raised at the trial level. Such an approach would eviscerate the rule providing for review of manifest constitutional errors raised for the first time on appeal under RAP 2.5(a)(3). Wrathall raises a constitutional due process challenge predicated on the need for the trial court to find a willful violation of an LRA before the LRA can be revoked.

A constitutional error is manifest under RAP 2.5(a)(3) "if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). The trial court did not find a willful violation but nevertheless revoked Wrathall's LRA. The revocation is the concrete detriment to Wrathall's due process rights. Wrathall's claim is an error of constitutional

magnitude that can be raised for the first time on appeal. Cf. State v. McCormick, 166 Wn.2d 689, 692-97, 213 P.3d 32 (2009) (addressing merits of constitutional claim that due process required finding of willful violation before SSOSA could be revoked, even though that theory not advanced by the defense at trial level).

c. The State's Response Otherwise Fails To Grasp Wrathall's Argument.

The State attempts to counter Wrathall's argument that continuation of the LRA did not jeopardize public safety by claiming LRA conditions are sufficient to prevent public harm only with the full cooperation of the offender. BOR at 26. The State, by focusing on the person rather than the plan, once again misses the mark. Whether an LRA provides "adequate community safety" necessarily assumes an SVP is likely to reoffend. Bergen, 146 Wn. App. at 533. The question is whether the LRA will prevent an otherwise-likely offense. Id. "The focus of this determination is therefore on the plan, not the person." Id. The State acknowledges, as it must, that Wrathall's LRA supervision was "intensive." BOR at 26. The plan ensured community safety. See BOA at 20-26.

Finally, the State claims Wrathall did not challenge any findings labeled as factual, including the purported finding that Wrathall "requires

treatment in a secure facility rather than a transitional community setting." BOR at 26. Wrathall assigned error to this latter "finding" and several related "findings" and conclusions. BOA at 1. The argument section of the opening brief challenges their sufficiency, whether they are construed as legal conclusions or factual findings. BOA at 20-26. The court's determination that Wrathall required treatment in a secure facility is predicated on the court's erroneous conclusion that Wrathall presented a danger to the community if he remained in his LRA and that his best interests in obtaining suitable treatment required revocation. Contrary to the State's assertion, the opening brief addresses the State's "compelling interest" in treating offenders. BOA at 26-29. There is no dispute Wrathall needs appropriate treatment. The dispute rests in where he should receive that treatment.

B. CONCLUSION

For the reasons stated, this Court should reverse revocation of Wrathall's less restrictive alternative and remand for further proceedings.

DATED this 30th day of November, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorney for Appellant

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DIVISION I

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	)	
Respondent,	)	
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v.	)	COA NO. 63143-8-I
	)	
DAVID WRATHALL,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF NOVEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID WRATHALL
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER, 2009.

x Patrick Mayovsky