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Court of Appeals
Division I
State of Washington

NO. 71930-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re the Detention of Bradley Ward:

STATE OF WASHINGTON,

Appellant,

v.

BRADLEY WARD,

Respondent.

APPELLANT'S REPLY

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I. INTRODUCTION

In response to the State's Opening brief, Ward has submitted a scathing indictment of Ward's treatment and the conditions of his confinement at the SCC. His assertions are based exclusively on the report authored by Ward's retained expert, Dr. Abrams. By focusing on allegations of Ward's mistreatment at the SCC rather than the question of whether he was in violation of the conditions of his conditional release, Ward attempts to transform his revocation proceeding into an entirely different sort of proceeding. On the one hand, Ward appears to attempt to retroactively convert the revocation action into a hearing in which the conditions of his release could be modified, a different proceeding brought pursuant to a different portion of the statute. In the alternative, Ward appears to attempt to challenge the adequacy and constitutionality of the conditions of Ward's confinement. Neither of these inquiries is properly before this Court as part of this appeal.

The State sought revocation of Ward's conditional release pursuant to RCW 71.09.098(6). While Ward unquestionably could have filed a counter-motion asking that, rather than revoking his conditional release altogether, the terms of his release be modified pursuant to RCW 71.09.098(7), he did not. Nor, despite the harsh criticisms of his care at the SCC offered by his expert and in his Response, has Ward

brought any sort of action specifically challenging either his treatment or the conditions of his confinement at the SCC.

The only question properly before this Court is whether the trial court abused its discretion when it denied the State's request to revoke Ward's conditional release to the SCTF where all parties agreed that he had violated the terms of his release and there was overwhelming evidence that he could no longer be safely managed there. Claims relating to the conditions of Ward's confinement or to the adequacy of his treatment at the SCC must be litigated in another forum in which the correct parties are joined and have an opportunity to respond to Ward's allegations. This Court should reverse the trial court and grant the State's motion revoking Ward's conditional release to the SCTF.

II. ARGUMENT

A. Ward Raised Concerns Regarding His Care Only After The State Moved To Revoke His Conditional Release

As discussed in the State's Opening Brief, Ward's condition began to deteriorate in 2011 after several years at the Secure Community Transition Facility on McNeil Island (SCTF). App. Br. at 13. Between 2012 and 2014, he was repeatedly returned to the SCC for periods of time, during which the professionals working with him attempted to stabilize his condition. *Id.* at 13-22. These efforts met with some success during that

period and he was able to be returned to the SCTF twice between February and October of 2012.

Between the time he was initially returned to the SCC in February of 2012 and the State's filing of a motion to revoke his less restrictive alternative placement (LRA) in January of 2014, and despite the need to repeatedly house him in the SCC's Intensive Management Unit (IMU) during this time, there is nothing in the record to suggest any concerns on his part regarding the adequacy of the treatment he was receiving or the conditions of his confinement while at the SCC. Counsel for Ward did not file anything during this time to protest the conditions to which he was being subjected, or indeed to even bring those conditions to the attention of the trial court.

These concerns did not emerge until the State, after almost two years of attempting to stabilize his condition after his decompensation in late 2011, finally took steps to formally terminate his conditional release to the SCTF by filing a motion to revoke in January of 2014. It was at this point that Ward retained Dr. Abrams and requested an evaluation that would address a broad number of issues, including: Ward's continued status as an SVP; whether he is "malingering;" whether he is competent; whether he is "behaving willfully and with knowledge of what he is doing when he violates SCC rules;" whether he should undergo any kind of

additional testing/evaluations and if so, what; whether Ward is “receiving appropriate and adequate care” at the SCC and if not, the sort of care required and where he could receive that care; and, finally, whether he could be safely managed in such an alternate medical placement. CP at 53-54.

Dr. Abrams’ report is highly critical of the care provided to Ward at the SCC. His report has certain obvious shortcomings and deficiencies: He did not interview Ward, who refused to meet with him. CP at 53. He also reveals some confusion about Ward’s sexual offending history, incorrectly asserting that Ward’s sexual offending began with a traumatic brain injury in January of 1988 (CP at 53, 20) despite the fact that, elsewhere in his report, he makes clear that he is aware of reports that discuss Ward’s pre-accident deviancy. CP at 54, 57. Dr. Abrams is critical of the “fact” that Ward’s treatment and assessment at SCC “has primarily been with psychologists who are recent graduates or pre-doctoral level.” CP at 72. Beyond one reference (CP at 64), however, Dr. Abrams does he indicate to whom he is referring and, in the case of certain persons identified in the record, this assertion is demonstrably false.¹

¹ Dr. Mark McClung, M.D., for example, a licensed psychiatrist who submitted a report in 2012 at the request of DSHS, completed his medical training in 1983. CP at 179; <http://doctor.webmd.com/doctor/mark-mcclung-md-dbc8894b-b82d-46bf-a91d-013271b0e2c8-overview>.

While critical of the quality of SCC reports, Dr. Abrams references the “excellent assessments” by various psychologists outside the SCC. CP at 72. He does not, however, suggest that any of these assessments were ever critical of the care offered at the SCC. CP at 5-13. Likewise, while he applauds the “independent and excellent treatment provided by Dr. Whitehill” and the “scattered individual competent and caring clinicians over the years at SCC” (CP at 72), he points to nothing in the reports by Dr. Whitehill or those clinicians that suggests that any of them believed that the treatment offered Ward has been inappropriate or inadequate. Indeed, Ward cites to absolutely nothing in the record suggesting that, before the State moved to revoke his conditional release to the SCTF, there were ever any complaints or concerns regarding the adequacy of his treatment at the SCC. This is true despite, according to Ward’s own count, his having been placed in the IMU 14 separate times over a period of roughly 13 months including, on one occasion, for 89 days. *See* Appendix 4 to Respondent’s Answer to Motion for Discretionary Review.

The most likely explanation for this failure to challenge these conditions is that all parties involved in both Ward’s treatment and his legal representation agreed that Ward’s periods of detention in the IMU were unavoidable in light of his grossly decompensated mental condition,

delusional state, and complete inability to comply with the terms and conditions of any court order. These behaviors included threats to a female resident of the SCTF (CP at 105), putting his head into a toilet bowl containing feces (CP at 123), smearing feces (CP at 128-32; 143-44), attempting to hug other residents, who responded aggressively (CP at 121), repeatedly ignoring staff directives (CP at 65-68; 104-05; 128-32), refusing his medications (CP at 65-68); sitting on a bed saturated with urine and refusing a shower, threatening staff should anyone attempt to force him to take his medications, and physically “charging” staff “in an aggressive manner.” *Id.* As noted by Dr. McClung, Ward’s “tendency to engag[e] in serious behavior without a whole lot of warning” made it “difficult to predict the times when he may be at greater risk of offending or at risk of aggression to self or others.” CP at 182.

In addition, there was ample evidence that staff at the SCC was doing everything it could to manage his psychosis and assist him in returning to rational behavior. As noted by Dr. Whitehill, Ward’s therapist in the community, Ward’s return to the SCC was intended to “enable more careful assessment and management of his psychiatric condition.” CP at 1. When Ward’s off-island visits to Dr. Whitehill were first cancelled, SCC staff made special efforts to assure Ward that this was not a form of punishment. CP at 308. Dr. Sziebert, the SCC’s staff psychiatrist, made,

according to Dr. Whitehill, “dogged” attempts to find a mediation “cocktail” that “could allow for a measure of re-compensation.” CP at 313. The SCC arranged for specialized medical assessments, including a CAT-scan and an EEG, neither of which appear to have produced any new medical findings that could account for Ward’s deterioration. CP at 1, 315. Ward’s strategic attack on the conditions of his confinement should not serve as a basis to continue his placement at a facility that cannot provide the level and type of care his condition requires.

B. Ward Improperly Attempts To Convert This Revocation Action Into A Hearing Regarding Conditions Of His Confinement

1. Ward Failed To Timely Request A Modification Hearing And Cannot Raise This For The First Time On Appeal

In response to the State’s attempt to revoke his conditional placement, Ward argued to the trial court that his continued placement at the SCTF would present no potential harm to the public, and would allow him to continue in treatment with Dr. Whitehill. CP at 442. He did not ask that the hearing be treated as a modification hearing pursuant to RCW 71.09.098(7), nor did he propose any modifications to his care beyond stating that, “ideally,” he “would have access to a psychiatric

hospital for care and treatment.” *Id.*² Having never raised concerns regarding the conditions of his confinement prior to the State’s request for revocation, and having asked for no modifications of his care or treatment after the revocation action was filed, Ward now cites to these allegedly defective conditions as a basis to continue his placement at the SCTF. For the reasons discussed in the State’s Opening Brief (App. Br. at 26-38), this claim fails. Nor is it appropriate to attempt to resolve these claims before this Court at this juncture.

This action originated as a revocation action pursuant to RCW 71.09.098(6). The parameters of and the evidence to be considered at such a hearing are set forth in that statute. Ward now attempts to circumvent that particularized inquiry, arguing that, because his retained expert believes the conditions and treatment at the SCC are inadequate, conditions he characterizes as “unconstitutional” (Rsp. at 25), it cannot possibly be in his best interest to stay there, and the trial court properly returned him to the SCTF.

In what is apparently an alternative argument, Ward seeks to retroactively convert this revocation action into a hearing modifying the

² The term “ideally” is used presumably because the writer was familiar with RCW 71.09.060(4), which provides that DSHS “shall not place the person, even temporarily, in a facility on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.”

conditions of his LRA controlled by a separate statutory section. Although he concedes that that portion of the statute relating to modification of conditions (RCW 71.09.098(7)) is “inapplicable” to this (revocation) proceeding (Rsp. at 23, 25), Ward argues that this Court, based on the “extraordinary” circumstances of this case, “should hold that the trial court may modify the conditions of Mr. Ward’s release to the extent the court believes is necessary to protect him from further harm.” *Id.* at 25. In other words, although the portion of the statute relating to modification of the conditions of release is inapplicable, it should be applied here. This argument fails.

First, the record in this proceeding is inadequate to consider whether the conditions of Ward’s release should be modified pursuant to a different statutory section. Had Ward wished to ask the Court to modify the conditions of his release, he could have done so, and the State would have been prepared to respond to that request. Because the matter was not litigated below, the record contains no evidence that would allow this Court to determine the question of modification. There is no evidence, for example, of whether the SCTF could possibly be retro-fitted to accommodate someone with the severe mental disabilities from which Ward suffers. Had Ward wished to have these matters before the trial court, he should have noted a hearing in order to permit the parties to

respond, first as to the threshold matter of proper scope of any hearing before the trial court, and then to permit the relevant parties to be joined and to present evidence. He did not do this. The sole question before the trial court, and the issue upon which the parties were prepared to proceed, and the issue that has been presented for review by this Court, was whether to revoke Ward's conditional release. There is no basis for this Court to find that an action brought to determine one issue—revocation—is properly transformed into another—modification—with no notice to either party.

a. Ward Cannot Challenge Conditions Of His Confinement Or Adequacy Of Treatment Within The Revocation Action

Nor is this the correct forum to determine Ward's claim that he is being deprived of his "constitutionally-mandated treatment for his mental abnormality." Rsp. at 25. Should he wish to pursue such a claim, he must institute a separate action in which DSHS, the proper party to present evidence on that issue, is a party.

While the question of challenges to conditions of confinement has not arisen specifically within the context of a revocation proceeding, numerous courts have addressed the inter-relationship between conditions of confinement/adequacy of treatment claims and SVP commitment proceedings. Our supreme court has, for example, determined that

attempts to invalidate commitment by arguing that conditions of confinement at the SCC are inadequate “demonstrate a fundamental misunderstanding of the purpose of an SVP commitment proceeding.” *In re Detention of Turay*, 139 Wn.2d 379, 404, 986 P.2d 790 (1999). There, Turay had unsuccessfully attempted to introduce evidence of the conditions of confinement at the SCC as well as the verdict in his federal litigation relating to those conditions at his commitment trial.³ *Id.* Rejecting his argument that such evidence was “relevant and powerful,” the *Turay* Court, citing RCW 71.09.060(1), stated that “[t]he trier of fact’s role in an SVP commitment proceeding, as the trial judge correctly noted, is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement.” (Emphasis in original).⁴

³ Turay, a committed SVP, filed a lawsuit in the United States District Court for the Western District of Washington against several officials at the SCC. In this suit, which he maintained under 42 U.S.C. § 1983, Turay alleged that the conditions of his confinement at the SCC were unconstitutional and thus violated his civil rights under the United States Constitution. A federal court jury found that the officials at the SCC had violated Turay’s constitutional right to access to adequate mental health treatment and awarded him \$100.00 in compensatory damages. Following receipt of the verdict, the United States District Court placed the SCC under an injunction “narrowly tailored to remedy this constitutional violation.” *Turay*, 139 Wn.2d at 386. The injunction was dismissed in 2007, the federal court concluding that DSHS had “worked long and hard to meet the constitutional requirements identified by this Court, and there is no longer any basis or the Court’s continued oversight.” <http://seattletimes.nwsourc.com/ABPub/2007/03/26/2003637061.pdf>.

⁴ RCW 71.09.060(1) provides, in pertinent part, “[t]he court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.... If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services [DSHS] for placement in a secure facility operated by the department of social and health services for control, care and treatment....”

“The particular DSHS facility to which a defendant will be committed,” the court continued, “should have no bearing on whether that person falls within [the] definition of an SVP.” *Id.*⁵

Likewise, the United States Supreme Court has rejected the idea that civil commitment is constitutional only for those for whom treatment is available. In *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2084 (1997), the Court considered the constitutionality of an SVP scheme modeled on and almost identical to that of Washington State. There, Hendricks argued that Kansas’ SVP Act “is necessarily punitive because it fails to offer any legitimate ‘treatment.’” *Id.* at 365. “Without such treatment,” Hendricks alleged, “confinement under the Act amounts to little more than disguised punishment.” *Id.* The *Hendricks* Court soundly rejected this argument, noting that, while it had “upheld state civil commitment statutes that aim both to incapacitate and to treat, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.” 521 U.S. at 365.

⁵ In addition, a person committed under RCW 71.09 “may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to be an SVP and committed under the provisions of RCW 71.09.” *Turay*, 139 Wn.2d at 404, citing *In re Detention McClatchey*, 133 Wn.2d 1, 5, 940 P.2d 646 (1997). This holding, “applies with equal force” where it is the State, rather than the respondent, who seeks to introduce testimony relating to the conditions of confinement. *In re Detention of Post*, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010).

A State could hardly be seen as furthering a “punitive” purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.

Id. (internal citations to authority omitted).

This does not mean that Ward is without an avenue for relief. As noted by the *Turay* Court, the remedy for unconstitutional conditions of confinement at the SCC is an injunction action and/or an award of damages. 139 Wn.2d at 420. Pursuant to RCW 71.09.080(3), any person committed pursuant to the SVP law “has the right to adequate care and individualized treatment.” DSHS is required to keep records “detailing all medical, expert, and professional care and treatment received by a committed person,” and such records must be made available to that person’s attorney upon request. As observed by the United States Supreme Court, “if the [Special Commitment] Center fails to fulfill its statutory duty [under this section], those confined may have a state law cause of action.” *Young v. Seling*, 531 U.S. 250, 265, 148 L.Ed.2d 734, 121 S.Ct. 727 (2001).

To the extent that Ward’s claim relates to “constitutionally-mandated treatment for his mental abnormality” (Rsp. at 25), other avenues are likewise available: The Rules of Appellate Procedure provide for the filing of a personal restraint petition where “[t]he conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.” RAP 16.4(c)(6). Likewise, a confined person challenging the conditions of his confinement can also file an action pursuant to 42 U.S.C. § 1983, as did Turay. *See* n.3, *infra*. *See Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (civil rights action is the proper method of challenging conditions of confinement). Requiring Ward to bring this action as a PRP or civil rights action pursuant to 42 U.S.C. § 1983 would allow for joinder of the proper parties. As explained in Petitioner’s Answer to Objection to and Motion to Strike Improper Amicus Brief filed in this cause, DSHS is not a party in SVP proceedings and the Attorney General’s Criminal Justice Division, Sexually Violent Predator Unit, does not represent DSHS in either the trial court or this Court” and as such is not a party to this action. Pet. Answer to Objection at 1.⁶

⁶ This was filed in response to Ward’s Objection To and Motion to Strike

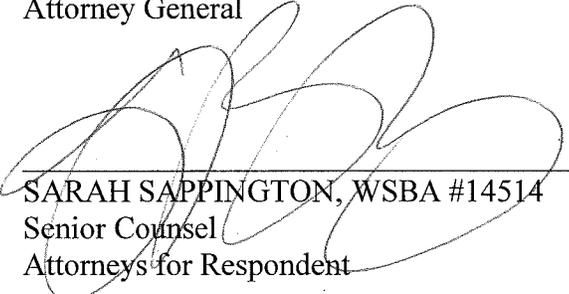
Ward, however, has made no such challenges, and the important question of the adequacy of his treatment should not be litigated within the context of a proceeding in which the sole question before the court is whether his conditional release to the SCTF should be revoked.

III. CONCLUSION

The order returning Ward to the SCTF should be reversed, and his conditional release to the SCTF revoked.

RESPECTFULLY SUBMITTED this 25th day of March, 2015.

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Improper Amicus Brief in this cause. In his Objection, Ward argued that DSHS and the SCC were already parties to this action, had “opted not to present evidence to the Superior court either at the hearing or via a motion for reconsideration regarding the ability of the SCTF-PC to house and care for Mr. Ward,” (Objection at 3) and were in fact the parties seeking discretionary review of the trial court’s ruling.

NO. 71930-1-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of:

BRADLEY B. WARD,

Respondent.

DECLARATION OF
SERVICE

I, Joslyn Wallenborn, declare as follows:

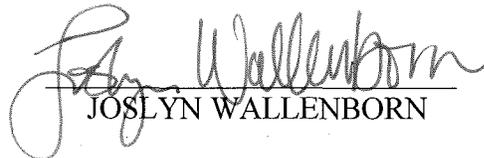
On March 25, 2015, I via electronic mail and regular USPS mail a true and correct copy of Appellant's Reply and Declaration of Service, postage affixed, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of March, 2015, at Seattle, Washington.


JOSLYN WALLENBORN