

FILED
December 31, 2015
Court of Appeals
Division I
State of Washington

NO. 73106-8-I

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

STATE OF WASHINGTON,

Appellant,

v.

DARLA KIDDER,

Respondent.

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

The Honorable David R. Needy, Judge
The Honorable John M. Meyer, Judge

BRIEF OF RESPONDENT

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A. COUNTERSTATEMENT OF THE ISSUES

1. The trial court, based on a competency evaluation, determined Kidder was incompetent to stand trial and ordered restorative treatment at Western State Hospital (WSH) for the statutory period of 90 days. When Kidder had not been transported to WSH more than 50 days later, the trial court ordered her immediate transport. Still nothing happened, so the trial court held WSH in contempt. WSH remained steadfast in refusing to transport Kidder, leading to the court's imposition of monetary sanctions until Kidder was admitted to WSH. When Kidder was finally transported, 104 days after WSH had initially been ordered to transport her, the 90-day restoration period had expired. Because the restoration order had expired, WSH declined to provide Kidder with restorative treatment until explicitly ordered to do so. Under the circumstances, did the trial court exceed its statutory authority when it determined Kidder "is incompetent to stand for trial, and it is unlikely that she will become competent w[ith]in a reasonable period of time," dismissed the charge without prejudice, and ordered Kidder to be evaluated for civil commitment proceedings?

2. Competency concerns were initially advanced by the State in August 2014. Kidder was determined to be incompetent in September 2014. Yet Kidder was detained in Skagit County Jail until January 6, 2015 without any restorative treatment whatsoever. Her decompensation during this

lengthy period was well documented by her attorney. After transport to WSH, Kidder was further detained without any restorative treatment because WSH refused to treat her without an additional trial court order. Regardless of the trial court's compliance or noncompliance with chapter 10.77 RCW, did the trial court act within its constitutional authority to prevent the further violation of Kidder's substantive due process rights by dismissing the charge without prejudice?

B. COUNTERSTATEMENT OF THE CASE

1. Charges

Kidder was arrested on July 18, 2014, and the State charged her with first degree arson on July 22, 2014. CP 29-30, 69. On July 31, 2014, Kidder was arraigned on this charge. CP 70. On August 19, 2014, the State filed an amended information charging a second count of first degree arson that allegedly occurred on June 22, 2014. CP 31-32. Kidder was not arraigned on this count.

2. Competency evaluation, finding, and order of restoration

On August 21, 2014, the State requested a competency evaluation by WSH. CP 103. The trial court ordered an in-custody competency evaluation and stayed the proceedings. CP 143-45. The court also scheduled a review hearing for September 4, 2014. CP 139, 143.

Due to WSH's delay, the review hearing was continued to September 18, 2014. CP 68. The evaluation was completed by September 18, 2014 but the accompanying report was not, so the trial court again continued the review hearing to September 25, 2014. CP 106, 131.

The September 18, 2014 report summarized Kidder's medical history, including a previous abscess in her brain stem resulting in a craniotomy. CP 157. She suffered from resulting seizures and received in-home caregiving services. CP 157. The report detailed a history of substance use. CP 157-59. The report also diagnosed "Stimulant Use Disorder (Methamphetamine)," "Cannabis Use Disorder," "Rule Out Opioid Use Disorder," "Substance/Medication Induced Psychotic Disorder," "Other Specified Personality Disorder, mixed personality features," "Conversation Disorder, with speech symptoms and with psychogenic/non-epileptic seizures, persistent," "Rule out Somatic Symptom Disorder," and "History of Methamphetamine induced psychotic episode." CP 161-62. Kidder also has a history of colon cancer. CP 157.

The evaluator stated Kidder's ability to consult with counsel was substantially diminished given a "multitude of traits that make effective communication strenuous." CP 162. "[S]he would be unable to tolerate the stress and demands of extended courtroom proceedings such as a trial while remaining focused, attentive, and non-disruptive to the processes." CP 162.

Kidder also “expressed what appear to be non-reality based beliefs regarding the charges against her and her planned defense strategy.” CP 162. The evaluator opined Kidder “did not demonstrate the ability to make rationally informed, reality based decisions regarding her current legal situation and potential options.” CP 163. The evaluator indicated Kidder “appears to decompensate rapidly in the face of stressful or challenging situations, both emotionally and physical.” CP 163. The report concluded that Kidder “lacks the capacity to assist in her defense. She does appear to have a factual understanding [of] the nature of the proceedings against her.” CP 163 (boldface omitted).

The report noted Kidder had not been previously admitted for restoration services at WSH, nor had she ever been admitted to voluntary or involuntary inpatient treatment. CP 159. The evaluator recommended inpatient restoration services with the possibility of forced medication. CP 163.

On September 24, 2014, the trial court found Kidder incompetent, stayed the proceedings, and directed her to a 90-day commitment to WSH for competency restoration. CP 127-29.

Kidder was not committed. The State and WSH ignored the restoration order entirely.

3. Order for immediate transport to Western State Hospital

On November 17, 2014, defense counsel moved for Kidder's immediate transport to WSH. CP 52-55. The motion cited RCW 10.77.086(1)(a), which provides for a 90-day restoration period. CP 54-55. Because more than 50 days had already passed, the motion asserted, "Time is of the essence and defense requests transport of Ms. Kidder by Friday, November 21, 2014 by 4:30 p.m." CP 55.

Counsel's declaration stated, "On October 7, 2014, I was advised via email with [WSH] administration that it would be 70+ days before Ms. Kidder was admitted." CP 23. Counsel recounted efforts to obtain appropriate medication for Kidder while warehoused in Skagit County Jail. CP 24-25. Counsel also described Kidder having difficulty standing and walking related to balance and seizure issues from her brain surgery, yet the jail provided her no assistance whatsoever. CP 24. Counsel concluded she was "seeing [Kidder] decompensate mentally in custody." CP 24.

The trial court heard and granted the defense motion on November 20, directing WSH to transport Kidder no later than November 21, 2014. CP 141; RP 3-5. The trial court noted "several counties have held [WSH] in contempt of violating the timeframe." RP 3. The trial court scheduled a review hearing for December 3, 2014. CP 141; RP 5.

4. The trial court holds Western State Hospital in contempt

Kidder was not transported on November 21. The trial court entered an order directing WSH to appear on December 3, 2014 to show cause why it should not be held in contempt. CP 135.

WSH filed a “resistance to finding of contempt” on November 25, 2014. CP 188-93. WSH asserted that the restoration order had no specific date for admission so it had placed Kidder on a waitlist. CP 188-89. WSH contended its violation of the November 20, 2014 transport order was not willful or intentional because WSH “was unable to admit the Defendant.” CP 189.

WSH’s “resistance” to contempt relied on the declaration of WSH medical director Dr. Brian Waiblinger. CP 36-43. Waiblinger asserted WSH did not receive the September 24, 2014 restoration order until October 7, 2014, and that on October 7, “WSH did not have the ability to admit Ms. Kidder for restoration treatment, so she was placed on a waitlist for admission.” CP 37. Waiblinger estimated Kidder could “be admitted to WSH by the week ending January 9, 2015. This is the earliest reasonable estimate for Ms. Kidder’s admission based upon the current status of the forensic waitlist.” CP 37. Waiblinger stated, “To the extent that forensic admissions are delayed, the delay is due to factors outside of WSH’s control.” CP 38.

Waiblinger also indicated WSH had “reinstated the use of [his] prioritization algorithm for the admissions waitlist.” CP 39. Waiblinger asserted this algorithm had led to shorter wait times for misdemeanor and 45-day restorations. CP 39-40. Waiblinger did not discuss the algorithm’s effect on wait times for 90-day restorations, like Kidder’s, ostensibly because it had no effect. See RP 21 (WSH witness testifying, “at least the shorter term people are being seen in a timely fashion. And once we get that under control then we can work on the longer term patient wait list. That is the theory, I believe.”). Waiblinger also suggested that jails should start involuntarily medicating those on the wait list and could do so “with the proper resources, staff, and court orders.” CP 42-43.

Defense counsel filed a reply brief on December 2, 2014, again describing the State’s obligation under RCW 10.77.086(1)(a), which limits the restoration period “in any event for a period of no longer than ninety days[.]” CP 46-48. Defense counsel also contended Waiblinger’s “allocation algorithm” did not address Kidder’s individualized medical needs, the result being “Ms. Kidder is languishing and decompensating in county jail. It is not reasonable to keep her in this environment.” CP 47-48.

At the December 3, 2014 show cause hearing, without prior notice to defense counsel, WSH presented the testimony of Roberta Kresse, the director of community programs, rather than Waiblinger. RP 8. Kresse

stated WSH had 270 beds for patients housed in the Center for Forensic Services (CFS), which provided forensic services for 15-, 45-, and 90-day competency evaluation and restoration commitments as well as for detainees found not guilty by reason of insanity (NGRI). RP 10. Kresse testified that among the 270 total beds, 100 beds were set aside for longer term competency commitments, 17 for shorter term commitments, and 153 for NGRI detainees. RP 17. The 100 beds set aside for 90-day competency restorations covered all counties in Western Washington. RP 22. Kresse acknowledged WSH could not comply with the statutory timeframes, but “the hospital’s position is that that is our goal.” RP 22.

During cross examination, defense counsel pointed Kresse to Waiblinger’s declaration: “in the declaration it states that some people can actually be moved up on the list if they have medical issues that would require severe psychiatric symptoms and psychiatrically related medical issues.” RP 32. Kresse confirmed that WSH had not reviewed Kidder’s medical issues or taken them into consideration with respect to the waitlist. RP 32.

Kresse also testified she had no hand in the noncompliance with the court’s November 20, 2014 transport order. RP 32-33. Kresse could not say whether “there was any response taken when that order was provided.” RP 33. Rather, Kresse said, “What I know is that we are attempting to just

follow the wait list.” RP 33. Kress was “not aware of any” efforts made by WSH to comply with the order. RP 33.

The State argued it did not intentionally violate the November 20, 2014 transport order. RP 43. Despite Kidder having spent two-and-a-half months in Skagit County Jail since restoration was ordered, the State also contended “that the statute [RCW 10.77.086(1)(a)] establishes 90 days from the date of admission to the hospital. And, you know, the statute doesn’t specifically set a difference between the time for transport or the time for admission.” RP 44-45. Thus, the State’s position was “that the 90 days doesn’t start on the issuing of the order but on admission to the hospital.” RP 45.

The trial court found WSH in contempt. RP 53. The court stated, “the State by failing to provide [restorative] services in many instances is putting a grave burden on local communities by essentially warehousing people in need of restorative services in jail” and that “it is not sufficient to simply attempt to follow a wait list.” RP 53. The court pointed out that “no efforts whatsoever were taken by the State to comply with the” November 20, 2014 transport order. RP 53. The court further found “the State had the ability to comply but chose not to because of its procedures.” RP 53. Finally, the court determined WSH could purge the contempt by transporting Kidder to WSH for restorative services by December 4, 2014 at 4:30 p.m.

RP 53-54. In the event WSH failed to purge its contempt, the court set a December 10, 2014 hearing to consider further sanctions. RP 54. The trial court also entered written findings and conclusions on its contempt order on December 4, 2014. CP 65-66.

5. The trial court sanctions Western State Hospital

Kidder was not transported on December 4, 2014, prompting defense counsel to request sanctions. CP 49-51. Counsel requested \$16,000 immediately and then a \$2000-per-day sanction to be apportioned evenly between the Skagit County General Fund and Kidder's Skagit County Jail account. CP 50-51. Defense counsel noted Kidder was accruing debt for medical expenses while jailed in Skagit County. CP 17, 50.

On December 12, 2014, the trial court ordered sanctions at \$200 per day: \$100 for jail housing cost, \$50 to Kidder for general services, and \$50 as a punitive sanction. CP 168-69. The sanctions were scheduled to begin December 10, 2014 and last "until such time Ms. Kidder is transported[.]" CP 168.

6. Motions for release on personal recognizance

On December 18, 2014, defense counsel appeared in court, requesting Kidder be released on personal recognizance so that she could attend her medical appointments. CP 102. The trial court denied the motion

but allowed it to be renewed if Kidder was not promptly transported to WSH. CP 102.

On December 22, 2014, defense counsel filed a motion to release Kidder on personal recognizance. CP 64. In counsel's affidavit, counsel explained Kidder could be released to her home under a caregiver's direct supervision. CP 3. The court considered this motion on December 31, 2014 and ruled that if Kidder were not transported by January 9, 2015, she would be released pursuant to defense counsel's request. CP 110, 136-37.

7. Dismissal without prejudice

On December 30, 2014, 97 days after the 90-day restoration order issued, defense counsel filed a motion for dismissal. CP 76-98. Counsel contended the lengthy delay violated the strictures of chapter 10.77 RCW, Kidder's speedy trial right, Kidder's constitutional rights to procedural and substantive due process, and Eighth Amendment protections against cruel and unusual punishment. The motion also argued for dismissal for government misconduct under CrR 8.3. Counsel's affidavit attached the order granting plaintiffs' motion for summary judgment in Trueblood issued by United States District Judge Marsha Pechman on December 22, 2014,

which ruled that WSH's significant delays for those incarcerated while awaiting competency restoration violated substantive due process.¹ CP 5-16.

Kidder was transported to WSH on January 6, 2015, 104 days after competency restoration services had been ordered and after almost six months of warehousing Kidder in Skagit County Jail. CP 71. Defense counsel received an e-mail from WSH personnel indicating "Kidder was admitted to WSH on 1/6/15 for up to 90 days" and that an evaluator would be "assigned either two weeks prior to the schedule departure date [of April 2, 2015], or when the defendant is referred for evaluation by the treatment team." CP 71.

On January 7, 2015, the court heard argument on the motion to dismiss. Defense counsel acknowledged Kidder had finally been transported but asserted that the 90-day restoration period had expired, there was no request for an extension of the competency period, and that there was no statutory basis to hold Kidder any longer. RP 68-69. Defense counsel pointed out that, according to WSH's email, Kidder was not being treated at all. RP 69. Defense counsel also asserted her client's substantive and

¹ Trueblood v. Washington State Department of Social and Health Services, United States District Court for the Western District of Washington Case No. C14-1178 MJP, is a "class action brought on behalf of people facing criminal charges who have been found to be, or are suspected to be, mentally incompetent to stand trial." CP 7. As WSH's attorney recognized, Kidder is a member of this plaintiff class. RP 52.

procedural due process rights. RP 72-73. Therefore, argued defense counsel, there were several reasons requiring dismissal. RP 69-74.

The State acknowledged its arguments were “not to say that this time period is appropriate.” RP 75. However, the State argued that, because of the separation of powers between the courts and the legislature, the court should not dismiss because the remedy had to come from the legislature’s funding of additional beds. RP 76-77.

The trial court recognized the gravity of the situation: “I’ve got a pretty good idea what I’m going to do on this. But, frankly, regardless of what I do, it’s going up. It’s Washington’s great moment. I want to do it right.” RP 78-79. It also asserted, “I’m not going to run this one off the cuff and make a ruling. I think we all need to look at the profound and wide spread implications of this particular case.” RP 79. The trial court expressed it was “very concerned about” Kidder “not getting care.” RP 81. The court indicated it would issue a written ruling. RP 79, 82.

On January 8, 2015, the State filed a motion to shorten time because WSH “is requesting an additional order with review and return dates for competency restoration” and “Kidder needs restoration treatment and the normal time periods for criminal motions would unnecessarily keep her at [WSH] without treatment for competency.” CP 100. The trial court set a hearing for the next day. CP 142.

At the hearing on January 9, 2015, the court indicated it had not yet made a decision on the motion to dismiss. RP 84. Defense counsel argued “the State has not cited any authority for them to even make this motion. Because their time period has expired,” noting that the State had an opportunity to request extension of the 90-day restoration period *before* it expired but it failed to do so. RP 87, 91-92. Defense counsel argued, “at this point my client should be brought back from Western because there’s no restoration order.” RP 88-89. Defense counsel also proposed an alternative of evaluation for civil commitment under chapter 71.05 RCW. RP 89. The court stated it would issue a ruling that afternoon. CP 104; RP 95-96.

At 2:20 p.m. on January 9, 2015, the court issued an order dismissing the case without prejudice, which read,

- 1) The [defendant] has been charged with Arson 1^o, alleged to have occurred 7/18/14.
- 2) A competency evaluation report was filed 10/14/14.
- 3) [Defendant] has been diagnosed with possible Depressive [and] Bipolar disorders [and] other specified personality disorder w[ith] mixed personality features.
- 4) [Defendant] lacks the capacity to assist in her defense.
- 5) She is a danger to herself and the community.
- 6) She has fairly recently been unable to deal with daily tasks; decompensates.
- 7) She ha[d] a craniotomy in 2007.
- 8) [Probable cause] exists that the [defendant] committed the crime charged.
- 9) The [defendant] is incompetent to stand for trial, and it is unlikely that she will become competent w[ith]in a reasonable period of time.
- 10) The charge herein should be dismissed w[ith]o[ut] prejudice.
- 11) The [defendant] should remain at Western State Hospital for a reasonable period of time for evaluation for filing of a RCW 71.05 petition.
- 12) These findings were confirmed by

the Court's personal view of the [defendant] in court. 13)
The [defendant] is not to be released into the community
w[ith]o[ut] being evaluated under RCW 71.05.

CP 25. The State appeals this order. CP 119.

C. ARGUMENT

1. THE TRIAL COURT ACTED WELL WITHIN ITS
STATUTORY AUTHORITY WHEN IT DISMISSED THE
PROSECUTION WITHOUT PREJUDICE

On appeal, the State repeatedly asserts that the trial court abused its discretion by not following the mandatory procedures established by chapter 10.77 RCW. Br. of Appellant at 3-6. But the State does not explain how the trial court violated the statute. In actuality, the trial court followed the procedures established in chapter 10.77 RCW, determined the State would not comply with those procedures, and, after several attempts to force compliance, determined the case should be dismissed without prejudice. Because the trial court acted within its statutory authority, Kidder asks this court to affirm.

RCW 10.77.060(1)(a) requires the trial court to order a competency evaluation whenever "there is reason to doubt" a defendant's competency. The trial court doubted Kidder's competency based on the State's request and, in full compliance with RCW 10.77.060's procedures, ordered Kidder to undergo a competency evaluation. CP 103, 143-45.

An evaluation report issued pursuant to RCW 10.77.060(3) finding Kidder incompetent to stand trial. CP 163. The trial court then found Kidder incompetent and stayed the proceedings in accordance with RCW 10.77.084(1)(a).² CP 127-29.

Once a defendant is determined to be incompetent, until the defendant regains competency or is determined unlikely to regain competency, “but in any event for a period of no longer than ninety days, the court . . . [s]hall commit the defendant to the custody of the secretary who shall place such defendant in an appropriate facility of the department for evaluation and treatment” Former RCW 10.77.086 (1)(a) (2013) (emphasis added), amended by LAWS OF 2015, 1st Spec. Sess., ch. 7, § 5.³ In full compliance with former RCW 10.77.086(1)(a), the trial court ordered Kidder to undergo a 90-day restoration period at WSH. CP 127-29.

“At the end of the mental health treatment and restoration period, if any, or at any time a professional person determines competency has been, or is unlikely to be, restored, the defendant shall be returned to court for a

² RCW 10.77.084(1)(a) provides, “If at any time during the pendency of an action and prior to judgment the court finds, following a report as provided in RCW 10.77.060, a defendant is incompetent, the court shall order the proceedings against the defendant be stayed”

³ The legislature’s 2015 amendments to chapter 10.77 RCW took effect on July 1, 2015, after the trial court dismissed without prejudice. LAWS OF 2015, 1st Spec. Sess., ch. 7, § 19. Kidder therefore addresses the trial court’s actions under the statutes in effect at the time of dismissal.

hearing.” Former RCW 10.77.084 (1)(b) (2012), amended by LAWS OF 2015, 1st Spec. Sess., ch. 7, § 4. “If, after notice and hearing, competency has been restored, the stay entered . . . shall be lifted. If competency has not been restored, the proceedings shall be dismissed without prejudice.” Id. (emphasis added). “If the court concludes competency has not been restored, but that further treatment . . . is likely to restore competency, the court may order that treatment for purposes of competency restoration be continued.” Id. “If at any time during the proceeding the court finds, following notice and hearing, a defendant is not likely to regain competency, the proceedings shall be dismissed without prejudice and the defendant shall be evaluated for civil commitment proceedings.” Former RCW 10.77.084(1)(c) (emphasis added).

The trial court followed the procedures outlined in former RCW 10.77.084(1). During the ordered 90-day restoration period, the trial court attempted to ensure Kidder was actually receiving the competency restoration treatment it ordered. On November 20, 2014, almost 60 days into the 90-day period, the court granted the defense motion for immediate transport so that Kidder could undergo this treatment. CP 141; RP 3-5. On December 3, 2014, when WSH failed to comply with the court’s transport order, the trial court held WSH in contempt and allowed WSH to purge its contempt by transporting Kidder by December 4, 2014. CP 65-66; RP 53-

54. Then when WSH failed to purge its contempt, on December 12, 2014, the court imposed monetary sanctions against WSH until Kidder was transported. CP 168-69. When Kidder moved for dismissal on December 30, 2014, the 90-day restoration period had expired and Kidder still had not been transported to WSH. Kidder was finally transported on January 6, 2015 but still was not receiving the restoration treatment the trial court had ordered. CP 71; RP 69. Given that Kidder had languished in Skagit County Jail rather than receive any restoration treatment during the entirety of the 90-day period, the trial court reasonably determined that competency had not been restored “[a]t the end of the mental health treatment and restoration period.” Former RCW 10.77.084(1)(b). CP 125. Therefore, pursuant to former RCW 10.77.084(1)(b)—which states that “[i]f competency has not been restored [at the end of the restoration period], the proceedings shall be dismissed without prejudice”—the trial court dismissed the case without prejudice. CP 125. Furthermore, the court found Kidder was “not likely to regain competency” and ordered that Kidder “be evaluated for civil commitment proceedings.” Compare former RCW 10.77.084(1)(c) with CP 125. The court complied with RCW 10.77.084(1).

In addition to the RCW 10.77.084 procedures, former RCW 10.77.086(2) provides, “On or before expiration of the initial period of commitment . . . the court shall conduct a hearing, at which it shall determine

whether or not the defendant is incompetent.” “If the court finds by a preponderance of the evidence that a defendant charged with a felony is incompetent, the court shall have the option of extending the order of commitment . . . for an additional period of ninety days” Former RCW 10.77.086(3).

Here, as discussed, the court held several hearings before expiration of the initial 90-day commitment period. At these hearings, the trial court attempted to force WSH to provide Kidder restoration services within the initial 90-day restoration period. But WSH refused. At all of these hearings, the court operated under the assumption that Kidder remained incompetent because she had not undergone any restoration treatment. Thus, “[o]n or before expiration of the initial period of commitment” the trial court conducted hearings at which it determined Kidder was incompetent as former RCW 10.77.086(2) requires.

In addition, the court determined by a preponderance of the evidence that Kidder was incompetent and would not regain competency within a reasonable period of time. CP 125; former RCW 10.77.086(3). Indeed, Kidder had spent more than five months decompensating in Skagit County Jail, three months of which occurred after the trial court ordered restoration at WSH. The trial court thus rejected its discretionary “option of extending the order of commitment . . . for an additional period of ninety days.”

Former RCW 10.77.086(3). Instead, because it reasonably appeared to the trial court that (1) Kidder was not competent because she had not received any restoration services and (2) Kidder would not receive any such treatment and would not regain competency within a reasonable period of time, the trial court exercised its discretion under former RCW 10.77.084(1)(c) to dismiss the case without prejudice and order a civil commitment evaluation. The trial court did not violate any statute.

The State does not explain how, under the facts of this case, the court violated chapter 10.77 RCW procedures. Though it is not clear, the State appears to argue that the violation occurred because no expert had “weighed in on the likelihood of restoration procedures pursuant to RCW 10.77.084.” Br. of Appellant at 6. The State also asserts that the trial court’s “finding of ‘not likely restorable’ was made without expert opinion, without attempts at restoration, without a hearing on the defendant’s ability to stand trial following attempts at restoration.” Br. of Appellant at 8 (emphasis added).

The trial court repeatedly attempted to get an expert to “weigh in” on whether Kidder’s competency could be restored. As discussed, after ordering restoration services in September 2014, the trial court ordered immediate transport in November 2014, held WSH in contempt for not transporting Kidder in December 2014, and thereafter imposed monetary sanctions because WSH remained in contempt. Thus, the State’s claim that

the trial court's not-likely-restorable-within-a-reasonable-period finding was made "without attempts at restoration" is patently false. Throughout these proceedings, the trial court did everything in its power to coerce the State into providing Kidder with restoration services. The State repeatedly refused to do so within a reasonable period of time. It was the State that failed to comply with the procedures outlined in chapter 10.77 RCW, not the trial court.

Nor does the statutory scheme require an expert opinion on competency restoration, as the State suggests. The trial court ordered a restoration period that "in any event" would last "no longer than [90] days" pursuant to former RCW 10.77.086 (1)(a). At the end of this 90-day period, competency had not been restored. There was no evaluator recommendation as contemplated by former RCW 10.77.084(1)(b) because the State refused to evaluate Kidder within the 90-day period. Because competency had not been restored at the end of this period, the trial court dismissed the proceedings without prejudice, as former RCW 10.77.084(1)(b) requires. Moreover, based on the State's contumacious refusal to comply with any of the trial court's orders, following several hearings the trial court determined Kidder was not likely to regain competency, dismissed the charges, and ordered Kidder to be evaluated for civil commitment proceedings, exactly as

former RCW 10.77.084(1)(c) mandates. There was no statutory violation on the trial court's part.

The State's position appears to be that the 90-day restoration period consists only of the time defendants are actually undergoing treatment and that they may be warehoused without treatment indefinitely beforehand. The text of former RCW 10.77.086(1)(a) and the legislature's recent amendments to this provision clarify that the State's position is not supportable.

Under former RCW 10.77.086(1)(a)(i), when a defendant is incompetent, the court "[s]hall commit the defendant to the custody of the secretary who shall place defendant in an appropriate facility of the department for evaluation and treatment." The court thus must commit defendants for restoration services "but in any event for a period of no longer than ninety days." Former RCW 10.77.086(1)(a). This statute does not indicate that the 90-day period includes only the time a defendant is actually in a facility receiving evaluation and treatment. Rather, the statute plainly indicates that the *total* restoration period is 90 days "in any event." At the end of the 90-day period, the court has the option of extending restoration services for another 90 days. Former RCW 10.77.086(3); former RCW 10.77.084(1)(b). Or the court has the option of dismissing the proceedings without prejudice. Former RCW 10.77.086(1)(b), (c). These statutes do not require 90 days of actual restoration services, as the State seems to suggest.

The legislature's 2015 amendments to RCW 10.77.086 clarify that the 90-day period referenced in the former statute is not limited to the actual time the defendant is receiving treatment. In 2015, the legislature added the following language to RCW 10.77.086: "The ninety day period for evaluation and treatment under this subsection (1) includes only the time the defendant is actually at the facility and is in addition to reasonable time for transport to or from the facility." LAWS OF 2015, 1st Spec. Sess., ch. 7, § 5(1)(a)(ii) (codified as amended at RCW 10.77.086(1)(a)(ii)).

"Where the statute has not been interpreted to mean something different and where the original enactment was ambiguous to the point that it generated dispute as to what the Legislature intended, a subsequent amendment can enlighten courts as to a statute's original meaning." Waggoner v. Ace Hardware Corp., 134 Wn.2d 748, 755, 953 P.2d 88 (1998). The 90-day period in the former version of RCW 10.77.086(1)(a) had never been interpreted to include only the time a defendant actually spends at WSH.⁴ At most, former RCW 10.77.086(1)(a) was ambiguous as to what

⁴ In Weiss v. Thompson, 120 Wn. App. 402, 407-08, 85 P.3d 944 (2004), this court held that a 14-day restoration period for incompetent misdemeanants did not include transportation time to and from a mental health facility because "the plain, unambiguous language of [former RCW 10.77.090(1)(d)(i)(C) (2000), repealed by LAWS OF 2007, ch. 375, § 17] provides that the 14-day period for mental competency restoration applies only to the time the defendant is actually placed at a facility for treatment." Unlike former RCW 10.77.086 (1)(a), former RCW 10.77.090(1)(d)(i)(C) provided the 14-day period "plus any unused time of the evaluation . . . shall be considered to include only the time the defendant is

must happen during this timeframe, thereby generating disputes like this one over what the legislature intended.⁵ The legislature has now explicitly stated that the statutory 90-day period includes only the time a defendant actually spends at the facility. This amendment undermines the State's claim that the 90-day period referenced in the former version of RCW 10.77.086(1)(a) was limited only to the period of inpatient treatment.

But, even if the statute had always meant that the 90-day period included only treatment time, it does not follow that the State may detain an incompetent defendant who is not receiving any treatment for more than three months in a county jail after treatment has been ordered. The amendments make clear that the 90-day period for actual evaluation and treatment is "in addition to reasonable times for transport to or from the facility." LAWS OF 2015, 1st Spec. Sess., ch. 7, § 5(1)(a)(ii) (emphasis added). The 2015 amendments give some alternatives to dismissal without prejudice, which include referring a defendant to community mental health providers or contracting for mental health services within a "therapeutic

actually at the facility and shall be in addition to reasonable time for transport to or from the facility." Weiss does not elucidate the appropriate interpretation of former RCW 10.77.086(1)(a). And, in any event, the Weiss court did not "mean to suggest that ongoing, systemic problems with delayed transportation could not be remedied by means of a habeas corpus petition, injunctive relief, or such other relief as may be warranted." 120 Wn. App. at 413 (emphasis added).

⁵ As the trial court noted, it was following the lead of other superior courts that had dismissed proceedings without prejudice under similar circumstances. RP 94.

environment” at a county or city jail, but these options were not available to the trial court in this case. See id. § 5(1)(a)(i)(B). Kidder spent 104 days warehoused in Skagit County Jail without treatment before she was finally transported to WSH. These 104 days could not, under any stretch of the imagination, constitute reasonable time for transport. The trial court did not err when it dismissed this case without prejudice.

In sum, the trial court made repeated attempts to send Kidder to WSH for competency restoration services under chapter 10.77 RCW. The State refused to follow the court’s orders and the 90-day restoration period expired. The trial court acted within its authority when it determined Kidder’s competency would not be restored within a reasonable period of time and dismissed the case without prejudice. On appeal, the State does not provide any meaningful or substantive statutory analysis at all to support its assignment of error that the “superior court failed to follow the mandatory procedures set forth in RCW 10.77.” Br. of Appellant at 1. This court should affirm the sound decision of the trial court.

2. THE JUDICIARY HAS THE POWER TO ISSUE ORDERS TO PREVENT EGREGIOUS SUBSTANTIVE DUE PROCESS VIOLATIONS

Aside from the statutory requirements, trial courts have ample authority to prevent serious violations of the Fourteenth Amendment’s substantive due process guarantee. Under this guarantee, the State cannot

constitutionally detain incompetent defendants for months before they receive restorative treatment. Because the trial court plainly saw that the State had violated Kidder's substantive due process rights, the court did not err when it dismissed this case without prejudice.

"At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

[A] person charged by the State with a criminal offense who is committed solely on account of [her] incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that [s]he will attain that capacity in the foreseeable future.

Id. "Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg v. Romeo, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). Incapacitated criminal defendants "have a liberty interest in receiving restorative treatment" and "must be provided with mental health treatment that gives them 'a realistic opportunity to be cured or improve the mental condition for which they were confined.'" Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1121 (9th Cir. 2003) (quoting Sharp v. Weston, 233 F.3d

1166, 1172 (9th Cir. 2000)). ““Lack of funds, staff, or facilities cannot justify the State’s failure to provide [such persons] with [the] treatment necessary for rehabilitation.”” Id. (alterations in original) (quoting Ohlinger v. Watson, 652 F.2d 775, 779 (9th Cir. 1980)). To determine whether the State has violated an incapacitated defendant’s substantive due process rights, courts must balance the defendant’s liberty interest in physical freedom from incarceration and restorative treatment against the State’s legitimate interest. Youngberg, 457 U.S. at 321.

The State has no legitimate interest in warehousing incapacitated criminal defendants without mental health treatment for a period of 104 days *after* the court has already ordered restorative treatment.⁶ “While they are detained in jail, incapacitated defendants do not receive care giving them a realistic opportunity of becoming competent to stand trial.” Mink, 322 F.3d at 1121. Indeed, the record here demonstrates that, while awaiting admission to WSH, Kidder had significantly decompensated physically and mentally. CP 24 (counsel’s affidavit describing Kidder’s seizure-related difficulty standing and walking as a result of her craniotomy and Skagit County Jail’s failure to provide any assistance); CP 47-48 (counsel’s affidavit stating, “Ms. Kidder is languishing and decompensating in county jail. It is not reasonable

⁶ In Mink, the Ninth Circuit held a substantive due process violation resulted from a detention of only 23 days before admission to the State hospital, 322 F.3d at 1107, which pales in comparison to the lengthy term of detention Kidder was forced to endure.

to keep her in this environment”); RP 32 (counsel’s examination of WSH witness confirming that WSH did not take into account Kidder’s “severe psychiatric symptoms and psychiatrically related medical issues”). The State violated Kidder’s substantive due process rights by jailing her without treatment instead of admitting her to WSH in a timely manner.

And, when Kidder finally was admitted, after nearly six months in Skagit County Jail, WSH indicated it would merely continue to detain her without treatment unless the trial court extended the already expired restoration period. CP 71. Indeed, the State asked to extend the restoration period because WSH “request[ed] an additional order with review and return dates for competency restoration.” CP 100. An e-mail from WSH indicated no evaluator had been assigned to Kidder’s case and that evaluators “are assigned either two weeks prior to the scheduled departure date, or when the defendant is referred for evaluation by the treatment team.” CP 71. Admitting Kidder to WSH to undergo additional incarceration without restorative treatment merely continued the violation of Kidder’s substantive due process rights.

The trial court understood the gravity of the situation before it and the repugnancy of the State’s inaction. It was “very concerned” Kidder was not receiving any care. RP 81. It stated, “This is a case of great magnitude.” RP 77. It called Kidder’s case “Washington’s great moment.” RP 78. The

trial court also had the United States District Court's ruling in Trueblood before it, which, as WSH conceded, directly applied to Kidder. RP 52. The court in Trueblood had already determined that average restoration waits of 15 to 17 days violated substantive due process, a far cry from the 104 days at issue here. CP 7, 13.

The trial court had already attempted remedies short of dismissal, such as ordering immediate transport, holding WSH in contempt, and further imposing monetary sanctions against WSH. The State flatly ignored these attempts, complaining it did not have the staff or resources to meet the terms of the court's orders. Thus, regardless of its compliance or noncompliance with chapter 10.77 RCW, the trial court acted well within its judicial authority to put a stop to the egregious substantive due process violations at issue by granting the narrow remedy of dismissal without prejudice.

"It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803). The trial court did just that, ensuring that Kidder's substantive due process rights would not be violated further. This court should affirm.

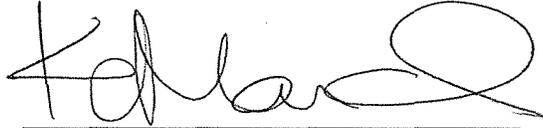
D. CONCLUSION

Because the trial court complied with statutory procedures and vindicated Kidder's constitutional rights against being warehoused without mental health treatment, Kidder asks that this court affirm.

DATED this 31st day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

KEVIN A. MARCH

WSBA No. 45397

Office ID No. 91051

Attorneys for Respondent

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

STATE OF WASHINGTON)	
)	
Appellant,)	
)	
vs.)	COA NO. 73106-8-1
)	
DARLA KIDDER,)	
)	
Respondent.)	

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 31ST DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DARLA KIDDER
P.O. BOX 83
CONCRETE, WA 98237

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF DECEMBER 2015.

X *Patrick Mayovsky*