68873-1

68873-1

No. 68873-1

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

STATE OF WASHINGTON,

Respondent,

v.

DONNA L. HOWLAND,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

More than two decades after Donna Howland was acquitted by reason of insanity of a criminal offense and confined involuntarily to Western State Hospital, she petitioned the court for conditional release. The court denied the petition summarily because Ms. Howland did not present expert testimony to support her petition. But Ms. Howland did not dispute that she was still mentally ill. The ultimate question at issue was whether any danger she presented to the community could be mitigated through court-ordered conditions. Expert testimony was unnecessary to make that determination. Because the court erred in requiring Ms. Howland to present expert testimony, the case must be remanded to the trial court for a new determination on the petition for conditional release.

B. ASSIGNMENTS OF ERROR

1. The court erred in concluding Ms. Howland was required to present expert testimony to support her petition for conditional release.

2. The court erred in dismissing the petition for conditional release.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

When an insanity acquittee petitions for conditional release, the question under the statute is whether the person may be released on conditions without substantial danger to the public. The statute does not inquire into the acquittee's mental status, only her dangerousness. Moreover, Ms. Howland did not dispute that she was still mentally ill. Did the court err in concluding she must nonetheless present expert testimony to support her petition for conditional release?

D. STATEMENT OF THE CASE

In 1988, the State charged Donna Howland with one count of premeditated first degree murder. CP 1. The State alleged she killed her live-in boyfriend by stabbing him with a knife. CP 2. Ms. Howland told police after her arrest that she had heard voices telling her to stab her boyfriend. CP 2. Prior to the incident, Ms. Howland had a three-year history of repeated hospitalizations for suicidal gestures and psychotic ideation. CP 32.

Ms. Howland was diagnosed with chronic paranoid schizophrenia and borderline personality disorder and entered a plea of not guilty by reason of insanity. CP 5-6, 33. The trial court found that her mind was affected by her mental disorder to the extent that she

could not perceive the nature and quality of the act she committed and could not tell right from wrong with reference to it. CP 5. Therefore, the court acquitted her by reason of insanity. CP 5-6. The court also found Ms. Howland presented a substantial danger to the public and a substantial likelihood of committing felonious acts if not confined to a state mental hospital. CP 6. Therefore, the court ordered her committed to Western State Hospital (Western). CP 6.

Ms. Howland made significant progress at the hospital. In January 1999, the secretary[1] recommended that she be conditionally released and the court agreed. CP 8. The court ordered her release subject to several conditions, including that she follow her treatment plan, take her medications, and remain in a state of remission without a significant deterioration of her mental condition. CP 9.

At first, Ms. Howland was transferred to a community program located on the hospital grounds but administered separately from it. 5/28/10RP 48; CP 33. In May 2005, she was transferred to a group home in West Seattle. 5/28/10RP 53; CP 33. She returned to Western voluntarily for a few months in summer 2009 for stabilization after

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[1] The "secretary" for purposes of the statute is "the secretary of the department of social and health services or his or her designee." RCW 10.77.010(21).

struggling with delusions, depression and diabetes. CP 33. When released, she returned to the group home in West Seattle.

Ms. Howland's baseline mental condition in the community was paranoid and irritable with occasional delusions and outbursts of rage. 5/28/10RP 23, 30, 50, 63. At the same time, she had a good sense of humor and was sometimes cheerful. 5/28/10RP 23, 30. The record contains no evidence that Ms. Howland ever assaulted or threatened anyone, or committed any crimes, either while she was at Western or while she lived in the community. 5/28/10RP 77-78, 120.

Ms. Howland was diligent and consistent about taking her psychiatric medications. 5/28/10RP 16, 26, 54. She understood the need for the medications to maintain her mental stability. 5/28/10RP 16. But one day in winter 2009, she refused to take both her morning and evening doses. 5/28/10RP 27, 31, 38, 56. Her physician had been adjusting her medications for a few months prior to that and, as a result, she was experiencing debilitating side effects. 5/28/10RP 20-21, 36, 55-57, 135. She was also taking far more medications than she had been previously, due to her worsening medical conditions. 5/28/10RP 17-19, 54-57. She decided not to take her medication that day so that she could be readmitted to the hospital, where she would be safe until

the dosages were finally adjusted. 5/28/10RP 69. She violated no other conditions of her conditional release. 5/28/10RP 77.

Upon learning that Ms. Howland had not taken her medication, her case manager immediately telephoned a staff person at Western, who called police. 5/28/10RP 27, 31. Ms. Howland was returned to Western that day. 5/28/10RP 37.

At first, Ms. Howland did not adjust well to being back in the hospital. 5/28/10RP 74. She refused to participate in activities, refused to talk to people, and slept a lot. 5/28/10RP 74. She was angry about being back at Western. 5/28/10RP 81. She had fixed delusions,[2] although they never caused her to lash out in an assaultive or threatening manner. 5/28/10RP 23-25, 34, 112. She also continued to be diligent about taking her medications. 5/28/10RP 110.

Ms. Howland began to improve after she was moved to a new ward in April 2010. 5/28/10RP 83. She was generally in a good mood, her delusions were diminishing, and she was getting better at managing her emotions. 5/28/10RP 110-12, 116, 125. Nonetheless, the "Risk

[2] When she first returned to Western, Ms. Howland had delusions that she owned the "Treatment and Recovery Center" at Western, which provides therapy and classes for patients, and that a staff person was an attorney who had bought the place for her. 3/18/11RP 14-16.

Review Board"[3] recommended that conditional release be revoked. CP 33-34. The State filed a motion to revoke conditional release based on Ms. Howland's failure to take her medication for one day and her need for further treatment. CP 19.

A hearing was held in May 2010. Suzanne Leichman, a clinical nurse specialist and therapist who had provided services for Ms. Howland for several years, testified she did not believe Ms. Howland presented a danger to others despite her refusal to take her medication on two occasions. 5/28/10RP 96. Ms. Howland testified she would agree to stay at Western until her medications were adjusted but that conditional release should not be revoked because she wanted to be able to leave the hospital when she became stabilized. 5/28/10RP 135.

The court found Ms. Howland had violated the terms of conditional release by refusing to take two doses of her medication and by suffering a deterioration of her mental condition. 5/28/10RP 165; CP 27. Therefore, the court revoked conditional release and remanded Ms. Howland to the custody of Western. CP 26-29. But at the same

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[3] The "Risk Review Board" is a group composed of department heads at Western who meet with a patient's treatment team to decide whether to recommend the patient's release. 3/18/11RP 6.

time, the court expressly found that the State had not proved Ms. Howland presented a threat to public safety. 5/28/10RP 165; CP 27.

As of March 2011, Ms. Howland was continuing to take her medications and was participating more in treatment. 3/18/11RP 22-24, 28. Her delusions had apparently resolved or, at least, were not apparent to her therapist. 3/18/11RP 14-16, 32-34. Although she talked to herself quite a bit, there was no indication she was receiving internal commands to harm anyone. 3/18/11RP 16. She was still often angry but her outbursts had abated considerably. 3/18/11RP 28. She had not assaulted or threatened anyone. 3/18/11RP 38-39.

In light of her improvement, in January 2011, Ms. Howland filed a petition for conditional release. CP 31, 55-61. The Risk Review Board opposed the petition. The Board concluded Ms. Howland should not be conditionally released because she was refusing to attend the Treatment and Recovery Center (TRC) and was attending alternative treatment groups and classes on the ward instead. CP 48-49; 3/18/11RP 17-18. TRC is a facility located close to the ward which offers four hours of treatment groups and classes per day; the treatment there is more intensive than the treatment Ms. Howland was receiving. 3/18/11RP 12-13; 25. Although Ms. Howland was doing well enough

to progress to a level "three" security clearance, she could not progress any higher unless she attended TRC. CP 48, 50; 3/18/11RP 31-32. The Risk Review Board will not recommend conditional release until a patient progresses to level "seven." 3/18/11RP 48-49.

After a hearing, the court denied Ms. Howland's petition for conditional release. 3/11/18RP 60; CP 51-54. The court found that, although Ms. Howland had made improvement, she still had delusions and angry outbursts; she refused to attend TRC; and the Risk Review Board did not recommend conditional release. 3/18/11RP 60.

On February 7, 2012, Ms. Howland filed another petition for conditional release and requested a hearing. CP 64. Again the petition was not supported by the Risk Review Board. CP 78. The State filed a motion to dismiss the petition. CP 65-83. The State argued the petition was frivolous because Ms. Howland had not offered any expert testimony supporting conditional release. CP 70. The State also argued Ms. Howland had to show a change of circumstances since the last hearing and that she had failed to do so. CP 72-73. Finally, the State argued Ms. Howland was collaterally estopped from arguing she was entitled to conditional release because the court had rejected the identical argument the previous year. CP 73-74.

Attached to the State's motion was an October 12, 2011, progress report from Western. CP 76-78. The report states that, since the previous report, Ms. Howland had made progress in managing her anger and applying healthy coping skills, in gaining insight into her emotional responses, and in refraining from acting out. CP 77. But she still continued to become verbally abusive and argumentative sometimes when she did not get her way. CP 77. Ms. Howland continued to evidence acute symptoms of her mental illness, such as expressing paranoia and maintaining fixed delusions. CP 77. She still refused to attend treatment at TRC, although her attendance in the alternative groups was good. CP 77.

The State also attached a March 15, 2012, progress report to its motion to dismiss. CP 80-83. According to that report, Ms. Howland's symptoms had not fully stabilized and therefore, if she were released to the community, she would likely be at risk of poor medication compliance and less able to cope with interpersonal stressors. CP 81. She had made progress, however. Her angry outbursts had diminished, she had improved her ability to respond to stressful situations, and she had greater insight into her emotional responses. CP 82. Nonetheless, the report concluded Ms. Howland presented a substantial danger to the

public because she had not made substantial progress in treatment, she was unable to verbalize insight into her mental illness or the possible signs of relapse, and she had not progressed beyond security level "three." CP 83.

The court granted the State's motion and summarily dismissed Ms. Howland's petition for conditional release without holding a hearing.[4] CP 106-08. The court found, "[w]ithout expert testimony to support defendant's position, the court has no basis to conditionally release the defendant. Without any such evidence, her petition is frivolous and will be dismissed." CP 108. At the same time, the court rejected the State's argument that Ms. Howland had not shown a change of circumstances. CP 108. The court found that Ms. Howland's progress since the last hearing amounted to such a change. CP 108.

[4] A copy of the court's order granting the State's motion to dismiss the petition is attached as an appendix.

E. ARGUMENT

The court's decision to require Ms. Howland to support her petition for conditional release with expert testimony was erroneous and unreasonable, where no authority supports the court's position and expert testimony was unnecessary to answer the question of Ms. Howland's dangerousness

1. The ultimate question to be determined on the petition for conditional release was whether any danger Ms. Howland presented could be adequately mitigated through court-ordered conditions.

In Washington, a criminal defendant may be acquitted by reason of insanity of an offense if she proves to the fact-finder by a preponderance of the evidence that she was insane at the time of the offense. RCW 10.77.080. If the fact-finder also finds the defendant "is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions," the court must order her detained in a state mental hospital or any appropriate less restrictive treatment. RCW 10.77.110(1). If the fact-finder finds the defendant does not present such a danger, the court must order her full release. Id.

Constitutional due process requires that a person committed to a mental institution following an insanity acquittal must be released once

the original justification for the confinement has ended. The Due Process Clause "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). The fact that a person has been found beyond a reasonable doubt to have committed a criminal act indicates the person is dangerous and an insanity acquittal supports an inference of continuing mental illness. Jones v. United States, 463 U.S. 354, 364, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). Therefore, a finding of not guilty by reason of insanity is a sufficient basis to commit an insanity acquittee for the purposes of treatment and protection of society. Id. at 366.

But "[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Id. at 368-70 ("As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness.") (footnote omitted). In other words, even if the acquittee remains either mentally ill or dangerous, but not both, she may not be confined against her will indefinitely. Id. at 370; see also Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (holding State may no longer hold defendant

against his will in mental institution as insanity acquittee because he was no longer mentally ill); O'Connor v. Donaldson, 422 U.S. 563, 575-76, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) ("a finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely").

Washington's statute mirrors the constitutional requirement and permits the insanity acquittee to petition for full discharge upon a showing that she is no longer dangerous as a result of mental illness. RCW 10.77.200(3) (acquittee entitled to full release upon showing that she "no longer presents, as a result of a mental disease or defect, a substantial danger to other persons, or a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.").

Although an insanity acquittee must be *fully* released if she is no longer mentally ill or dangerous, Washington's statute provides a mechanism to petition for conditional release for acquittees who are still mentally ill and present some possible danger. The question to be determined in such a proceeding is "whether or not the person may be released conditionally without substantial danger to other persons, or

substantial likelihood of committing criminal acts jeopardizing public safety or security." RCW 10.77.150(3)(c).[5]

The statute provides for conditional release of an acquittee who is still mentally ill and dangerous as long as her dangerousness can be adequately controlled through appropriate conditions. State v. Reid, 144 Wn.2d 621, 628-29, 30 P.3d 465 (2001). "Conditional release is appropriate for an insanity acquittee who continues to be mentally ill but may not be unacceptably dangerous if certain conditions are imposed." Id. at 629. In sum, even if an insanity acquittee is dangerous as the result of a mental disease or defect, this does not preclude the court from granting conditional release. Id. at 630. "Quite the contrary. Conditional release is a mechanism whereby mentally ill persons of varying degrees of dangerousness can be conditionally

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[5] Ms. Howland filed a petition for conditional release under RCW 10.77.200(5), which permits the acquittee to apply directly to the court without first applying to the secretary. See RCW 10.77.200(5) ("Nothing contained in this chapter shall prohibit the patient from petitioning the court for release or conditional release from the institution in which he or she is committed."). The procedures for conditional release provided in RCW 10.77.150 apply to petitions for conditional release filed under RCW 10.77.200(5). See State v. Kolocotronis, 34 Wn. App. 613, 623-24, 663 P.2d 1360 (1983) (procedures set forth in RCW 10.77.150 are applicable when acquittee files petition for conditional release directly with court under former RCW 10.77.200(3) (1974) [now RCW 10.73.200(5)]).

reintroduced into society where it is determined the conditions will reasonably mitigate the dangerousness." Id.

Thus, the principal issue to be determined when an acquittee files a petition for conditional release is the petitioner's dangerousness, not her mental status. Id. at 630 (the conditional release statute "does not inquire into mental status, only dangerousness"); RCW 10.77.150(3)(c). The question is not whether the petitioner remains mentally ill, but the degree to which any possible danger can be mitigated through court-imposed conditions. RCW 10.77.150(3)(c).

That the conditional release statute focuses the inquiry on dangerousness and not mental status is further reinforced by the fact that, in Washington, an acquittee's dangerousness is not presumed to continue indefinitely even though she is presumed to remain mentally ill. "Washington law since 1905 has presumed the mental condition of a person acquitted by reason of insanity continues and the burden rests with that individual to prove otherwise." State v. Klein, 156 Wn.2d 103, 114, 124 P.3d 644 (2005) (citations omitted). In contrast, there is no presumption that the person continues to be dangerous. Id. at 118; Reid, 144 Wn.2d at 627-28. For this reason, the Washington Supreme Court has explicitly recognized that the principal question to be

determined when an acquittee files a petition for release is not whether she continues to be mentally ill but whether she continues to be dangerous. Klein, 156 Wn.2d at 118 ("Because of the statutory presumption that an insanity acquittee continues to be insane, the primary inquiry for the release statute remains the dangerousness of the individual.").

In sum, when an insanity acquittee files a petition for conditional release, the question to be determined is whether any danger she presents can be adequately mitigated through conditions. RCW 10.77.150(3)(c).

2. Expert testimony was not necessary to answer the question of whether any danger Ms. Howland presented could be adequately mitigated through the imposition of conditions.

The State presented expert evidence of Ms. Howland's mental status and symptomatology. CP 76-78, 80-83. Ms. Howland did not dispute that she was still mentally ill. There was therefore no need for her to present her own expert testimony regarding her mental status. The principal question to be determined was not her mental status but whether the court could impose conditions that would adequately mitigate any potential danger she presented to the public. RCW 10.77.150(3)(c); Klein, 156 Wn.2d at 118; Reid, 144 Wn.2d at 630.

There is no authority for the court's position that Ms. Howland was required to present expert testimony to answer this question. Indeed, the determination of Ms. Howland's possible dangerousness and the degree to which it could be controlled did not principally lie within the realm of medical knowledge.

Although generally questions regarding the admission of evidence are reviewed on appeal for abuse of discretion, if the issue is based on the meaning of a statute, as it is here, it is a question of law reviewed de novo. State v. Haq, 166 Wn. App. 221, 272, 268 P.3d 997 (2012), review denied, 278 Wn.2d 1111 (2012).

The conditional release statute does not provide that a petitioner must present expert testimony in order to be entitled to conditional release. See RCW 10.77.150. To the contrary, the statute implies that expert testimony presented on behalf of a petitioner is discretionary and that the court can decide a petition for conditional release without it. See RCW 10.77.150(3)(b) (providing that the court shall appoint an expert to examine the petitioner only if the petitioner is indigent and requests the appointment of an expert).

Chapter 10.77 RCW requires a defendant who pleads not guilty by reason of insanity in the first instance to provide expert testimony of

her mental condition in order to support the insanity defense. See RCW 10.77.060(1)(a) ("Whenever a defendant has pleaded not guilty by reason of insanity, . . . the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.").

By contrast, the statute does not require the presentation of expert testimony or medical expertise to address the question of dangerousness. Under the statute, the issue of dangerousness is central to the question of whether the acquittee must be detained and for how long. See RCW 10.77.110(1), .150(3)(c), .200(3). Here, Ms. Howland did not dispute her mental status or that she remained mentally ill. The only question was whether any possible danger she presented could be adequately mitigated through court-imposed conditions. This was not a question that required expert testimony in order for the court to answer.

In Washington, expert testimony is generally appropriate only where the question to be decided involves scientific, technical, or other highly specialized knowledge. See ER 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand

the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."). The question of an acquittee's dangerousness does not require this kind of specialized knowledge. To the contrary, the issue of dangerousness "presents a mixed question involving both a legal and social judgment as well as a medical opinion." Powell v. Florida, 579 F.2d 324, 333 (5th Cir. 1978). Thus, once an acquittee's mental status is established, no further medical opinion is necessary. In the context of a petition for conditional release, the question becomes whether, given the acquittee's mental status, any danger she presents can be controlled adequately through the imposition of conditions. RCW 10.77.150(3)(c).

Determining the appropriateness and nature of conditions to impose upon an acquittee who is conditionally released is a quintessential judicial function and is not a matter to be decided by a medical expert. The statute requires the court to determine what conditions are necessary and provides the court with authority to impose those conditions. RCW 10.77.150(3)(d). The court may modify or reject any conditions suggested by the secretary. Id.

In this case, the statute provided for several conditions that the court could have imposed in order to ensure the safety of the public. The court could have required Ms. Howland to take her medication and attend treatment regularly, and to report to a mental health practitioner for such medication or treatment. RCW 10.77.150(4). The mental health practitioner would have been required, in turn, to submit regular written reports to the court and to immediately inform the court and the prosecuting attorney if Ms. Howland failed to appear for medication or treatment or upon a change in her mental condition that would render her a potential risk to the public. Id.; RCW 10.77.140, .160. The court would have been required to review the case no later than one year after conditional release and no later than every two years thereafter, and determine each time whether Ms. Howland should continue to be conditionally released. RCW 10.77.180.

The record demonstrates there is a transitional program that provides structure and security, and could have been appropriate for Ms. Howland, had the court ordered her conditional release. The program is a community program for insanity acquittees on conditional release. 5/28/10RP 48; 3/18/11RP 41. The program is located on the grounds of Western but is administered separately from it. 5/28/10RP

48; 3/18/11RP 47. The facility is less secure than the locked ward where Ms. Howland currently resided, but it does have a locked door and surrounding fence. 3/18/11RP 47. Patients in the program are subject to weekly risk assessments by the treatment team. 3/18/11RP 43. The program is a five-tier security level program. 3/18/11RP 41. Patients gradually earn the right to greater freedom to move about the hospital grounds. At first they may move about while accompanied by a companion and then, at the higher levels, they may move about for short periods without a companion. 3/18/11RP 42; 5/28/10RP 91.

Patients in the transitional program can be required to attend the Treatment and Recovery Center (TRC) at the hospital. 5/28/11RP 90-91. The Risk Review Board placed great importance on Ms. Howland's failure to attend TRC when it decided not to recommend conditional release. CP 48-49; 3/18/11RP17-18. The court could have made Ms. Howland's attendance at TRC a condition of her conditional release. RCW 10.77.150(4). The court had authority to order conditional release despite the objection of the Risk Review Board. RCW 10.77.150(3)(d); 3/18/11RP 50.

In sum, the question before the court on Ms. Howland's petition for conditional release did require expert testimony to answer. The

court could have determined, without expert testimony, that Ms. Howland could be safely released on conditions. The court had authority to impose several conditions that it could reasonably have concluded would be sufficient to protect the safety of the public. Therefore, the court erred in dismissing Ms. Howland's petition summarily on the basis that she did not present expert testimony.

F. CONCLUSION

Because the court erroneously and unreasonably dismissed Ms. Howland's petition for release on the basis that she did not present expert testimony, the court's order should be reversed and the case remanded for a new determination on the petition.

Respectfully submitted this 28th day of January, 2013.

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Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

FILED

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KING COUNTY
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KENT, WA

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

STATE OF WASHINGTON, Plaintiff, vs. DONNA HOWLAND, Defendant.	NO. 88-1-05554-4 SEA ORDER GRANTING STATE'S MOTION TO DISMISS PETITION FOR CONDITIONAL RELEASE

THIS MATTER came before the Court on State's Motion to Dismiss Defendant's Motion for Conditional Release, the Court reviewed the files and records herein, including:

1. State's Motion to Dismiss Defendant's Motion for Conditional Release, and exhibits attached thereto;
    a. Exhibit 1 – Progress Report from DSHS dated October 12, 2011;
    b. Exhibit 2 – Progress Report from DSHS dated March 15, 2012.
2. Defense Opposition to State's Motion to Dismiss Petition for Conditional Release;
3. State's Reply Brief re: Defendant's Motion for Conditional Release;

Pursuant to RCW 10.77.200(5), Defendant, Donna Howland, has petitioned the court for conditional release from Western State Hospital. The State moved to dismiss her petition on the following grounds: (1) the petition was frivolous because defendant had no expert

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Judge Regina S. Cahan
King County Superior Court
Maleng Regional Justice Center
401 Fourth Ave N
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testimony to support her request; (2) defendant needed a showing of material change since her last petition; (3) collateral estoppel; and (4) the court lacked authority to determine placement determinations within the Community Program of the DSHS treatment facility without approval from the Western State Hospital Risk Review Board (RRB) and the Public Safety Review Panel (PSRP).[1]

Defense responded by stating that RCW 10.77.200(5) provides the procedural right for the defendant to have a hearing and it is premature to consider whether she would be successful at the hearing. Moreover, there is nothing in the statute that requires a showing of material change. Defense argued that collateral estoppel does not apply because the situation is different since the last hearing.

Certainly, the defendant has a right to file a petition pursuant to RCW 10.77.200(5). RCW 10.77.200(5) states: "Nothing contained in this chapter shall prohibit the patient from petitioning the court for release or conditional release from the institution in which he or she is committed." Ms. Howland filed a petition. The State moved to dismiss that petition based on the fact that Ms. Howland has not provided any expert witness to support her petition. Moreover, the State argued when Western State Hospital disapproves of the defendant's application, RCW 10.77.150(3) allows the court discretion on whether to grant a hearing.

Ms. Howland's petition is not supported by Western State Hospital and she possesses no expert to support her conditional release. The State presented a letter dated October 12, 2011 from Ms. Howland's primary therapist and attending psychiatrist that did not recommend

[1] This last argument was raised in reply and will not be addressed given the lack of opportunity for defense to respond.

Howland for conditional release at that time. Exhibit 1. The second letter dated March 15, 2012 was from Western State Hospital Risk Review Board and again does not recommend a conditional release. Exhibit 2. The Risk Review Board found that given her fixed delusions, her acute psychotic symptoms and trouble managing emotional liability, Ms. Howland is a substantial danger to other persons and presents a substantial likelihood of committing criminal acts jeopardizing public safety or security. There has been no declaration provided by defense to the contrary in response to the Motion to Dismiss. Without expert testimony to support defendant's position, the court has no basis to conditionally release the defendant. Without any such evidence, her petition is frivolous and will be dismissed. [2]

IT IS HEREBY ORDERED that the State's Motion to Dismiss is GRANTED.

DATED this 10th day of April, 2012.

Judge Regina S. Cahan
King County Superior Court

[2] Given the court's ruling regarding the necessity of an expert witness to support defendant's petition, the court has not addressed the State's second argument, whether a material change is required. As to the State's third argument, the court does not find the State's argument that collateral estoppel precludes defendant's petition convincing. Time has transpired and Howland's petition is based on her progress since the last hearing, which is a change of circumstances.

Judge Regina S. Cahan
King County Superior Court
Maleng Regional Justice Center
401 Fourth Ave N
Kent, WA 98032

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68873-1-I
v.	)	
	)	
DONNA HOWLAND,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DONNA HOWLAND WESTERN STATE HOSPITAL 9601 STEILACOOM BLVD SW TACOMA, WA 98498	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JANUARY, 2013.

X_____

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