COA NO. 70022-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICKEY BEAVER,

Appellant.

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

The Honorable Brian D. Gain, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

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

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A. ARGUMENT IN REPLY

AS A MATTER OF DUE PROCESS, BEAVER CANNOT BE INVOLUNTARILY COMMITTED WITHOUT A FINDING OF CURRENT MENTAL ILLNESS.

The State does not challenge the basic premise that due process is violated when a person who lacks a mental illness is involuntarily confined in a mental hospital. Revocation of conditional release results in the person being sent back to involuntary confinement in a mental hospital. If that person no longer has a mental illness, then that civil confinement is unconstitutional.

The State nonetheless argues no finding of current mental illness is required to revoke a person's conditional release because an insanity acquittee is presumed to remain mentally ill. As a result of this presumption, the State contends, there is no need for a finding of current mental illness before revocation of conditional release takes place. Brief of Respondent (BOR) at 20, 24, 27, 29.

There is a presumption that the mental condition of a person acquitted by reason of insanity continues. State v. Klein, 156 Wn.2d 103, 114, 124 P.3d 644 (2005). But "that inference does not last indefinitely." State v. Sommerville, 86 Wn. App. 700, 710, 937 P.2d 1317 (1997) (citing United States v. Bilyk, 29 F.3d 459, 462 (8th Cir. 1994)), review denied, 133 Wn.2d 1023, 950 P.2d 477 (1997). The presumption of mental illness

does not last forever regardless of changed circumstances. The presumption is rebuttable.

The State argues there is substantial evidence in the record to show Beaver continued to suffer from a mental illness. BOR at 25-27. But that does not resolve the due process issue. There is also evidence that Beaver does not currently have a mental illness, and the trial court indicated Beaver was no longer mentally ill in its oral remarks. CP 111-12, 367-68; RP 30-33.

There is conflicting evidence on the issue. It is the trial court's province to resolve the conflict under the substantial evidence standard. The determination of whether Beaver continues to suffer from a mental disease or defect is a question of fact. Klein, 156 Wn.2d at 115. "Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true." Stieneke v. Russi, 145 Wn. App. 544, 566, 190 P.3d 60 (2008). If that standard is satisfied, the reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. Stieneke, 145 Wn. App. at 566. Moreover, the trial judge, as trier of fact, is not bound by any expert opinion, including any expert that believed Beaver has a mental illness that renders him dangerous. See State v. Toomey, 38 Wn. App.

831, 837, 690 P.2d 1175 (1984) ("Expert opinions are not binding. The court, not the particular expert testifying, makes the decision.").

The trial court expressed grave reservation about sending Beaver back to Western State Hospital (WSH). It is clear the court seriously considered that Beaver was no longer mentally ill based on the WSH reports, notwithstanding contrary opinions expressed by others. RP 30-33. Where the trial court went wrong is that it did not enter a finding on whether Beaver still had a mental illness, erroneously believing no such finding was needed to revoke conditional release.

Due process requires that finding. The Supreme Court recognized "in order to confine an insanity acquittee to institutionalization against his or her will, the trial court must make two determinations: first, that the acquittee suffers from a mental illness and second, that the acquittee is a danger to others." State v. Bao Dinh Dang, 178 Wn.2d 868, 876, 312 P.3d 30 (2013). The Supreme Court applied that overarching requirement to the revocation of conditional release. Bao Dinh Dang, 178 Wn.2d at 876-77. Bao Dinh Dang addressed the finding for dangerousness because that was the issue raised on appeal. But the findings needed to confine an insanity acquittee apply to both mental illness and dangerousness, not simply dangerousness. Id. at 876. Revocation of conditional release amounts to "confin[ing] an insanity acquittee to institutionalization against

his or her will." Id. It follows that before the State could constitutionally revoke Beaver's conditional release and thereby subject him to institutionalization against his will, the court needed to find that Beaver was both dangerous and mentally ill.

The State asserts "[a] conditional release does not inquire into the mental status of the insanity acquittee." BOR at 21. But there is a constitutionally significant difference between earning conditional release and revoking a conditional release. Bao Dinh Dang, in equating revocation of conditional release with involuntary institutionalization, proves the point.

The State claims a finding of mental illness as a prerequisite to revocation of conditional release is not required because the statutory scheme already provides for an unconditional release procedure wherein the insanity acquittee must ether prove lack of mental illness or lack of dangerousness. More particularly, the State contends that requiring the court to make a finding of mental illness at the revocation hearing would transform it into an unconditional release hearing, with the State required to prove mental illness. BOR at 30.

There are problems with the State's position. First, requiring a finding of the presence of mental illness no more transforms the revocation hearing into an unconditional release hearing than does

requiring a finding that the person is dangerous before conditional release can be revoked. Under the State's logic, there ought not to be a required finding for dangerousness in the revocation context because that would transform the revocation hearing into an unconditional release hearing. The Supreme Court in Bao Dinh Dang did not see it that way. Bao Dinh Dang, 178 Wn.2d at 874 ("the constitution requires a specific finding of dangerousness before ordering the confinement of an insanity acquittee."). The procedures for revocation of conditional release and unconditional release continue to exist side by side, even though a finding of dangerousness is required before conditional release may be revoked.

Second, the need for a finding on mental illness does not turn on which party has the burden of proof. Given the presumption of continuing insanity, the State has argued an insanity acquittee should bear the burden of proof to show lack of mental illness. But even if the insanity acquittee bears the burden of proving lack of mental illness, a finding on mental illness is still required. Such a finding is required regardless of who bears the burden of proof. The trial court must find that the insanity acquittee does or does not have a mental illness. If the acquittee bears the burden of proof and fails to meet it, then the requisite finding would be that the acquittee did not prove he no longer had a mental illness that caused him to be dangerous.

Comparison with the unconditional release context illustrates the point. The insanity acquittee bears the burden of proof for either lack of mental disease or lack of dangerousness to win unconditional release. RCW 10.77.200(2). The State has no burden of proof. Yet when unconditional release is denied, factual findings on the presence of mental illness and dangerousness are still made. Klein, 156 Wn.2d at 121-23 ("substantial evidence in the record supports the trial court finding that Klein continues to present a substantial danger to others or a substantial likelihood of committing criminal acts jeopardizing public safety."); State v. Reid, 144 Wn.2d 621, 631, 30 P.3d 465 (2001) (trial court, in denying unconditional release, found dangerousness but no mental illness; effect of latter finding mandated unconditional release). Under the State's theory, no finding on mental illness should be required in the unconditional release context because the insanity acquittee bears the burden of proving lack of mental illness. That is clearly not the case.

The State contends if it must prove Beaver's insanity at a revocation hearing, Beaver would be provided an opportunity to be unconditionally released without having to meet his burden of proof required by RCW 10.77.200. BOR at 31. The State is mistaken.

Bao Dinh Dang is again instructive. If an acquittee proves at an unconditional release hearing that he is no longer dangerous, then he is

entitled to unconditional release. But under Bao Dinh Dang, the State still bears the burden of proving dangerousness to revoke conditional release, and a supported finding of dangerousness is a due process prerequisite for revocation. Bao Dinh Dang, 178 Wn.2d at 874. Requiring the State to prove dangerousness in a revocation setting does not provide acquittees an opportunity to be unconditionally released without having to meet their burden of proof under RCW 10.77.200. It just means that if the State fails to prove dangerousness, then the conditional release cannot be revoked. In such a circumstance, the person remains on conditional release, but is not unconditionally released. The same goes for a finding on mental illness under Beaver's argument. If the State cannot prove mental illness at the revocation hearing, then the result is that the State is unable to revoke the conditional release, but Beaver is not unconditionally released. He is still subject to being monitored under approved conditions in the community.

The State's bold proclamation that finding a mental illness before revoking conditional release and placing a person in a mental hospital would undermine the purpose of the entire civil commitment scheme falters in light of the plain fact that the purpose of civil commitment is to treat those with a mental illness that renders them dangerous to society. RCW 10.77.210; Jones v. United States, 463 U.S. 354, 368, 103 S. Ct.

3043, 77 L. Ed. 2d 694 (1983) ("The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.").

The Supreme Court has flatly counseled "civil commitment statutes are constitutional only when both initial *and continued confinement* are predicated on the individual's mental abnormality and dangerousness." State v. McCuistion, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012), cert. denied, 133 S. Ct. 1460, 185 L. Ed. 2d 368 (2013) (emphasis added). The State contends what McCuistion had to say on that point is limited to the SVP context and is irrelevant to the civil commitment scheme for insanity acquittees under chapter 10.77 RCW. BOR at 29.

The cases relied on by McCuistion show otherwise. McCuistion cited five cases in support of the proposition that a civil commitment statute is constitutional only when both initial *and continued confinement* are predicated on the individual's mental abnormality and dangerousness. McCuistion, 174 Wn.2d at 387-88. Two of the cases relied on by McCuistion addressed the civil commitments of those found not guilty by reason of insanity. McCuistion, 174 Wn.2d at 387-88 (citing Foucha v. Louisiana, 504 U.S. 71, 77-78, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)

(civil commitment of a person found not guilty by reason of insanity: statutory provision permitting confinement of an insanity acquittee based on dangerousness alone violated due process); Jones, 463 U.S. at 368 (civil commitment of a person found not guilty by reason of insanity: "The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.")).

Two cases involved other types of civil confinement schemes. McCuistion, 174 Wn.2d at 387-88 (citing Jackson v. Indiana, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972) (pretrial commitment of incompetent criminal defendants: "At the least, due process requires that the nature and duration of commitment bear a reasonable relation to the purpose of the commitment."); O'Connor v. Donaldson, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) (civil commitment based on mental illness: not enough that "original confinement was founded upon a constitutionally adequate basis . . . because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." . . . A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement.").

Only one of the cases relied on by McCuistion was a SVP-type case. Id. at 388 (citing Kansas v. Hendricks, 521 U.S. 346, 358, 117 S. Ct.

2072, 138 L. Ed. 2d 501 (1997) (civil commitment in sexually violent predator context requires mental abnormality rendering the individual dangerous)).

It is clear on the basis of the foregoing authority relied on by McCuistion that civil commitment statutes in general, including those involving insanity acquittees, are constitutional only when both initial and continued confinement are predicated on the individual's mental abnormality and dangerousness.

The State nevertheless contends what McCuistion had to say on that point is irrelevant to the civil commitment scheme for insanity acquittees because Beaver pled and proved his own insanity and an acquittee's insanity is presumed to continue while the SVP's mental disease is not. BOR at 29.

The State's attempt to wish the import of McCuistion away is not well-taken. The insanity acquittee's mental illness is presumed to continue because "it was a fact established after a full hearing that the petitioner was insane at the time of the [crime]." State v. Platt, 143 Wn.2d 242, 251 n.4, 19 P.3d 412 (2001) (quoting In re Brown, 39 Wn. 160, 166, 81 P. 552 (1905)), cert. denied, 534 U.S. 870, 122 S. Ct. 161, 151 L. Ed. 2d 110 (2001). The SVP's mental abnormality is likewise established after a full hearing at the initial commitment trial, just as the acquittee's mental

condition is established after a full hearing at the initial criminal trial. See McCuistion, 174 Wn.2d at 379 (individual committed only after full evidentiary trial where the fact finder determine whether the individual meets the definition of a SVP beyond a reasonable doubt). And an SVP's mental abnormality, recognized as a verity in determining whether an individual is mentally ill and dangerous at a later date, is considered severe, chronic and in need of long term treatment. McCuistion, 174 Wn.2d at 385, 389-90. Yet due process still requires a finding of current mental abnormality in order to continue to confine the SVP after the initial commitment.

Due process requires a finding that an insanity acquittee is mentally ill before conditional release is revoked and the acquittee is involuntarily institutionalized. The lack of finding here renders Beaver's revocation unconstitutional.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Beaver respectfully requests reversal of the commitment order.

DATED this 3rd day of April 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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

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DIVISION ONE

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	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 3RD DAY OF APRIL, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICKEY BEAVER
630 MOSES LANE SOUTH APT. B
RENTON, WA 98057

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF APRIL, 2014.

X Patrick Mayovsky

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