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NO. 70750-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Detention of Dennis Breedlove

STATE OF WASHINGTON,

Appellant,

v.

DENNIS BREEDLOVE,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

Breedlove asserts five arguments, all without merit: 1) the State invited the trial court's error; 2) the State did not properly preserve at the trial court level the issues presented in this appeal; 3) the Court of Appeals "improvidently granted" review; 4) the trial court did not abuse its discretion in denying the State's Motion to Reconsider; and 5) the trial court properly granted Mr. Breedlove an unconditional release trial. These issues are discussed in the order presented.

A. The State Did Not Invite The Trial Court's Error By Answering A Specific Question.

Respondent alleges, misleadingly, that the State somehow invited error during oral argument that preceded the State's Motion to Reconsider. Brief of Respondent at 5. To support this claim, Respondent cites the verbatim report of proceedings where the Court only asked if there was a statute that limited "treatment" to "an existing course that is the only course that meets the definition." RP at 19-20. This exchange is not representative of anything other than the State's agreement that no single particular course is identified by RCW 71.09 et. seq. to define "treatment." In fact, the actual point at issue is whether the Court should interpret "treatment" under RCW 71.09 to mean "sex offender treatment" and/or "sex offender specific treatment" as clearly intended by the legislature

versus some nebulous and vague definition that includes activities that are not recognized sex offender treatment modalities. This point was iterated and reiterated more than a dozen times during the course of the oral argument both before and after the trial court posed its question.[1] Whether something other than sex offender specific treatment could be considered "continuing participation in treatment" was specifically identified by the trial court as the only remaining issues before the court. RP at 31-32. The court then admits:

> Nowhere in this statute is treatment defined. It's also not defined, continuing. So, I don't know what continuing means and I don't think the case law is clear on what continuing means much less what treatment means. So I don't know if that was intentionally vague by the Legislature or if the just didn't think it through. I don't know what treatment means.

RP at 31-32.

After the trial court reiterated that the interpretation of the definitions of treatment and continuing were the issues before it, Respondent's counsel, *after* the trial court questioned the State, then agreed that the trial court could interpret "treatment" to mean the sex offender treatment program at the SCC, stating:

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[1] RP at 12, 13, 14, 16, 17, 20, 21, 22, and 23.

> [T]he court can find, if it feels appropriate, that the Legislature, what they meant by treatment was specifically the Sex Offender Treatment Program at the Special Commitment Center.

RP at 26. The Respondent's attorney then argued why he believed that was not the correct course of action, but nevertheless acknowledged that the issues before the trial court were the interpretation of statutory language based on the clear intent of the legislature. This is exactly one of the issues currently before this Court.

The Respondent's current attorney, who was not present at the oral argument and who did not argue any of the issues to the trial court, is the only person under the impression that the issue of legislative intent of the definition of treatment was somehow conceded by the State at the trial court level. The error was not invited, the subject issues were never conceded, and the issues were preserved both during the initial trial court hearing and as part of the State's Motion to Reconsider. The Respondent's argument is based on incorrect recitation of the arguments presented to the trial court and a dearth of legal support. The argument must fail.

B. The Appellant Has Abided By RAP 2.5 And Has Not Raised Any Issues For The First Time On Appeal.

Respondent alleges that the Appellant violated RAP 2.5 by raising the issue of the appropriate definition of "treatment" under RCW 71.09 *et.*

seq. for the first time on appeal. Respondent does this by objecting to the State's CR 59 Motion to Reconsider, an objection he raises for the first time on appeal.

First, the present issues on appeal were more than adequately preserved. As discussed above, the issues before this Court were preserved in both written and oral formats to the trial court. Both the trial court *and the Respondent* plainly recognized the present issues as the subjects of the arguments to the trial court.

Second, the Respondent's arguments regarding CR 59 are misplaced. Respondent never objected to the State's Motion to Reconsider nor filed any manner of pleadings in response to the State's Motion. If the Respondent felt that the State's Motion should not have been considered by the trial court, it should have objected at the time, not for the first time in a responsive appellate pleading.

Even if the Respondent had timely objected to the State's CR 59 Motion, the trial court properly considered the Motion. The State's CR 59 Motion did not contain new evidence, nor did it contain issues not presented at the original hearing. What the State did allege, however, was that the trial court made an error in interpreting the law regarding the definition of "continuing participation in treatment," and provided additional support from the Washington Administrative Code. CP 3-9.

CR 59(a) provides, in pertinent part, that reconsideration may be granted pursuant to any one of the following:

> (8) Error in law occurring at trial and objected to at the time by the party making the application; and
> (9) That substantial justice has not been done.

CR 59(a)(8) and (9).

The State alleged that the trial court erred in interpreting the law. In granting an unnecessary and unwarranted trial on the issue of unconditional release of an untreated sexually violent predator, the trial court failed to do substantial justice. Either of these bases would have been sufficient to warrant reconsideration.

C. Review Was Properly Granted Based On Both Probable And Obvious Error Committed By The Trial Court.

Despite Respondent's repeated implications to the contrary, whether a trial court erred in finding the evidence presented establishes probable cause is subject to *de novo* review. *State v. McCuistion,* 174 Wn.2d 369, 382, 275 P.3d 1092 (2012) *cert. denied*, 133 S. Ct. 1460, 185 L. Ed. 2d 185 (2013). Also, contrary to Respondent's argument and suggested authority that avoiding a useless trial is not a standard for awarding discretionary review (Brief of Respondent at 11-12), the opposite is true. [2]

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[2] The Respondent also indicates, without legitimate basis, that the State somehow misled this Court at the Motion Discretionary Review Hearing. Brief of

> Discretionary review may be granted where the trial court "has committed an obvious error which would render further proceedings useless", RAP 2.3(b)(1), or to ***avoid a useless trial***, *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

Dussault v. Seattle Public Schools, 69 Wn. App. 728, 732, 850 P.2d 581 (1993) (emphasis added).

The Respondent suggests that because the State and Mr. Breedlove will engage in a less restrictive alternative release (LRA) trial there is no material consideration in adding another trial (unconditional release) to be heard at the same time. That suggestion is contrary to both law and practicality and cannot be the basis for dismissing this Court's decision to grant review. First, while there may be a LRA trial regarding Mr. Breedlove, that trial is by no means guaranteed as it is subject to pre-trial determination of the issues by way of summary judgment. RCW 71.09.094. A summary judgment hearing on these issues would not include the issues at an unconditional release trial. Second, the issues at trial for LRA are tremendously different from unconditional release for many reasons including, but not limited to:

1. One of the requirements for an LRA trial to proceed is that the Respondent agrees he is a SVP that requires sex-offender treatment.

Respondent at 11. Even a cursory reading of the Commissioner's ruling reveals that the allegations of nefarious conduct by the State are false. This Court should disregard the baseless accusations.

2. The Respondent agrees to participate in that treatment.
3. The Respondent's proposed treatment meets statutory requirements and it adequate to address his (and the community's) needs.
4. The Respondent's proposed housing meets both the Respondent's needs and the community's needs for security and protection.
5. The Department of Corrections will provide information and analysis of the proposed less restrictive alternative release plans, conditions, and housing.

See RCW 71.09.092. None of these issues are present at an unconditional release trial.

Contrarily, the issues at an unconditional release trial are far different. Primarily, an analysis of whether or not the Respondent currently meets the statutory definition of a sexually violent predator will be the entirety of an unconditional release trial. These trials require expert testimony that covers many issues including diagnoses, risk assessments, actuarial statistical analysis, dynamic risk factor analysis, and other analyses germane to the determination of whether the Respondent meets the criteria for SVP as a threshold issue. Put into perspective, in initial commitment cases where almost identical issues are at stake, the trials routinely last more than two weeks. While there may be some minimal overlap of material, such as sexual offending historical data, it is important to note that the entirety of the issues in an unconditional release trial (whether the Respondent meets the definition of a SVP) are *assumed to be*

true during an LRA trial. Respondent's suggestion that essentially doubling the considerations for a jury is not tantamount to creating a useless trial is simply not realistically acceptable when the actual ramifications of the trial court's rulings are analyzed.

This Court correctly concluded that the obvious errors committed by the trial court did render further proceedings useless in that the errors would result in a useless trial on a number of complex and heavily litigated issues. The Respondent's argument fails.

D. The Trial Court Erred In Denying The Motion To Reconsider.

As described above, although the denial of a motion to reconsider is reviewed for abuse of discretion, the underlying ruling, which is also subject to review by this Court, is subject to *de novo* review. *McCuiston, supra.*

Regardless, the trial court also abused its discretion by failing to exercise discretion and by interpreting a statute in such a way as to render the term "treatment' meaningless.

Under Washington law, " '[f]ailure to exercise discretion is an abuse of discretion.' " *In re Det. of Mines,* 165 Wn. App. 112, 125, 266 P.3d 242 (2011) (alteration in original) (quoting *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999)), *review denied,* 173 Wn.2d 1032, 277 P.3d 668 (2012). Ascertaining legislative intent

is the fundamental objective of statutory interpretation. *In re Detention of Mines*, 165 Wn. App. 112, 120, 266 P.3d 242 (2011); *Rozner v. City of Bellevue,* 116 Wn.2d 342, 347, 804 P.2d 24 (1991).

The Legislature's primary mechanism for encouraging treatment is making it a requirement for release:

> By making treatment the only viable avenue to a release trial (absent a stroke, paralysis, or other physiological change), the State creates an incentive for participation in treatment.

McCuistion, 174 Wn.2d at 394. This court gives "substantial deference" to the Legislature's finding that the mental conditions of SVPs are "severe and chronic" and unlikely to remit over time. *Id.* at 391. DSHS adopted rules requiring individual treatment plans (ITP) for each resident. WAC 388-880-040. All ITPs require a "description of the person's specific treatment needs in . . . **Sex offender specific treatment**[.]" WAC 388-880-040(3)(a)(i) (emphasis added).

Respondent spends a significant portion of his brief focusing on the phrase "but not limited to" as it appears in WAC 388-880-040. Brief of Respondent at 14-16. The entirety of that argument ignores the context of the statute which states:

> The ***ITP shall include***, but not be limited to:
> (a) a description of a person's specific treatment needs in :
> (i) Sex offender specific treatment

WAC 388-880-040(3)(emphasis added). To suggest that by stating that the list that follows the ITP's *requirements* is not exhaustive, that somehow the required items on the list are flexible and expendable is simply inaccurate.

During its ruling, the trial court admitted that it did not know what either "continuing" or "treatment" meant. VRP 31-32. The trial court admitted this even when it recognized that the definitions of these words were critical to the issues at bar. *Id.* Instead of ascertaining legislative intent, *and even when clear legislative intent was shown to the court*, the trial court did not consider that intent, did not exercise its discretion or do due diligence to make its required considerations. Failing to exercise this discretion alone warrants review. However, the court's failure to ascertain clear legislative intent, regardless of its exercise of discretion, also warrants review. The Respondent's argument fails.

E. The Trial Court Lacked Sufficient Evidence Of Probable Cause To Find Mr. Breedlove Had So Changed To Warrant An Unconditional Release Trial.

Even if the trial court's interpretation of the statutory meaning of "continuing" and "treatment" were valid, trial court lacked sufficient evidence to make its determination of probable cause. An SVP cannot demonstrate change through an evaluation that merely disagrees with

and attacks the original basis for commitment. See *McCuistion*, 174 Wn.2d at 832.

The trial court begins with the assumption that Breedlove is an SVP, and should have required him to produce evidence of a substantial change in his condition due to continuing participation in treatment. Instead, the evidence before the court was essentially an irrelevant collateral attack.

While it is true that the Respondent's hired expert, Dr. Fisher, did indeed state that Mr. Breedlove had "changed through treatment" the actual report fails to establish prima facie evidence of change. Dr. Fisher fails to support his opinions, or *ever* refer to actual completed treatment.

The trial court "must look beyond an expert's stated conclusion to determine if they are supported by sufficient facts." *In re Detention of Ward*, 125 Wn. App. 381, 387, 104 P.3d 747 (2005) *superseded by statute on other grounds as recognized by McCuistion*, 174 Wn.2d at 397-98. Breedlove is a prolific and dangerous serial child molester. Further evidence demonstrates he continues to harbor alarming sexual interest in children, even while in custody. Dr. Fisher's passing implication that Breedlove's participation in treatment was "continuing" was unsupported by any facts contained in his report. He had conflicting evidence regarding the duration of any type of meetings Mr. Breedlove had

attended, any concrete evidence of actual content of those meetings, and he had no idea even how many meetings Mr. Breedlove had actually attended. The awareness and preparation course was failed at least once and, even though completed, is merely an informational course about the treatment offered, and not itself considered treatment.

The trial court was tasked with evaluating the experts' opinions and their bases. Ironically, Mr. Breedlove cites a case that also stands for this proposition, *In re Jacobson*, 120 Wn. App. 770, 780, 86 P.3d 1202 (2004). While the Jacobson Court warns against weighing or balancing the evidence, it in no way advocates that all expert conclusions must be taken at face value; they must be rooted in actual fact. Dr. Fisher's opinions were based on shaky reasoning and inconsistent (and sometimes nonexistent) facts. His report failed to describe how Breedlove's activities at the SCC could be considered treatment, much less relevant or continuing treatment. Dr. Fisher's opinion that Breedlove had changed through treatment is the type of unsupported conclusion that should be disregarded. *Ward*, 125 Wn. App. at 387. This Court ruled correctly when it found that the trial court committed obvious error in failing to critically analyze Dr. Fisher's unsupported conclusory statements. It ruled correctly in finding that Dr. Fisher's report amounted to little more than a collateral attack on Mr. Breedlove's initial commitment, when such

attacks are specifically rejected under *McCuiston*. It also ruled correctly when it found that Dr. Fisher's report actually failed to describe a change in Mr. Breedlove's *mental condition*, regardless of the other deficiencies in Dr. Fisher's report.

The Respondent failed to establish probable cause at the trial court's hearing, and the order granting him a trial to determine the propriety of unconditional release should be reversed.

II. CONCLUSION

Breedlove's evidence fell far short of the statutory requirement that he show a substantial change in his condition due to his continuing participation in treatment. He has not engaged in sex offender treatment, except for two brief attempts long ago. The trial court's ordering of an unconditional release trial without evidence of treatment change was error. For these reasons, the state respectfully requests that this Court vacate the trial court's order.

RESPECTFULLY SUBMITTED this 18th day of August, 2014.

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NO. 70750-7

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of: DENNIS BREEDLOVE, Respondent.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On August 18, 2014, I served via electronic mail and deposited in the United States mail a true and correct copy of the Reply Brief Of Appellant and Declaration Of Service, postage affixed, addressed as follows:

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

DATED this 18th day of August, 2014, at Seattle, Washington.

Kelly Hadsell
KELLY HADSELL