73008-8

NO. 73008-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISAAC ZAMORA,

Appellant.

BRIEF OF RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. INTRODUCTION

After a violent crime spree which took place over the course of one afternoon in September 2008, Isaac Zamora was charged with 20 felonies, including six counts of first degree aggravated murder. In a plea bargain reached with the Skagit County Prosecuting Attorney, Mr. Zamora pleaded guilty to 18 of the 20 charges, including four of the murder charges, and pleaded not guilty by reason of insanity (NGRI) to the remaining two murder charges. Recognizing that this type of plea agreement would require that Mr. Zamora be committed to a state mental hospital for an indeterminate period of time prior to going to prison, the plea agreement contained a provision stating that the parties understood that there is no guarantee how long Mr. Zamora might remain committed to the state hospital, and that the length of time he stayed there would not be a basis to withdraw his pleas or otherwise void or collaterally attack the plea and sentence. CP 380.

In 2010 and 2013, the Washington State Legislature amended the statute governing the final release of insanity acquittees from state custody. The first amendment allowed the Department of Social and Health Services (DSHS) to independently petition for the release of an insanity acquittee. The second amendment modified the criteria insanity acquittees need to meet for a final release from DSHS custody. That

amendment allowed insanity acquittees who will be transferred to a Department of Corrections (DOC) institution or facility to serve a sentence for a class A felony following their release from DSHS custody to be released when it is shown that the acquittee's mental disease or defect is manageable within a state correctional institution or facility.

Based on the authority granted by these new laws, DSHS successfully petitioned in September 2014 to have Mr. Zamora released from its custody. Mr. Zamora appeals this decision, arguing that he should not be released from DSHS custody. But Mr. Zamora shows no error because: (1) his release does not violate his plea agreement, (2) the statutory changes do not violate the ex post facto or bill of attainder clauses of the Washington State and U.S. Constitutions, (3) the statutory changes are not unconstitutionally vague, and (4) notwithstanding an attempt to order two conditions of treatment onto DOC, the trial court correctly found that Mr. Zamora's mental illness is manageable within a state correctional institution or facility and released him from DSHS custody.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Legislature's amendments to the release provisions of RCW 10.77.200 violate Mr. Zamora's plea agreement when the only reference in the plea agreement to Mr. Zamora's release from DSHS custody states that there is no guarantee how long he will spend in DSHS custody?

2. Do the amendments violate the ex post facto and bill of attainder clauses of the Constitution, even though they have no retroactive or punitive effect on Mr. Zamora?

3. Did the trial court correctly find that the amendment to RCW 10.77.200 was not impermissibly vague when it determined that it was capable of being applied in this case?

4. Did the trial court's attempt to place two conditions onto DOC's treatment of Mr. Zamora after ordering his release from DSHS custody negate the release finding, even though the conditions placed on DOC by the court did not infer that DOC could not manage Mr. Zamora's mental illness?

III. COUNTERSTATEMENT OF THE CASE

Mr. Zamora was charged with 20 felonies for his actions on September 2, 2008, including multiple counts of burglary, theft, and aggravated murder. CP 376. On November 17, 2009, the trial court approved a plea agreement Mr. Zamora entered into with the Skagit County Prosecuting Attorney in which he agreed to plead guilty to all but two of the counts of aggravated murder. CP 378. In exchange for his plea, Skagit County agreed to not seek the death penalty for the aggravated murder charges. CP 378-79. The parties also stipulated that Mr. Zamora would enter a plea of Not Guilty By Reason of Insanity to the remaining two counts of aggravated murder, and that the trial court should find him NGRI and commit him to Western State Hospital because he meets the commitment criteria under RCW 10.77.110(1). CP 379. As part of the agreement, Skagit County also agreed to not file further charges or sentencing enhancements against Mr. Zamora, and agreed to seek a standard range sentence for the counts he pled guilty to. CP 379-80. Skagit County also agreed to recommend that the trial court follow the agreement by finding Mr. Zamora NGRI of the remaining two counts, and committing him to Western State Hospital pursuant to RCW 10.77.120. CP 379-80.

The plea agreement next contained a provision stating that it was understanding of the parties that, based on State v. Sommerville, 111 Wn.2d 524, 760 P.2d 932 (1988) and RCW 10.77.120, Mr. Zamora would be first sent to Western State Hospital, and that it was only after he was eligible for a conditional release that he would be transferred to DOC for the serving of his sentence. CP 380. The agreement went on to state that the parties understood that there was no guarantee how long Mr. Zamora might remain at Western State Hospital, and that the length of time he spent there was not a basis for withdrawing, voiding, or collaterally attacking the plea and sentence. CP 380.

The same day the plea agreement was approved, the trial court made findings of fact that Mr. Zamora committed all 20 of the acts he was accused of, but that he was legally insane at the time of the commission of two of the aggravated murders. CP 137. The trial court also found that Mr. Zamora should be placed in treatment at Western State Hospital. CP 137. Based on these findings, the trial court concluded

> that pursuant to the agreement of the parties and *State v. Sommerville*, 111 Wn.2d 524 (1988), the Defendant should be committed to Western State Hospital, and that upon any conditional release that may subsequently be ordered by the Court, he should be remanded to the custody of the Washington Department of Corrections to serve any prison term imposed under this cause.

CP 138. On November 30, 2009, a Felony Judgment and Sentence was entered requiring that Mr. Zamora be committed to DOC custody to serve a criminal sentence of life without parole upon his discharge from DSHS custody. CP 130-31. The trial court also entered an Order of Commitment stating that Mr. Zamora would be committed to the custody of DSHS "subject only to further proceedings of this Court for conditional release and/or final discharge or release" and that "upon any conditional release or final discharge or release, he shall be remanded to the custody of DOC to serve his prison term of four life sentences." CP 308.

In 2010, the Legislature amended RCW 10.77.200 to allow DSHS to petition for the release of insanity acquittees. Laws of 2010, ch. 263, § 8. In December 2012, Mr. Zamora was moved from Western State Hospital to the Special Offender Unit (SOU), a mental health treatment facility at the Monroe Correctional Complex. CP 31. Although now placed in a DOC facility, Mr. Zamora remained in the custody of DSHS. *Id*. In 2013, the Legislature amended RCW 10.77.200 again, this time to allow for the release of an insanity acquittee who will be transferred to a state correctional institution or facility upon release from DSHS custody to serve a sentence for any class A felony, if it is shown that the acquittee's mental disease or defect is manageable within a state correctional institution or facility. Laws of 2013, ch. 289, § 7.

In December 2013, DSHS filed a petition pursuant to RCW 10.77.200 seeking Mr. Zamora's release from DSHS custody and transfer to DOC. CP 30-36. DSHS alleged in its petition that Mr. Zamora had progressed in treatment to the point that his condition was manageable in a DOC correctional facility. CP 32.

In September 2014, the trial court held an evidentiary hearing on the petition. The court heard testimony from Brian Waiblinger, M.D., a psychiatrist and the Medical Director at Western State Hospital; Cynthia Goins, Ph.D., a clinical psychologist at the SOU; Paul Jewitt, M.D., a psychiatrist at SOU; Bruce Gage, M.D., DOC's Chief of Psychiatry; and Sally Johnson, M.D., a psychiatrist retained by Mr. Zamora. CP 8. At the conclusion of the hearing, the trial court made the following findings concerning Mr. Zamora's condition and care:

> The experts agree, and their testimony establishes the following: (1) Mr. Zamora continues to suffer from a serious mental illness; (2) Mr. Zamora has not been a management problem during his 20 months at SOU; (3) DOC has cared for Mr. Zamora's (sic) appropriately during his 20 months at SOU; and (4) Mr. Zamora has responded better to treatment at the SOU than he did while at Western State Hospital.

CP 8-9. Based on these findings the court concluded Mr. Zamora's mental illness was manageable within a state correctional institution, ordered him released from DSHS custody, and remanded him to DOC custody to serve

his criminal sentence. CP 9. The court also imposed two conditions on DOC with regard to its care and custody of Mr. Zamora:

> Once in the custody of DOC, Mr. Zamora will remain in the SOU and not to be transferred until two psychiatrists who have worked with him jointly recommend that he be transferred somewhere out of the SOU. DOC will also appoint a psychiatrist to be responsible for monitoring Mr. Zamora's care.

CP 9.

Both Mr. Zamora and DOC timely appealed the decision.

IV. ARGUMENT

A. The Plea Agreement Was Not Breached By the Amendments to RCW 10.77.200 Because the Prosecutor Made No Promises Regarding How Long Mr. Zamora Would Spend in DSHS Custody or How His Release Could Be Obtained

DSHS does not dispute that Mr. Zamora's plea agreement can be enforced. A plea agreement is a contract between the prosecutor and the defendant. State v. Wakefield, 130 Wn.2d 464, 474, 925 P.2d 183 (1996). The defendant exchanges his guilty plea for some bargained-for concession from the State: dropping of charges, a sentencing recommendation, etc. State v. Barber, 170 Wn.2d 854, 859, 248 P.3d 494 (2011). But because plea agreements are more than simple contracts and concern fundamental rights of the accused, due process considerations require that the prosecutor adhere to the terms of the agreement. State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). Whether a breach of

a plea agreement occurred is an issue appellate courts review de novo. State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015).

Mr. Zamora contends that the State violated his plea agreement by changing the criteria under which he could be released from DSHS custody. Brief of Zamora at 2-3. He argues that the plea agreement "guaranteed a certain legal framework would apply and procedural safeguards would protect him from being sent to prison when he remained substantially dangerous to himself or others due to his mental illness." *Id*. at 17. He argues that he relied upon the law as it was written at the time, specifically the provision regarding who could petition for release and his understanding that only he could petition for his release, and that he would not have accepted the plea bargain if he had known the law would be changed. *Id*. at 7, 15 (citing CP 269). He concludes that the statutory changes disregarded the parties' understanding and settled expectations under the plea agreement. *Id*. at 20.

The plea agreement clearly shows that the criteria under which Mr. Zamora was to be released from DSHS custody is not part of the bargained-for concessions from the prosecutor. The sentence recommendation portion of the agreement states that Mr. Zamora agreed to plead guilty to 18 of the 20 charges against him in exchange for the State agreeing to not seek the death penalty for the six charges of

aggravated murder or file any further charges or sentence enhancements based on this incident. CP 378-79. It also states that the parties stipulated that Mr. Zamora would enter a plea of not guilty by reason of insanity to two of the aggravated murder charges, that the trial court should find him not guilty by reason of insanity, and that he should be committed to Western State Hospital because he meets the commitment criteria set forth in RCW 10.77.110(1). CP 379. As for the specific recommendations, the plea agreement states that the parties will recommend that the court follow the agreement that Mr. Zamora be found not guilty by reason of insanity as to the two counts, and that concurrent with the entry of judgment and sentence as to the other counts, Mr. Zamora should be committed to Western State Hospital. CP 379-80. The parties also agreed to seek a standard range sentence on the 18 counts Mr. Zamora agreed to plead guilty to. CP 380.

The sentence recommendation in the plea agreement also addresses the legal context for commitment to DSHS and later release to DOC:

> It is further understood by the parties, that based on case law the defendant and the State *anticipate that the defendant will be sent to Western State Hospital until such time if any he is eligible for a conditional release and at that time he will be transferred to the Department of Corrections for the serving of his sentence in this case*. The interpretation of the law that the defendant shall go to Western State Hospital is based on *State v. Sommerville*, 111 Wash. 2d 524, (1988) and RCW 10.77.120.

> It is further understood by the parties, *there is no guarantee how long the defendant might remain at Western State Hospital and that the length of time that the defendant remains at Western State Hospital is not a basis to permit the defendant to seek to withdraw the guilty plea or plea of not guilty by reason of insanity or otherwise voiding or collaterally attacking the plea and sentence herein*.

CP 380 (emphasis added).

The plea agreement thus makes three things clear. First, the release criteria of RCW 10.77.200 were not incorporated into the agreement as Mr. Zamora now claims. Second, the parties agreed that it was not clear how long Mr. Zamora would spend in DSHS custody. And, third, the length of time spent in DSHS custody could not be used as grounds to withdraw, void, or attack the plea. Moreover, the release criteria in RCW 10.77.200 and limits on who is allowed or not allowed to petition for release from DSHS custody are not part of the additional documents filed with and by the trial court at the same time as the plea agreement, including the Motion for Acquittal and Statement of Defendant (CP 194-205) and the Findings of Fact and Conclusions of Law (CP 136-39).[1]

[1] Mr. Zamora cites to the sentencing memorandum filed with the trial court, and its description of the release criteria under RCW 10.77.200 at the time, as proof that it was incorporated into the plea agreement. Brief of Zamora at 15. However, it is what the defendant reasonably understood to be the terms of the plea agreement at the time he pled guilty, and not when he is sentenced, that controls. United States v. De la Fuente (8 F.3d 1333, 1337-38 (1993)). Furthermore, the other documents filed at sentencing,

The citations to Sommerville and RCW 10.77.120 in the plea agreement merely explain the legal basis for why Mr. Zamora needed be detained to the custody of DSHS before the custody of DOC. It does not incorporate the release criteria of a prior version of RCW 10.77.200 into the plea agreement. For example, RCW 10.77.120 describes the legal obligation that DSHS has to care for insanity acquittees, without reference to who can petition for their release or what the criteria for release are. And Sommerville concerned the interpretation of RCW 10.77.220 and held that a person who was found both guilty and NGRI should be placed at DSHS subject to later transfer to DOC. Because RCW 10.77.220 prohibits the incarceration of a person committed under RCW 10.77 in a state correctional institution or facility, a defendant needed to complete his commitment under RCW 10.77 before serving his sentence at DOC. Sommerville, 111 Wn.2d at 534-36. Since Mr. Zamora was first committed to the custody of DSHS and only subsequently committed to the custody of DOC after being released from DSHS custody, nothing about Sommerville has been violated in this case.

Critically, the statements in the plea agreement do not establish a promise by the prosecutor to disregard future changes in the NGRI commitment law or an assurance that the law would not change. Absent a

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including the Felony Judgment and Sentence (CP 120-31), and the Order of Commitment (CP 307-08), do not support this contention.

specific promise in the agreement, Mr. Zamora cannot establish that the use of the new release criteria breaches the prior agreement. State v. McRae, 96 Wn. App. 298, 305, 979 P.2d 911 (1999). Nor is Mr. Zamora entitled to rely solely on an expectation that the law would not change. Id., *citing* State v. Hennings, 129 Wn.2d 512, 528, 919 P.2d 580 (1996) ("a mere expectation based upon an anticipated continuance of the existing law" is not a vested right entitled to due process protection) (quoting Caritas Servs., Inc. v. Department of Social & Health Servs., 123 Wn.2d 391, 414, 869 P.2d 28 (1994)).

Mr. Zamora cites to MacDonald to support his claim that the State cannot induce a plea, and then render the plea meaningless by changing the statutory scheme. Brief of Zamora at 22. First, there is no merit to his claim that the plea is meaningless—Zamora is serving the very sentence to which he agreed and avoided the capital charges. Second, MacDonald makes no assertion that the legislative power to manage DSHS and DOC institutions can be limited by a plea agreement bargained by a prosecutor. The court in MacDonald held only that an investigating officer could not make remarks at sentencing contrary to the plea agreement, finding that the obligation to adhere to the terms of the plea agreement applies not only to the prosecutor, but to those who act as a "substantial arm" of the prosecution. MacDonald, 183 Wn.2d at 14-16. The Legislature is not a

substantial arm of the Skagit County prosecutor, and Mr. Zamora therefore cannot claim that law-making powers are bound by the terms of the plea agreement.

For all these reasons, the changes to RCW 10.77.200 do not violate the terms of the plea agreement.

B. The Amendments to RCW 10.77.200 Do Not Violate the Ex Post Facto and Bill of Attainder Clauses Because They Are Not Retroactive and Have No Punitive Effect on Mr. Zamora

Mr. Zamora next claims that the changes to RCW 10.77.200 violate the ex post facto and bill of attainder clauses of the United States and Washington State Constitutions. He argues that the "state of the law" changed after his criminal case was decided in a way that imposed a more severe punishment on him than was permissible when the crimes were committed and undermined the settled expectations of his plea agreement. Brief of Zamora at 27. Because the changes in the law are civil in nature, apply prospectively, and do not enhance the punishment for the crimes for which he pled guilty, Mr. Zamora's argument fails.

This Court reviews alleged violations of the prohibition of ex post facto laws de novo. State v. Pillatos, 159 Wn.2d 459, 469, 474-77, 150 P.3d 1130 (2007). The party disputing the constitutionality of a statute bears the burden of proving that the statute is unconstitutional

beyond a reasonable doubt. State v. Enquist, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011).

Both the United States and Washington Constitutions prohibit ex post facto laws. U.S. Const. art. I, § 10; Const. art. I, § 23. "The ex post facto analysis is essentially the same in Washington as under the federal constitution." Enquist at 46. A violation of the prohibition on ex post facto laws occurs when the State imposes punishment for conduct that was not punishable when committed or when it increases the quantum of punishment. In re Pers. Restraint of Flint, 174 Wn.2d 539, 545, 277 P.3d 657 (2012) (quoting In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)). In order to bring a successful ex post facto claim, Mr. Zamora must show that the law he is challenging (1) is operating retroactively, and (2) increases the quantum of punishment from the level he was subject to on the date of the crime. Id. at 545, 554.

Statutes are presumed to apply prospectively, absent contrary legislative intent. In re Estate of Burns, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). A statute is considered to be retroactive if the "triggering event" for its application happened before the effective date of the statute. Pillatos, 159 Wn.2d at 471. However, a statute is not retroactive merely because it applies to conduct that predated its effective date. Id. Instead, "[a] statute operates prospectively when the

precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." Id. (citing Burns at 110).

In this case, the amendments to RCW 10.77.200 operate prospectively. The triggering event for their operation was the filing of the petition for release from DSHS custody, not the entry of Mr. Zamora's underlying commitment order. Since the petition for release was filed after the effective date of the statute, the amendment is not retroactively applied. To argue that it was retroactively applied in his case, Mr. Zamora claims he has a right to have the old law apply to him. Brief of Zamora at 24. However, this claim relies on a mere hope that previous law would be unaltered. *Id*. at 24, 27. A statute does not operate retroactively just because it upsets expectations based on prior law. Flint at 547.

The ex post facto claim also fails because the amendments to RCW 10.77.200 do not increase the quantum of punishment. The salient question is whether the law in question, "imposes punishment for an act that was not punishable when committed or that inflicts a greater punishment than could have been imposed at the time the crime was committed." Enquist at 46; *see also* State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). RCW 10.77 "provides for the civil commitment of insanity acquittees." State v. Reid, 144 Wn.2d 621, 627, 30 P.3d 465, 468

(2001). The changes the Legislature made to RCW 10.77.200 are civil in nature, and did not create a punishment for an act that was not punishable at the time it was committed–in 2008, the act of premeditated murder was a crime subject to punishment. RCW 9A.32.030. Nor did the changes to RCW 10.77.200 increase the sentence for first degree murder–it was and still is life in prison. RCW 9A.32.040. Because the statutory changes at issue did not attach new consequences to events completed before their enactment, they did not violate the ex post facto clauses of the state or federal constitution.

Mr. Zamora's bill of attainder argument likewise is without merit. The bill of attainder clause forbids "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Brown, 381 U.S. 437, 448-49 (1965) (quoting United States v. Lovett, 328 U.S. 303, 315-16 (1946)). "[A] legislative act is not a bill of attainder merely because it compels an individual or a defined group to 'bear burdens which the individual or group dislikes . . . .' " State v. Manussier, 129 Wn.2d 652, 666, 921 P.2d 473 (1996) (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 470, 97 S. Ct. 2777, 2803, 53 L. Ed. 2d 867 (1977)). Although the changes at issue are legislative acts that apply to a

specifically designated group, Mr. Zamora continues to have the right to a judicial proceeding to determine whether or not he should be released from DSHS custody. Indeed, this is why DSHS petitioned the court in the first place. Since the requite fact-finding to implement the statute is performed by the judiciary and not the Legislature, it is not a bill of attainder. Brown at 448-49. State v. Thorne, 129 Wn.2d 736, 760, 921 P.2d 514 (1996).

In addition, RCW 10.77.200 does not inflict punishment. As mentioned previously, the statute is civil in nature, does not establish the punishment for committing a class A felony, and does not impact the original judicial determination which led to the conviction. Furthermore, the legal ramification of the court's decision under RCW 10.77.200(3) is the same regardless of which group the insanity acquittee belongs to. Whether an insanity acquittee has a pending sentence for a class A felony or not, the result of the hearing held under RCW 10.77.200(3) is either that the insanity acquittee will continue to be detained under RCW 10.77, or the insanity acquittee will be released from DSHS custody. The decision to punish the insanity acquittee was made during the criminal proceeding, not under the authority of RCW 10.77.200. Thus, the fact that release from DSHS custody could lead to the implementation of a previously-ordered criminal sentence may be a collateral consequence of

the hearing, but it is not directly caused by the hearing. Therefore, the application of RCW 10.77.200 in this case does not inflict punishment and does not create a bill of attainder.

C. The Trial Court Correctly Found That RCW 10.77.200 Was Not Impermissibly Vague When It Determined That the Ordinary Definition of "Manageable" Was Capable Of Being Applied to the Phrase "Person's Mental Disease Or Defect Is Manageable Within A State Correctional Institution Or Facility."

One of the amendments to RCW 10.77.200 at issue is this case allows insanity acquittees who will be transferred to a state correctional institution or facility because they will be serving a sentence for a class A felony following their release from DSHS custody to be released if it is shown that the person's mental disease or defect is manageable within a state correctional institution or facility. At trial, Mr. Zamora moved to have the release petition dismissed on basis that the term "manageable" was unconstitutionally vague. The trial court denied the motion.

The vagueness doctrine implicates procedural due process. In re Det. of LaBelle, 107 Wn.2d 196, 201, 728 P.2d 138 (1986). It serves two purposes: "to provide fair notice to citizens as to what conduct is proscribed and to protect against arbitrary enforcement of the laws." City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988); LaBelle, 107 Wn.2d at 201. The challenging party bears the burden of showing

that a statute is unconstitutionally vague beyond a reasonable doubt. Eze, 111 Wn.2d at 26.

A reviewing court will not invalidate a statute for vagueness simply because the statute could have been drafted with greater precision or because there is not "absolute agreement" on the statute's application. State v. Sullivan, 143 Wn.2d 162, 182, 19 P.3d 1012 (2001). " 'Condemned to the use of words, we can never expect mathematical certainty from our language.' " Eze, 111 Wn.2d at 27 (quoting Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). "For a statute to be unconstitutional, its terms must be so loose and obscure that they cannot be clearly applied in any context." In re Det. of Bergen, 146 Wn. App. 515, 530, 195 P.3d 529 (2008) (internal quotation marks omitted). If the language is susceptible to understanding by persons of ordinary intelligence, then it must be upheld. Id. at 532. Statutory language that has been challenged for vagueness cannot be examined in a vacuum. City of Spokane v. Douglass, 115 Wn.2d 171, 180, 795 P.2d 693 (1990). "Rather, the context of the entire enactment is considered," and the statutory language must be "afforded a sensible, meaningful, and practical interpretation." Id.

"In any vagueness challenge, the first step is to determine if the statute in question is to be examined as applied to the particular case or to

be reviewed on its face." Douglass, 115 Wn.2d at 181-82. A vagueness challenge to a statute that does not involve First Amendment rights must be evaluated "in light of the particular facts of each case." Id. But rather than argue about how the statute was applied in this particular case, Mr. Zamora argues that the statute violates due process because it fails to provide minimal standards to reduce the potential risk of arbitrary enforcement. Brief of Zamora at 28-31.

The trial court correctly concluded that whether Mr. Zamora's mental disease or defect is manageable within a correctional facility is a question that could be resolved through the use of the ordinary definition of "manageable". 1 Report of Proceedings (1 RP) (Sept. 8, 2014) at 8. As described in DSHS's briefing, "manageable" is defined in *Webster's II New College Dictionary* 664 (1995) as "[c]apable of being managed or controlled," and "manage," in turn, means "[t]o direct or control the use of," or "[t]o exert control over." CP 188.

Rather than interpret the statute in a sensible, meaningful, and practical way, Mr. Zamora relies on unreasonable interpretations of the statute to manufacture vagueness where none exists. For instance, an ordinary person would not understand "manageable" to mean locking a mentally ill prisoner in solitary confinement for one year without cause. Brief of Zamora at 29. Moreover, Mr. Zamora also fails to consider the

statute in its total context. The statute must be considered in the context of mental health treatment, specifically in the context of ending the NGRI commitment in favor of providing further mental health treatment in correctional facilities. Determining whether a mental disease or defect is "manageable" clearly requires the Court to determine whether DOC can exert control over Mr. Zamora's mental disease or defect.

In order to establish DOC's ability to control Mr. Zamora's mental illness, DSHS presented the testimony of several mental health professionals familiar with Mr. Zamora and the level of treatment available at DOC, treatment that he had been receiving for the last 20 months. They all testified that "the Department of Corrections can handle Mr. Zamora, and that they handle other people even worse than Mr. Zamora, for lack of a better term." 3 Report of Proceedings (3 RP) (Sept. 10, 2014) at 85. They also testified that "DOC is currently treating and managing many persons such as Mr. Zamora," and that while Mr. Zamora has been at the SOU, "he's not been a management problem." 3 RP at 85-86.

In light of the ordinary meaning of the statute and the presentation of expert testimony at trial that evaluated how Mr. Zamora's condition is manageable in a correctional facility, (see also 1 RP at 41, 53-55; 2 Report of Proceedings (2 RP) (Sept. 9, 2014) at 56-57, 100-01) the statute's terms

cannot be said to "be so loose and obscure that they cannot be clearly applied in any context." In re Bergen, 146 Wn. App. at 530 (internal quotations omitted). Instead, when the release provision is afforded a sensible and practical interpretation, the applicable standard for determining whether an insanity acquittee is capable of being managed at DOC is susceptible to understanding by persons of ordinary intelligence. Therefore, the Court should reject Mr. Zamora's vagueness claim.

D. The Trial Court's Placement of Two Restrictions on the Treatment of Mr. Zamora at DOC Subsequent to His Release From DSHS Custody Does Not Undermine the Finding That He Is Capable of Being Managed at DOC

At the end of trial, the court found that Mr. Zamora had been receiving treatment at the SOU for 20 months, that he had not been a management problem during that time, that DOC had cared for him appropriately, and that he had responded better to treatment at the SOU than he did at Western State Hospital. CP 8-9. Based on this, the court concluded that "Mr. Zamora's mental illness is manageable within a state correctional institution or facility" and ordered him released from DSHS custody. CP 9.

Although the trial court granted the petition to release Mr. Zamora from DSHS custody, it also included in its order two conditions that would take effect once Mr. Zamora was in the custody of DOC. The first

condition was that Mr. Zamora was to remain at the SOU until two psychiatrists who have worked with him jointly recommend he be transferred elsewhere. *Id.* The second was that DOC appoint a psychiatrist to be responsible for monitoring Mr. Zamora's care. *Id.*

Mr. Zamora argues that because the trial court placed these conditions on DOC after releasing him from DSHS custody, DSHS failed to meet its burden of proving that his mental illness is manageable within a state correctional institution.[2] Brief of Zamora at 35-38. He also claims that the court imposed these conditions over a concern that DOC would alter his care and stop managing him in a constitutionally appropriate manner. *Id.* at 38. However, this not an accurate representation of the trial court's actions or why the court took them, and they do not undermine the court's order to release Mr. Zamora from DSHS custody.

The trial court did not imply, much less find, that but for these two conditions Mr. Zamora was not manageable at DOC. Nor did the court find any risk of treatment in an unconstitutional manner. Instead, the court acknowledged that "obviously the Department of Corrections is managing [Mr. Zamora] appropriately and continues to do so. I'm just overlaying it with a couple of additional requirements to ensure Mr. Zamora doesn't get

[2] Mr. Zamora argues in the alternative that the amendments to RCW 10.77.200 allow the court to impose conditions as part of a "conditional release" to DOC. Brief of Zamora at 38-40. DOC has already addressed the trial court's lack of authority over it within its briefing. DOC Brief in Response at 7-12.

left to the back burner." 3 RP at 90. The court's comments regarding "the back burner" were a reference to a speculative concern that if Mr. Zamora's symptoms improve and he becomes less acute, DOC may place him in a situation where he could potentially harm a DOC officer or another inmate. 3 RP at 82. To address this concern, the trial court imposed the two conditions on DOC requiring a psychiatrist be responsible for monitoring Mr. Zamora's care, and restricting Mr. Zamora's transfer out of the SOU until recommended by two psychiatrists involved in his care.

Whether the trial court has the authority to order these conditions onto DOC is an issue also before this Court. Putting aside the fact that both Mr. Zamora and DOC have taken positions that the order is contrary to statute, nothing suggests that DOC is incapable of providing the appropriate management of Mr. Zamora. The trial court even minimized the impact he believed the conditions would have on DOC, stating that "I don't think those are too onerous. I think they do that anyway." 4 Report of Proceedings (4 RP) (Jan. 6, 2015) at 3. Therefore, the conditions are not evidence of unmanageability. Rather, they confirm Mr. Zamora's manageability at DOC, because the debate is merely over whether a superior court can order such conditions. On the other hand, if DOC was being ordered to provide care or treatment to Mr. Zamora that it was not

capable of providing, then such a condition could impeach the general finding that DOC can manage him in a correctional setting. But that is not what the trial court was seeking, or why DOC intervened to oppose the conditions. Therefore, the Court should reject Mr. Zamora's claim that attempting to impose the two conditions on DOC invalidates the finding that DOC can manage his mental illness.

V. CONCLUSION

The trial court correctly found that Mr. Zamora's mental illness is manageable within a state correctional institution or facility and released him from DSHS custody. DSHS respectfully asks that the order be upheld and Mr. Zamora be remanded to the custody of DOC.

RESPECTFULLY SUBMITTED this 9th day of May, 2016.

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CERTIFICATE OF SERVICE

Jeffrey S. Nelson, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on May 9, 2016, I served a true and correct copy of this **BRIEF OF RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH SERVICES** and this **CERTIFICATE OF SERVICE** by sending via U.S. Mail and e-mail to the parties listed below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 9th day of May 2016, at Tumwater, Washington.

JEFFREY S. NELSON
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