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COA NO. 63143-8-I

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

IN RE DETENTION OF DAVID WRATHALL;

STATE OF WASHINGTON,

Respondent,

v.

DAVID WRATHALL,

Appellant.

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

The Honorable Douglass A. North, Judge

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KING COUNTY
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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's revocation of appellant's less restrictive alternative violated appellant's constitutional right to due process.

2. The trial court erred in entering the following findings and conclusions:

(i) "Respondent has made a number of statements to Dr. Pinedo and others that demonstrate a lack of progress in treatment, an oppositional attitude and an unacceptable level of risk to the community. These statements indicate that respondent requires treatment in a secure facility rather than a transitional community setting." CP 139 (FF 4).

(ii) "Respondent's statements and attitudes are incompatible with continued treatment in a less restrictive alternative setting. With these attitudes, respondent presents an unacceptable risk to reoffend if he remains in a community setting." CP 140 (FF 7).

(iii) "Respondent is in need of additional care, monitoring, supervision and treatment, which is best provided in the setting of a secure DSHS facility like the SCC. At this time, conditions do not exist that would make respondent's continued release adequate to protect the community or in his best interests." CP 141 (CL 2).

Issue Pertaining to Assignments of Error

1. Where appellant did not present a realistic danger of reoffending against members of the community while he remained in his less restrictive alternative, is reversal required because due process required the trial court to find appellant willfully violated a condition of his less restrictive alternative before it could be revoked?

B. STATEMENT OF THE CASE

In 1996, the State sought to involuntarily commit David Wrathall as a sexually violent predator (SVP). CP 1-2. Wrathall had a history of sexual offenses against underage males. CP 1-12; 70-72. The State's expert diagnosed Wrathall with (1) pedophilia, attracted to males, with features of sadism and bondage; (2) paraphilia not otherwise specified, rape of same sex individuals; (3) personality disorder not otherwise specified (with antisocial and schizoid features); and (4) borderline intellectual functioning. CP 28, 32. The State's expert further concluded Wrathall was at a high risk of reoffense while at large in the community and that his mental conditions made him likely to commit predatory acts of sexual violence outside of a secure facility. CP 31.

In 1997, David Wrathall stipulated to his commitment as an SVP.¹ The court ordered him into total confinement at the Special Commitment Center (SCC) on McNeil Island.²

In 2001, the court entered an agreed order placing Wrathall into a less restrictive alternative (LRA).³ By this time, Wrathall had completed the SCC treatment program.⁴ As a condition of Wrathall's release from total confinement, the court ordered Wrathall to participate in sex offender treatment with Lang Taylor, a certified treatment provider.⁵

Wrathall's less restrictive alternative was the Secure Community Transitional Facility (SCTF) on McNeil Island. CP 48. Under the LRA order, Wrathall was not permitted to leave the SCTF without prior approval.⁶ During any approved outing, Wrathall needed to be accompanied by an SCTF staff member or an approved monitoring adult.⁷ The person accompanying Wrathall was required to "maintain constant visual contact" with him.⁸

¹ Supp CP __ (sub no. 153, State's Memorandum (attached exh. 2), 2/2/99).

² Id.; CP 48.

³ Supp CP __ (sub no. 192, Agreed Order on Conditional Release to Less Restrictive Alternative, 11/7/01).

⁴ CP 48; Supp CP __ (sub no. 208, Annual Review at 9, 10/28/03).

⁵ Supp CP __ (sub no. 192, supra at 4).

⁶ Supp CP __ (sub no. 192, supra at 3).

⁷ Id.

⁸ Id.

Wrathall was required to be electronically monitored 24 hours a day and subject to GPS monitoring if available.⁹ His SCTF residence was to have a security system that alerted staff to any unapproved movements into or outside the facility.¹⁰ According to the agreed LRA order, "[w]ith this level of monitoring, Mr. Wrathall's residence will be sufficiently secure to protect the community."¹¹ An amended release order entered in January 2002 contained these same provisions.¹²

Wrathall remained at the SCTF until October 2002, when his LRA was revoked due to violations of various release conditions, including lack of compliance with supervision requirements in the community.¹³ Wrathall subsequently resided in the SCC and continued to participate in treatment.¹⁴ In December 2003, Wrathall regained his LRA due to treatment gains and returned to the McNeil Island SCTF. CP 48, 67.

During his LRA, Wrathall moved through the community with escorts. 3RP¹⁵ 28-29. His off-island plans were pre-approved and

⁹ Id. at 2.

¹⁰ Id.

¹¹ Id.

¹² Supp CP __ (sub no. 193, First Amended Order on Conditional Release to Less Restrictive Alternative Treatment, 1/ 29/02).

¹³ CP 48; Supp CP __ (sub no. 208, supra at 11-12); Supp CP __ (sub no. 210, Agreed Order of SCTF Violations and Return to the SCTF, 12/11/03).

¹⁴ Supp CP __ (sub no. 208, supra at 9).

¹⁵ The verbatim report of proceedings is referenced as follows: 1RP -

forwarded to local law enforcement. CP 39. He was always escorted by trained SCTF staff and monitored by a GPS system so that his location was always known. CP 39. Since regaining his LRA in 2003, Wrathall was criticized on occasion for not being totally aware of where his escort were at all times and failing to immediately remove himself from a child's proximity.¹⁶ Wrathall improved over time and properly responded in accord with his relapse prevention plan on a number of other occasions.¹⁷

Since being released from total confinement at the SCC, Wrathall participated in sex offender treatment.¹⁸ In February 2008, the State petitioned for modification of Wrathall's LRA, recommending a new treatment provider because Wrathall's treatment progress had stalled under Taylor's care.¹⁹ At the modification hearing, SCC clinical director Carey Sturgeon testified a change in providers might be beneficial because Wrathall's relationship with Taylor had reached a therapeutic stalemate. Exh. 1 (2/28/08 hearing); 1RP 8, 12, 15-16, 21-22.

2/28/08; 2RP - 4/3/08; 3RP - 10/16/08.

¹⁶ CP 65; Exh. 3 at 1-3, (4/3/08 hearing); Supp CP __ (sub no. 211, Progress Report, 5/17/04); Supp CP __ (sub no. 214, Progress Report at 2, 8/4/05).

¹⁷ CP 56-58, 60-61, 65-67; Supp CP __ (sub no. 212, Progress Report at 1, 4/1/05); Supp CP __ (sub no. 214, Progress Report at 1, 8/4/05).

¹⁸ 2RP 18; Supp CP __ (sub no. 196, Annual Review at 16, 6/26/02).

¹⁹ Supp CP __ (sub no. 226, State's Petition For Revocation/Modification, 2/27/08).

LRA/SCTF administrator Allen Ziegler testified the transition team did not have any concern that Wrathall was at a heightened risk to reoffend in the community but did believe a change in therapists would be beneficial because his treatment had stagnated. 1RP 33, 40. The court believed it was a good idea to change providers because Wrathall's progress had slowed and therefore modified Wrathall's LRA by replacing Taylor with Dr. Myrna Pinedo as Wrathall's treatment provider. 2RP 21-22. At the conclusion of the modification hearing, the prosecuting attorney informed the court that the State "decided to go forward for a modification of the LRA rather than a revocation in recognition that Mr. Wrathall has made some progress over the years and it is our hope that with Dr. Pinedo he will be able to make additional progress." 2RP 25.

The 2008 conditional release order, like the previous release orders, required Wrathall to comply with a number of conditions to maintain his LRA. CP 88-97. The court concluded Wrathall's LRA included "conditions that will adequately protect the community." CP 89. Wrathall was required to continue residing in the McNeil Island Secure Community Transitional Facility. CP 89-90, 139. This facility was operated by the Department of Social and Health Services (DSHS) and included 24 hour a day staff monitoring. CP 89. The release order provided Wrathall "shall not be at large alone in the community" and must be accompanied at all

times by a McNeil SCTF staff member or approved monitor who must supervise Wrathall closely and maintain close proximity to him. CP 90. Wrathall was required to wear an electronic home monitoring device with global positioning system (GPS) technology. CP 93.

Participation in treatment with Dr. Pinedo and compliance with her treatment agreement were also conditions of Wrathall's LRA. CP 88, 91, 139. The order provided "[i]f Respondent is terminated from treatment with Dr. Pinedo, the Respondent shall, consistent with RCW 71.09.098(2), immediately be taken into custody and a hearing scheduled to determine whether the Respondent's LRA will be revoked." CP 96, 139.

In May 2008, the SCC completed its annual evaluation of Wrathall. CP 46-68. Psychologist James Manley comprehensively reviewed all sources of information regarding Wrathall's status and interviewed Wrathall himself. CP 46-68. He concluded Wrathall was likely to reoffend if he were unconditionally released to the community because his "present mental condition seriously impairs his ability to control his sexually violent behavior without supervision." CP 67. Manley supported Wrathall's current residential placement "[g]iven the ongoing successful management of his dynamic risk factors and continued treatment gains." CP 68. Manley reported Wrathall had learned to successfully intervene deviant impulses. CP 62. Polygraph testing supported Wrathall's

assertion of diminished interest in underage males. CP 62, 65. Polygraph results confirmed he had not been unsupervised in the community and had no unreported physical contact with minors. CP 62, 76.

During Manley's diagnostic interview, Wrathall identified proximity to children as his biggest dynamic risk factor and was careful around them. CP 60-61. During the review period of June 2007 to May 2008, Wrathall "largely avoided all problematic community contact with children and/or material involving children. To his credit, Mr. Wrathall has more appropriate community interactions than behaviors requiring redirection [from SCC staff]. This is particularly true across the most recent several months." CP 65-66. Manley further reported "[p]rogress notes for the review period indicate Mr. Wrathall has steadily increased his alertness regarding children in his proximity. He has made steady gains across the review period regarding this dynamic risk. This has been a positive improvement during his community excursions and has increased his safety while in the community." CP 67. Manley also credited Wrathall with making the treatment gains necessary to be granted an LRA. CP 66.

Pinedo started treating Wrathall on May 1, 2008. 3RP 16. In a June report, she described Wrathall's treatment progress as "consistent." Exh. 7 at 6 (10/16/08 hearing). In August 2008, Pinedo determined she

would no longer treat Wrathall due to his "poor progress" in treatment. CP 139. She offered her opinion that Wrathall "is not currently ready to be involved in transition back to the community." CP 139. Testing did not reveal a neurological reason or developmental delay that prevented Wrathall from benefiting from treatment. 3RP 8-9.

During one treatment session, Wrathall told Pinedo he "liked getting people [officials] excited" and watching them cope with his provocative statements. He indicated that he did not like being told what to do and would sometimes do the opposite in order to elicit a response. For example, when asked if he would use drugs, give drugs to a child, give pornography to a child, and/or molest a child because he was told not to engage in these behaviors, respondent indicated that he would 'maybe' engage in this [sic] activities merely because he was told not to do them." CP 139-40. This question was prefaced with the hypothetical scenario of Wrathall's unconditional release into the community. Exh. 3 at 2 (10/16/08 hearing).

"On another occasion, respondent was asked what he would do on the worst day of his life when he was feeling lonely and frustrated" while unconditionally released in the community. CP 140; Exh. 3 at 2 (10/16/08 hearing). "Rather than providing strategies for preventing relapse into child sexual assault, respondent indicated that he would first go to a bar

for hard alcohol. If his feeling were not cured by alcohol, he would then obtain drugs. If the drugs did not improve his mood, respondent indicated to Dr. Pinedo that he 'might get a kid.' He indicated that sex makes him feel better so he would molest a child." CP 140.

When asked why he would give such a response, Wrathall said "well I thought you said that was on my worst day" and that she had asked what he would do in the "most extreme case." 3RP 11; Exh. 3 at 3 (10/16/08 hearing). Pinedo expected a response incorporating a relapse prevention strategy. 3RP 10-11. Based on Wrathall's provocative statement, Pinedo arranged to have him undergo a polygraph to explore his truthfulness. Exh. 5 at 2 (10/16/08 hearing). Wrathall passed the polygraph, showing no deception in answering he had not lied about the last time he had a sexual fantasy of a minor. Id.

After three months of treatment, Pinedo nevertheless decided to terminate treatment based on the session where Wrathall said he would drink, do drugs, and get a kid on the worst day of his life. 3RP 29. It was clear to Pinedo that Wrathall liked to get people excited by saying provocative things, and that he knew such a statement "did not benefit him and it created tremendous problems for him with the professionals he was working with." 3RP 29.

At one point in her testimony at the revocation hearing, Pinedo said Wrathall was not utilizing treatment, but elsewhere acknowledged an example of how Wrathall properly identified a risk factor in a real life situation. 3RP 23-24, 27; Exh. 4 at 4 (10/16/08 hearing) (describing Wrathall's choice not to live with brother as part of unconditional release plan as good decision).

The trial court found Wrathall's statements and attitudes demonstrated "an unacceptable level of risk to the community," "were incompatible with continued treatment in a less restrictive alternative setting," and indicated Wrathall required "treatment in a secure facility rather than a transitional community setting." CP 139 (FF 4); CP 140 (FF 7). The court concluded Wrathall was not complying with the terms of the 2008 conditional release order; "namely his actions have caused him to be terminated from sex offender treatment with Dr. Pinedo and declared ineligible to reside at the Pierce County SCTF." CP 140-41 (CL 1). The court further concluded Wrathall "is in need of additional care, monitoring, supervision and treatment, which is best provided in the setting of a secure DSHS facility like the SCC. At this time, conditions do not exist that would make respondent's continued release adequate to protect the community or in his best interests." CP 141 (CL 2). The court revoked

Wrathall's LRA and committed him to total confinement within the SCC.
CP 141. This appeal timely follows. CP 142-44.

C. ARGUMENT

1. DUE PROCESS REQUIRED THE TRIAL COURT TO
FIND A WILLFUL VIOLATION BEFORE REVOKING
WRATHALL'S LESS RESTRICTIVE ALTERNATIVE.

Wrathall's LRA plan adequately protected the community. In light of Wrathall's liberty interest in the continued maintenance of his LRA, due process required the trial court to find Wrathall willfully violated a condition of his LRA before it could lawfully be revoked.

a. Statutory Overview of the Less Restrictive
Alternative

The Special Commitment Center (SCC) on McNeil Island is a "total confinement facility," i.e., "a secure facility that provides supervision and sex offender treatment services in a total confinement setting." RCW 71.09.020(19). The trial court committed Wrathall to the SCC after it revoked his less restrictive alternative.

A "less restrictive alternative" under the SVP statute is a "court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092." RCW 71.09.020(6). Before the court may conditionally release someone to a less restrictive alternative, it must find, among other things, that (1) the person will be

treated by a qualified treatment provider with a specific course of treatment; (2) housing exists that is "sufficiently secure to protect the community," the agency providing housing has agreed to accept the person and to provide the level of security required by the court; and (3) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and court. Former RCW 71.09.092.²⁰ Conditional release into a less restrictive alternative is proper when it is determined such placement is in the best interest of the person and includes conditions that adequately protect the community. Former RCW 71.09.090(1), (2)(d)²¹; Former RCW 71.09.096(1), (4).²²

The prosecuting attorney may petition the court to revoke or modify the terms of the person's conditional release to a less restrictive alternative on the ground that the released person is not complying with the terms and conditions of his or her release or is in need of additional care, monitoring, supervision, or treatment. Former RCW 71.09.098(1).²³

²⁰ Laws of 1995 ch. 216 § 10 (eff. July 23, 1995). All references to RCW 71.09.092 are to the former version in effect at the time of Wrathall's revocation hearing unless otherwise noted.

²¹ Laws of 2005 ch. 344 § 2 (eff. May 9, 2005). All references to RCW 71.09.090 are to the former version in effect at the time of Wrathall's revocation hearing unless otherwise noted.

²² Laws of 2001 ch. 286 § 12 (eff. May 14, 2001). All references to RCW 71.09.096 are to the former version in effect at the time of Wrathall's revocation hearing unless otherwise noted.

²³ Laws of 2006 ch. 282 § 1 (eff. June 7, 2006). All references to RCW

At the hearing, "[t]he issue to be determined is whether the state has proven by a preponderance of the evidence that the conditionally released person did not comply with the terms and conditions of his or her release." Former RCW 71.09.098(3).²⁴ "[T]he court shall determine whether the person shall continue to be conditionally released on the same or modified conditions or whether his or her conditional release shall be revoked and he or she shall be committed to total confinement, subject to release only in accordance with provisions of this chapter." Former RCW 71.09.098(3).

b. The Requirements Of Due Process Apply To LRA Revocations.

The due process clause of the Constitution requires that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. Whether any procedural protections are due in a given context "depends on the extent to

71.09.098 are to the former version in effect at the time of Wrathall's revocation hearing unless otherwise noted.

²⁴ The new version of the LRA revocation statute, which took effect after Wrathall's hearing, directs the court to consider the following factors: "(i) The nature of the condition that was violated by the person or that the person was in violation of in the context of the person's criminal history and underlying mental conditions; (ii) The degree to which the violation was intentional or grossly negligent; (iii) The ability and willingness of the released person to strictly comply with the conditional release order; (iv) The degree of progress made by the person in community-based treatment; and (v) The risk to the public or particular persons if the conditional release continues under the conditional release order that was violated." RCW 71.09.098(6)(a) (Laws 2009, ch. 409, § 11 (effective May 7, 2009)).

which an individual will be 'condemned to suffer grievous loss.'" Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S. Ct. 624, 646, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring)). Courts look to the nature of the implicated interest in determining the scope of due process protection. Morrissey, 408 U.S. at 481.

This Court recognizes an SVP offender has a protected liberty interest in the LRA once a court determines that the SVP is entitled to such a release. In re Detention of Bergen, 146 Wn. App. 515, 525-26, 195 P.3d 529 (2008). Wrathall had already obtained his LRA.²⁵ He had constitutionally protected liberty interest in maintaining it.

Comparison to the liberty interest of parolees illustrates why Wrathall retained a protected liberty interest in his LRA placement. The person faced with revocation of his LRA shares similar interests with parolees and others subject to some form of conditional sentence that may be revoked due to a violation of release terms.

The private interest is freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from

²⁵ The Court in Bergren determined there is no liberty interest protected by due process in a petition for an LRA. Bergen, 146 Wn. App. at 525-26.

arbitrary governmental action. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The parolee has an interest in his continued liberty. Morrissey, 408 U.S. at 481-82. That liberty, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee. Id. at 482. The parolee is therefore entitled to procedural due process protections when faced with the revocation of his parole. Id.

Revocation of parole deprives an individual of the conditional liberty properly dependent on compliance with special parole restrictions. Id. at 480. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime, such as obtain gainful employment, associate with family and friends, and "form the other enduring attachments of normal life." Id. at 482. "Though the State property subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." Id.

Wrathall likewise had an interest in his continued liberty even though, like the parolee, that liberty was conditional and circumscribed rather than absolute. Like the parolee, Wrathall's condition in the LRA was markedly different than those in total confinement in the SCC. As part of his LRA, Wrathall had the freedom to socialize with friends and

family in the community. CP 93. He had the opportunity to obtain employment and education in the community. CP 93. Wrathall was also allowed to attend worship services in a church of his own choosing in the community. CP 92; Exh. 4 at 4 (10/16/08 hearing). Those totally confined in the SCC do not have such freedoms.

Furthermore, "[t]he parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." Morrissey, 408 U.S. at 482. "In many cases, the parolee faces lengthy incarceration if his parole is revoked." Id.

Wrathall similarly faces potentially lengthy detention in a total confinement setting due to the revocation of his LRA. And, like the parolee, he had an expectation, based on the terms of his release order, that his LRA would not be revoked unless he failed to live up to one of its conditions. These circumstances further show Wrathall had a protected due process liberty interest in his LRA.

c. Due Process Required The Trial Court To Find Wrathall Willfully Violated A Condition Of His LRA Before Revocation.

"Once it is determined that due process applies, the question remains what process is due." Morrissey, 408 U.S. at 481. As set forth below, due process required a finding by the trial court that Wrathall

willfully violated a condition of the LRA before it could be revoked for lack of compliance.

The Supreme Court recently provided an analytical framework for the determination of whether due process requires a finding of willfulness. The issue in State v. McCormick was whether a SSOSA²⁶ offender's suspended sentence could be revoked for violating a condition of his sentence without a finding that the offender willfully violated the condition. State v. McCormick, __Wn.2d__, __P.3d __, 2009 WL 2395237 at 1, 3 (2009).

In assessing whether due process requires a finding of willfulness before someone's liberty interest can be infringed in a particular context, the reviewing court must make a careful inquiry into a number of factors, including (1) the nature of the individual interest affected; (2) the extent to which it is affected; (3) the rationality of the connection between the legislative means and purposes; (4) and the existence of alternative means for effectuating the purpose. Id. at 6. A finding of willfulness is not required if violation of the condition threatens the safety of society. Id.

McCormick held due process did not require a finding of willfulness before the trial court revoked a SSOSA suspended sentence for violating the condition that the offender not frequent areas where minors

²⁶ Special Sex Offender Sentencing Alternative.

are known to congregate. Id. at 1, 8. McCormick's suspended sentence was revoked after he went to a food bank located in an elementary school. Id. at 1-3. The State's interest in protecting society, particularly minors, from a person convicted of raping a child outweighed McCormick's interest in not having his suspended sentence revoked without a willful action. Id. at 6-7. That interest was rationally served by imposing stringent conditions related to the crime McCormick committed. Id. at 6.

The Court was unwilling to conclude due process required a finding of willfulness because if it did, McCormick "would be allowed to be repeatedly in close proximity to minors and face no punishment because he did not know minors congregated there, even if it is reasonably obvious to everyone else that this is a place where minors congregate." Id. at 6. "Regardless of McCormick's intent, if he frequents areas where minor children are known to congregate, he would pose a danger to those minors." Id. The State's interest was sufficiently strong to not require a finding of willfulness because the Court did not want to "allow a convicted sex offender to frequent a food bank located in a church elementary school, where there is an opportunity to harm a minor." Id. at 7. "Given the State's strong interest in protecting the public, McCormick's diminished interest because of his status as a convicted sex offender serving a SSOSA sentence, and that McCormick's proposed scenario leads

to dangerous situations where McCormick can frequent places where minors are known to congregate, due process does not require the State to prove that McCormick willfully violated the condition." Id. at 6.

Wrathall's case presents a different scenario because he was supervised at all times under his LRA plan. Wrathall did not pose a realistic threat to children in the community if he remained in his LRA. Due process therefore required a finding of willfulness before revocation of the LRA could lawfully occur.

An LRA must adequately address community safety concerns. Bergen, 146 Wn. App. at 532. Whether an LRA provides "adequate community safety" necessarily assumes an SVP is likely to reoffend. Id. at 533. The question is whether the LRA will prevent an otherwise-likely offense. Id. "The focus of this determination is therefore on the plan, not the person." Id.

Regardless of Wrathall's lack of progress in treatment, his LRA plan provided adequate community safety. An LRA requires housing that is "sufficiently secure to protect the community." Former RCW 71.09.092(2). The "adequate community safety" determination thus involves examination of the residence identified in an LRA. In re Detention of Jones, 149 Wn. App. 16, 27, 201 P.3d 1066 (2009). Wrathall resided in a secure facility on an island. A "secure facility" is "a

residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community." RCW 71.09.020(15). Such facilities include total confinement facilities (i.e., the SCC) and "secure community transition facilities." RCW 71.09.020(15). The McNeil Island facility in which Wrathall was housed as part of his LRA was a secure community transition facility. By law, that facility must include "a fence and provide the maximum protection appropriate in a civil facility for persons in less than total confinement." RCW 71.09.295(2). Consistent with statutory requirements, Wrathall was required to wear electronic monitoring devices at all times, including GPA technology that tracked his movements. CP 93; RCW 71.09.305(1)(a). Wrathall did not pose a danger of molesting underage boys while he remained on the island in his SCTF.

His LRA plan also adequately protected the community when he left the island. Consistent with statutory requirements, Wrathall was escorted whenever he left the secure facility. CP 90; RCW 71.09.310. "At least one staff member, or other court-authorized and department-approved person must escort each resident when the resident leaves the secure community transition facility for appointments, employment, or other approved activities. Escorting persons must supervise the resident

closely and maintain close proximity to the resident." RCW 71.09.305(1)(b).²⁷

According to the State, Wrathall was "under close scrutiny and monitoring by DSHS and DOC" during his LRA "because he is more likely than not to commit predatory acts of sexual violence *if left to his own devices* in the community."²⁸ But Wrathall was not left to his own devices while in the community as part of his LRA. He was guarded. There is no realistic danger to the community that Wrathall would molest an underage boy in the presence of trained escorts. For example, Pinedo described an event at the parent's home where "a minor did by pass a boundary they had erected to keep him isolated but that the escort stepped in and handled the problem." Exh. 7 at 3 (10/16/08 hearing). There is no indication Wrathall ever tried to molest a child since he began his LRA.

Pinedo expressed concern over supposed discrepancies in Wrathall's self-report that he was sometimes left alone at church. Exh. 4

²⁷ The statute further provides that if DSHS does not provide a separate vessel for transporting residents of the secure community transition facility between McNeil Island and the mainland, DSHS must separate residents from minors and vulnerable adults, and not transport residents during times when children are normally coming to and from the mainland for school. RCW 71.09.275(1)(a) and (b). DSHS must also "designate a separate waiting area at the points of debarkation, and residents shall be required to remain in this area while awaiting transportation." RCW 71.09.275(2).

²⁸ Supp CP __ (sub no. 223A, State's Response To Wrathall's Request to Reduce Conditions, 7/21/07) (emphasis added).

at 3 (10/16/08 hearing); Exh. 7 at 4-5 (10/16/08 hearing). Wrathall responded he was misunderstood and was not left alone; there were always two other chaperones from the church present and an escort if the pastor left him. Id.; Exh. 3 at 5 (10/16/08 hearing). Pinedo complained Wrathall's responses made it difficult to obtain a clear report from him of what was going on in his community supervision while acknowledging that such responses could be manifestations of Wrathall's penchant for making provocative statements. Id.

At the revocation hearing, however, Pinedo testified there were only a "few blips" related to Wrathall's presence in the community but "nothing too horrendous" and nothing to knock him off his LRA. 3RP 28-29. No monitor ever reported Wrathall failed to maintain close proximity or left the monitor's visual range since Wrathall's LRA began in 2003. The State never alleged Wrathall violated any condition of his release related to supervision by a monitor since Wrathall regained his LRA. If he had, there is little doubt the State would have immediately sought to revoke his LRA on that ground. The trial court, in revoking Wrathall's LRA, did not find Wrathall violated any condition related to his supervision in the community.

The trial court entered two "findings of fact" that Wrathall presented an unacceptable risk to reoffend if he remained in the SCTF and

therefore needed to be removed from that setting. CP 139 (FF 4), CP 140 (FF 7). These "findings" resemble the court's ultimate conclusion of law, which stated Wrathall "is in need of additional care, monitoring, supervision and treatment, which is best provided in the setting of a secure DSHS facility like the SCC. At this time, conditions do not exist that would make respondent's continued release adequate to protect the community or in his best interests." CP 141 (CL 2).

"Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether a trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusion of law." Am. Nursery Prods. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990). Questions of law are reviewed de novo. State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995). Speculation is not substantial evidence. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Evidence is substantial only if it is sufficient to persuade a fair-minded, rational person of the finding's truth. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Conclusions of law cannot be shielded from review by denominating them findings of fact." State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). "A conclusion of law that is erroneously denominated a finding of fact is

reviewed as a conclusion of law." State v. Gaines, 122 Wn.2d 502, 508, 859 P.2d 36 (1993).

The court's findings regarding the need to remove Wrathall from the SCTF and revoke his LRA because he presented a danger to the community are actually conclusions of law and should be reviewed as such. "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." Williams, 96 Wn.2d at 221 (internal quotation marks omitted) (quoting Leschi Improvement Council v. Wash. State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974)). "Where findings necessarily imply one conclusion of law the question still remains whether the evidence justified that conclusion." Williams, 96 Wn.2d at 221.

Here, the court's findings regarding danger to the community are not independent of its conclusion that such danger requires removal from the SCTF. They are conclusions of law. Cf. Gaines, 122 Wn.2d at 508 (where trial court imposed exceptional sentence downward, purported "finding of fact" that "[s]ociety would be better protected by placing defendant, at his own request, in a treatment program" was actually conclusion of law). And for the reasons set forth above, those conclusions are unsupported by substantial evidence in the record. The court's

"findings" and conclusions regarding Wrathall's risk to the community are therefore erroneous. CP 139 (FF 4), CP 140 (FF 7); CP 141 (CL 2).

The trial court revoked the LRA because Pinedo terminated treatment. Treatment from Pinedo was a required condition of Wrathall's LRA. The trial court did not find Wrathall willfully violated this condition. Wrathall indisputably participated in treatment with Dr. Pinedo, as he did with his previous treatment provider. Pinedo made the decision to terminate treatment. Wrathall did not make that decision. DSHS declared Wrathall ineligible to reside at the SCTF because Pinedo terminated treatment. Wrathall did not make that decision. Wrathall was terminated from treatment and removed from the SCTF against his will.

In the course of participating in treatment, Wrathall said things that Pinedo interpreted as showing a lack of progress in treatment. That was Pinedo's interpretation and the trial court accepted it. The court, however, did not find Wrathall willfully failed to make progress in treatment. Indeed, Pinedo reported "he may not have the ability to effectively engage in treatment." Exh 4 at 2 (10/16/08 hearing). At the revocation hearing, Pinedo opined "he may not be capable of benefiting from treatment that would allow him to be in the community again." 3RP 12. Such observations undercut the idea that Wrathall willfully failed to make treatment progress.

Pinedo also criticized Taylor, Wrathall's previous treatment provider, for enabling Wrathall's lack of progress by means of inappropriate therapeutic techniques. 3RP 22; Exh. 4 at 7 (10/16/08 hearing). Pinedo believed Taylor undermined Wrathall's treatment. In her report dated August 13, 2008, Pinedo wrote "[o]ne of the concerns I have is that he [has] apparently received a message over a few years period when he does make an inappropriate remark it is reframed as 'that's just David,' which I believe is counter therapeutic." Exh. 4 at 2 (10/16/08 hearing). Pinedo continued: "By his report he may have received some support for his inappropriate and provocative statements when he was told each time, 'well, that's just David' and this would have undermined any therapy he may have received." Exh. 4 at 7 (10/16/08 hearing). At the revocation hearing, Pinedo testified she directly asked Taylor if he had any insights into Wrathall, to which Taylor responded "he sometimes says very provocative statements but that is just David." 3RP 22. In revoking Wrathall's LRA, the court rejected the idea that the LRA could be saved by having Taylor serve as the treatment provider again because Taylor did not provide adequate treatment in the past. 3RP 39-40.

Sex offenders need appropriate guidance from their treatment providers in order to succeed. Taylor's inability to provide proper treatment is an additional factor to be taken into account in determining

Wrathall's lack of willfulness in failing to make suitable treatment progress.

The trial court concluded continuation of the LRA would not be in Wrathall's best interests. CP 141 (CL 2). Whether an LRA is in a person's "best interests" involves consideration of whether it adequately serves his treatment needs as an SVP. Bergen, 146 Wn. App. at 531. The "best interests" standard "thus relates to the SVP's successful treatment, ensuring that the LRA does not remove 'incentive for successful treatment participation' or 'distract[] committed persons from fully engaging in sex offender treatment' and is the 'appropriate next step in the person's treatment.'" Id. at 529 (quoting Laws of 2005, ch. 344: § 1).

It was not in Wrathall's best interests to be previously treated by a provider that undermined the effectiveness of his treatment, which set up the unfortunate outcome with Pinedo. Continuation of treatment in the LRA would be in Wrathall's best interest if he could receive effective treatment there.

Whether due process requires a finding of willfulness involves examination of the existence of alternative means for effectuating the legislative purpose of the LRA. See McCormick, 2009 WL 2395237 at 6 (alternative means of effectuating legislative purpose to be considered in determining whether due process requires finding of willfulness). The

trial court has the option of modifying an LRA rather than revoking it. Former RCW 71.09.098(3). The trial court did not find Wrathall was incapable of being successfully treated in an LRA. Pinedo recommended different treatment modes in the SCC to address Wrathall's perceived shortcomings,²⁹ but the court did not find these different treatment techniques were unavailable in an LRA setting. Because Wrathall's continued presence in the LRA did not pose an unacceptable risk to community safety, he should have been given an opportunity to succeed by means of the different treatments recommended by Pinedo in an LRA setting before having his LRA revoked.

Due process prohibits revocation of an LRA without finding a willful violation. This Court should vacate the revocation order and remand for further proceedings.

D. CONCLUSION

For the reasons stated, this Court should reverse revocation of Wrathall's less restrictive alternative.

²⁹ Exh. 4 at 7 (10/16/08 hearing); Exh. 5 at 6 (10/16/08 hearing); 3RP 12-13.

DATED this 27th day of August, 2009.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63143-8-1
)	
DAVID WRATHALL,)	
)	
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 27TH DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID WRATHALL
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF AUGUST, 2009.

x *Patrick Mayovsky*