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No. 63791-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE

v.

LENORA CARLSTROM

STATE'S RESPONSE BRIEF

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I. INTRODUCTION

The State of Washington, through the King County Prosecutor's Office, represents the interests of the State in matters involving the civil commitment of the criminally insane. *See, e.g.* RCW 10.77.150, .200. Although the Department of Social and Health Services (DSHS) raises various issues of first impression in this action, including its authority to seek forcible medication in the absence of an authorizing statute, this court should decline review under the mootness doctrine. There is no need to determine complicated constitutional issues involving Ms. Carlstrom's individual rights and various Separation of Powers concerns, when the dispute raised by DSHS no longer exists.¹ The court should dismiss the DSHS appeal on mootness grounds.

II. THE DSHS APPEAL IS MOOT

Under RAP 18.9(c), the court will dismiss a moot appeal. An appeal is moot where only abstract questions of no real-world import remain:

A case is moot if the court can no longer provide effective relief. *Westerman v. Cary*, 125 Wash.2d 277, 286, 892 P.2d 1067 (1994) (citing *Orwick v. Seattle*, 103 Wash.2d 249, 253, 692 P.2d 793 (1984)). In general, where only moot questions or abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, an appeal should be

¹ The State also agrees with Respondent Carlstrom that DSHS has no right to appeal in this case. DSHS has also failed to demonstrate obvious or probable error by the trial court. *See* RAP 2.3.

dismissed. *Westerman*, 125 Wash.2d at 286, 892 P.2d 1067 (citing *Sorenson v. Bellingham*, 80 Wash.2d 547, 558, 496 P.2d 512 (1972)).

Born v. Thompson, 117 Wn.App. 57, 63, 69 P.3d 343 (2003).

DSHS acknowledges that the current appeal is moot. Ms.

Carlstrom no longer requires involuntary medication because she "has resumed voluntarily taking her medication and eating solid food, albeit as a result of strong encouragement from treating staff at the hospital." Brief of DSHS at 19. Because this matter is moot, the appeal should be heard only if it falls into an exception to the mootness rule.

Although DSHS is correct that civil commitment cases often merit application of the "public interest" exception to the mootness doctrine, the agency has failed to justify application of the mootness exception in the current case. The public interest exception was explained in *In re Detention of Swanson*, 115 Wn.2d 21, 24, 804 P.2d 1 (1990). Under *Swanson*, the public interest mootness exception requires consideration of the following factors: "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." *In re Detention of McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984). *See also Westerman v. Cary*, 125 Wn.2d 277, 286-

287, 892 P.2d 1067 (1994) (setting forth public interest exception to mootness doctrine).

In the current matter, the court should refuse to apply the public interest exception to overcome the mootness of the DSHS appeal. On the first factor, the State agrees with DSHS that this case involves a public, rather than a private, question of law.

With regard to the second question, however, DSHS fails to adequately explain the need for a decision in this appeal. In its opening brief, DSHS provides almost no argument on this point, except for the conclusory claim that "the Department needs an authoritative determination by this Court as to what procedures are available, if any, to involuntarily administer antipsychotic medications to patients found NGRI." Brief of DSHS at 20. From this statement, the agency is apparently expecting a broad playbook of what it can and cannot do with regard to involuntary medication. This matter does not present a record sufficient for such a decision. The trial court did not take any evidence regarding the supposed need to medicate Ms. Carlstrom against her wishes. Even if this court were to accept the DSHS claim that a trial court may order forcible medication absent statutory authority, any such ultimate ruling on whether to forcibly medicate would be left to the discretion of

the trial court. In short, any decision from this court is unlikely to present the broad guidance that DSHS claims it needs.

On the final question, the likelihood of this situation to recur, DSHS cannot meet the standards of the public interest exception mootness doctrine. It is worth noting that DSHS nowhere claims, despite many decades of experience with civil commitment of the criminally insane, that this is actually a common or recurrent problem at the Western State criminally insane ward. It claims only in its brief that "this issue is certain to recur," but nowhere provides any record materials demonstrating that this is a problem *at Western State Hospital*. Brief of DSHS at 20. DSHS does not refer to any other cases within the State of Washington where it was forced to seek a medication order,. It fails to demonstrate how the simple method that resolved this case -- pure persuasion with the patient -- is unlikely to continue resolving these cases in the future.

DSHS cannot improve the likelihood that this problem will recur by refusing to follow other, more obvious remedies that are available to it. First, rather than forcing involuntary medication issues into RCW 10.77, the agency could proceed by simply seeking additional civil commitment authority over Ms. Carlstrom. By initiating civil commitment under RCW 71.05.150, DSHS would have the authority to initiate involuntary medication procedures under the provisions of RCW 71.05. Once Ms.

Carlstrom was no longer a danger to herself or others, the RCW 71.05 commitment would dissolve and her detention would continue under the sole authority of RCW 10.77.

Second, DSHS has rule-making authority under RCW 10.77. The agency has already promulgated administrative rules applicable to the criminally insane. *See* WAC 388-875. Rather than seeking judicial relief on a moot case, DSHS should first attempt its own regulation governing involuntary medication of the criminally insane. Such a regulation would go through an appropriate process of public comment that is unavailable through the mechanism of a judicial opinion. *See generally* RCW 34.05.

Finally, the agency could seek request legislation from the Legislature. As Judge Canova noted below, the public policy issues surrounding involuntary medication are best addressed to the Legislature. VRP 6/22/2009 at 18-19.

It is discretionary with this court whether to entertain a moot case under the public interest doctrine. DSHS presents this court with weighty constitutional questions involving individual rights on an entirely bare and conclusory record. Moreover, the DSHS claim that this court should expand a supposed inherent authority of the courts over the mentally ill, engraft portions of RCW 71.05 onto RCW 10.77, and otherwise find authority for DSHS to forcibly medicate Ms. Carlstrom raises sticky

Separation of Powers issues that are best left for another day (if at all).
The court would perhaps need to take this case if DSHS had prevailed below, but judicial restraint counsels maintaining the status quo and waiting to see if the problem identified by DSHS really is, or needs to be, a problem worthy of a future appellate decision.

III. CONCLUSION

For the foregoing reasons, this court should enter an order dismissing the DSHS appeal as moot.. The court should exercise its discretion to refuse application of the public interest mootness exception in this case because DSHS has failed to show sufficient reason to justify application of this doctrine.

DATED this 14th day of December 2009.

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