

08663-1

08663-1

NO. 68663-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD HAYDEN.

Appellant.

**COPY RECEIVED**

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King County Prosecuting Attorney's Office  
Criminal Division  
Civil Commitment Unit

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

The Honorable Wesley Saint Clair, Judge

BRIEF OF APPELLANT

ERIC BROMAN  
Attorney for Appellant

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

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding it had jurisdiction over the person and subject matter of the state's petition for involuntary treatment with antipsychotic medications. CP 32.

2. The trial court erred in granting the petition and in ordering the involuntary administration of antipsychotic medications. CP 34.

Issues Related to Assignments of Error

The Department of Social and Health Services (DSHS) made numerous arguments about the trial court's authority to involuntarily administer antipsychotic medications. The DSHS arguments were premised on two assumptions: (1) that appellant had been committed to Western State Hospital for an offense with a lifetime statutory maximum, and (2) that the commitment followed a determination in this case that he was not guilty by reason of insanity (NGRI). This record shows that both assumptions are factually incorrect.

1. In this criminal case, where appellant pled guilty and where the five-year statutory maximum had long since expired, did the trial court lack jurisdiction to consider the DSHS petition?

2. For the same reasons, did the trial court err in granting the DSHS petition?

B. STATEMENT OF THE CASE

On May 30, 1984, the King County prosecutor charged appellant Donald Hayden with two counts: (1) second degree robbery, and (2) taking and riding in a motor vehicle without permission. CP 1-3. On September 5, 1984, Hayden pled guilty only to count 2, the take and ride. CP 4-8. Count 1 was dismissed at sentencing. CP 9.

At that time the offense was a class C felony and the maximum sentence was five years. RCW 9A.56.070(2) (1984); RCW 9A.20.020(1)(b) (1984). The plea form properly informed Hayden of the five-year maximum. CP 4.

On October 8, 1994, the court sentenced Hayden to “a maximum term of not more than five (5) years,” with the minimum to be fixed by the Board of Prison Terms and Paroles. CP 9. The judgment and sentence set the termination date of probation “at five years from the date of this order.” CP 9. One of the probation conditions directed Hayden to follow conditions of release in a different King County cause, No. 83100. Hayden’s conditional release on the 83100 offense was revoked, and he was transported to Western State Hospital. The sentence further noted that upon release, Hayden’s medication was to be monitored by a pharmacist selected by his probation officer. CP 9.

In this record, the 83100 cause number referenced a first degree assault offense that was identified as a 1977 or 1978 offense. CP 3 (noting an insanity acquittal in "1978" on a first degree assault charge). On March 1, 2002, the King County prosecutor presented an "Order of Termination" in this 1984 case. Although it mixed and muddled the facts of the 1977 case with those of this 1984 case, the court's order was clear:

**IT IS HEREBY ORDERED, ADJUDGED and DECREED** that the supervision of the above cause (as to the above defendant) is hereby terminated. This order does not restore the right to own, possess, or control firearms or explosives.

Supp. CP \_\_ (sub no. 27, Order of Termination), attached as appendix A. The prior offense is not further discussed in this record.<sup>1</sup>

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<sup>1</sup> Undersigned counsel is nonetheless familiar with that offense, as it was the subject of an appeal in this Court, No. 54361-0-I. Hayden was found not guilty by reason of insanity in 1977 and this Court determined the maximum sentence for that offense was life. State v. Hayden, 128 Wn. App. 1066, 2005 WL 1870786 (2005).

On November 22, 2011, more than 27 years after sentencing and more than nine years after the order of termination, the Department of Social and Health Services (DSHS), represented by the Washington Attorney General, filed a "Motion for Limited Intervention and Request for Ruling on Court's Jurisdiction." Attached as support for that ruling were six orders from various superior courts in other criminal cases that had authorized DSHS to intervene. The purpose of the proposed intervention was to allow DSHS to argue it should be granted authority to petition the court to order involuntary treatment with antipsychotic medication. Supp. CP \_\_ (sub no. 30, Motion for Limited Intervention).

DSHS also filed a petition to compel involuntary treatment with antipsychotic medication. The petition alleged Hayden was in Western State Hospital where he was "receiving involuntary treatment for up to the rest of his life, pursuant to an order for King County entered on 6/4/1984 [sic]." CP 12. The petition muddled the facts of Hayden's 1977 case with those in this case. CP 12. The petition made numerous other allegations about the need for involuntary medications based on activities allegedly occurring during Hayden's stay at Western State Hospital. CP 13-16.

Defense counsel was appointed to respond to the DSHS petition. On Hayden's behalf, counsel opposed the petition, raising several arguments, including: the King County court lacked jurisdiction; DSHS and the AG lacked standing to intervene in this King County prosecution; there was no statutory authorization for involuntary medication of persons committed under RCW 10.77 following a determination that the person was NGRI; and a recent Division Two decision had erroneously authorized involuntary medication of persons committed via NGRI proceedings. CP 17-23 (citing, inter alia, State v. C.B., 165 Wn. App. 88, 265 P.3d 951 (2011), rev. denied, 173 Wn.2d 1027 (2012)). The King County prosecutor also opposed DSHS intervention in this criminal case. RP<sup>2</sup> 3, 10-13.

DSHS replied, asserting that authority for involuntary medication existed under Division Two's decision in State v. C.B., which had relied on RCW 10.77.120(1). Supp. CP \_\_ (sub no. 35, Department's Reply).

At the hearing on January 5, 2012, DSHS again rested its argument on the erroneous foundational premise that the "NGRI finding [sic]" and RCW 10.77 provided the court with continued

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<sup>2</sup> The four volumes of transcripts are sequentially numbered.

authority to monitor and make decisions about Hayden's continued presence and treatment at Western State. RP 6, 17. DSHS repetitively claimed RCW 10.77 allowed the court to consider a DSHS petition for an NGRI patient. RP 9, 39. According to the assistant attorney general (AAG) representing DSHS, the petition was filed in King County because "King County Superior Court is the only court that's ordered Mr. Hayden to Western State Hospital. There is no case number in Pierce County that has anything to do with Mr. Hayden." RP 16. "I will say that this cause number, 84-1-01573-6 Seattle is the only cause number that is making Mr. Hayden be at Western State Hospital." RP 31.

To be fair to the AAG, the DSHS error was not corrected by the deputy prosecutor or by defense counsel. Everyone in court was under the mistaken assumption that there had been an NGRI determination in this case, and that Hayden could still be held in custody pursuant to that determination. See, e.g., RP 10-14, 26-27. In response to the court's question, the deputy prosecutor erroneously asserted there was "lifetime jurisdiction for assault with a deadly weapon." RP 26.

The prosecutor nonetheless argued that DSHS's proper course was to file a petition for involuntary commitment under RCW Chapter

71.05. RP 19, 22, 24-25. The prosecutor also inadvertently touched on the fact that a court loses jurisdiction in a criminal case under RCW 10.77 after the statutory maximum has passed. RP 23-24.

Defense counsel opposed the DSHS petition, arguing lack of jurisdiction, improper venue, and lack of statutory authority to order forced medication in the context of an RCW 10.77 NGRI commitment. RP 14-16, 22-23, 31-32, 34-36, 39-44, 51.

On the question of jurisdiction, the court ruled there was subject matter and personal jurisdiction to consider the DSHS petition. RP 30. The court found venue was proper in King County because "it is our case number." RP 32. The court then granted the DSHS request for intervention. RP 37-38. Finally, citing State v. C.B. and RCW 10.77.120, the court ruled that involuntary medication could be authorized if the state established the factual foundation for it. RP 52-53; Supp. CP \_\_ (sub no. 40, Order).

The parties then called expert witnesses and the court heard testimony on whether the state had established the necessary basis to compel involuntary treatment with antipsychotic medication. The defense provided substantial evidence to show why this medication was not necessary to meet a compelling state interest. RP 62-234.

Despite the defense showing, at the conclusion of the evidence and argument, the court ruled that DSHS had met its burden to involuntarily medicate Hayden with antipsychotic drugs. RP 238-240; CP 31. The court granted the petition and authorized DSHS to “administer Geodon with IM backup for refused doses or Prolixin with IM backup for refused doses, or Stelazine with IM backup for refused doses, as well as side effect medications, at clinically appropriate levels. . . for up to 180 days from the date this order is entered.” CP 34. The order was signed and filed April 19, 2012. CP 31, 35.

Hayden timely appeals. CP 36.

C. ARGUMENT

THE COURT ERRED IN CONSIDERING AND GRANTING THE DSHS PETITION.

This case arose from Hayden’s 1984 guilty plea to a class C felony. The statutory maximum for that offense was five years. Supervision was terminated by court order in 2002, albeit belatedly. The superior court had no further jurisdiction over Hayden on this offense.

1. The Court Lacked Jurisdiction to Consider the Petition.

In 1984, the crime of taking and riding in a motor vehicle without permission was a class C felony. RCW 9A.56.070(2) (1984).

The statutory maximum for that offense was a five-year term. RCW 9A.20.020(1)(c) (1984).

In accepting Hayden's guilty plea, the court properly informed him of the five-year term. CP 4. The sentence was properly limited to a five year maximum. CP 10; RCW 9.95.010 (1984). Supervision was formally terminated March 7, 2002. Appendix A.

Several settled rules govern the analysis. A court may not impose a sentence that exceeds the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012); In re Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009); In re Restraint of Tobin, 165 Wn.2d 172, 175-76, 196 P.3d 670 (2008); In re Restraint of Perkins, 143 Wn.2d 261, 264 n.3, 19 P.3d 1027 (2001); In re Restraint of Hopkins, 137 Wn.2d 897, 976 P.2d 616 (1999).<sup>3</sup> Stated another way, the statutory maximum limits the court's jurisdiction and authority. State v. Reanier, 157 Wn. App. 194, 197, 237 P.3d 299 (2010) (court order that exceeds statutory maximum exceeds the court's authority and must be corrected); State v. Zavala-Reynoso,

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<sup>3</sup> For offenses committed after July 1, 2000, statutory amendments have authorized the state to enforce the collection of restitution beyond the statutory maximum. See RCW 9.94A.753(4); State v. Smits, 152 Wn. App. 514, 522, 216 P.3d 1097 (2009). That is not an issue here.

127 Wn. App. 119, 123-24, 110 P.3d 827 (2005) (sentence that exceeds statutory maximum is facially invalid); State v. Jennings, 45 Wn. App. 858, 860, 728 P.2d 1064 (1986) (court loses jurisdiction to impose additional conditions after statutory maximum is served). A person is entitled to release or discharge as a matter of right when the maximum sentence expires. Honore v. Washington State Bd. of Prison Terms and Paroles, 77 Wn.2d 697, 700, 466 P.2d 505 (1970); Butler v. Cranor, 38 Wn.2d 471, 473-74, 230 P.2d 306 (1951); In re Restraint of Paschke, 61 Wn. App. 591, 595, 811 P.2d 694 (1991).

In several of the above-cited cases, the proper remedy was a remand to correct the erroneously excessive sentence or to order a release date at the end of the statutory maximum. That remedy is unavailable because the five-year statutory maximum has long since expired, and the court has long since terminated supervision.<sup>4</sup> The

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<sup>4</sup> The state established nothing to suggest that the probation period might have been tolled for any reason. Cf., City of Spokane v. Marquette, 146 Wn.2d 124, 43 P.3d 502 (2002) (probationary period tolled where state showed the probationer was sought on an arrest warrant); Petition of Little, 95 Wn.2d 545, 627 P.2d 543 (1981) (maximum term tolled during period of time inmate has escaped from custody), overruled on other grounds in State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982); State v. Robinson, 142 Wn. App. 649, 653, 175 P.3d 1136 (2008) (probation tolled where state proved Robinson was not subject to the court's control and supervision for substantial periods). Nor would this record support the conclusion that this five-year term was imposed consecutively to the prior NGRI finding. CP 9

only logical remedy is to vacate the trial court's erroneous later orders.

This is meaningful relief.

2. The Argument is Properly Raised on Appeal.

In response, the state may point out that argument 1 was not raised in the trial court. That is true, but for three reasons makes no difference.

First, a trial court's lack of jurisdiction may be raised for the first time on appeal. RAP 2.5(a)(1); State v. T.A.D., 122 Wn. App. 290, 293 n.7, 95 P.3d 775 (2004); State v. Epler, 93 Wn. App. 520, 523, 969 P.2d 498 (1999); see also, In re Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002) (sentence in excess of court's authority can be challenged at any time); In re Personal Restraint of Moore, 116 Wn.2d 30, 33, 803 P.2d 300 (1991) (confinement beyond statutory authorization is a fundamental defect). As shown in argument 1, the trial court lacked jurisdiction to consider the state's petition after the five-year maximum term expired.

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(no indication of consecutive sentence); cf. RCW 9.92.080(1) (1984) (consecutive term presumed only for current offense committed while offender was "under sentence of felony"). The prior NGRI finding was not a felony sentence; it was instead a commitment under RCW Chapter 10.77 following acquittal of the criminal charge. State v. Brasel, 28 Wn. App. 303, 312-13, 623 P.2d 696 (1981). The five-year maximum sentence has expired.

Second, if the state would rather style Hayden's argument as a factual claim, it may still be raised now. The state's petition was based on the necessary factual predicates that this sentencing court found Hayden NGRI in 1984, and retained continuing authority in this case pursuant to RCW 10.77. The state's failure to establish either necessary fact is subject to review. RAP 2.5(a)(2); Roberson v. Perez, 156 Wn.2d 33, 40, 123 P.3d 844 (2005); Stedman v. Cooper, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_ (2012), 2012 WL 5835297 at \*8.

Third, the forced administration of antipsychotic drugs affects Hayden's fundamental rights. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Washington v. Harper, 494 U.S. 210, 220-21, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). A court's continued restriction of a person's liberty beyond the statutory maximum is prejudicial. In re Bratz, 101 Wn. App. 662, 672-73, 5 P.3d 758 (2000). Hayden therefore may challenge this manifest error affecting his constitutional rights, because forced medication is a practical and identifiable consequence of the court's order. RAP 2.3(a)(3); State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); State v. Mosteller, 162 Wn. App. 418, 426, 254 P.3d 201 (2011).

3. The Argument is not Moot.

In response, the state may contend that review is moot for one of two reasons. First, the trial court's order authorized involuntary medication for 180 days, and that 180-day period has passed. Second, the absence of statutory authority was one of the primary legal issues litigated below. After the order was entered, the Washington Legislature enacted a statute to authorize Western State Hospital to administer antipsychotic medication for persons found under RCW 10.77 to be criminally insane. RCW 10.77.094 (effective May 1, 2012, see Laws 2012, ch. 256, §§ 12, 14.

Review is not moot because the trial court remains under the mistaken assumption that it has the continued authority to force on Hayden the administration of antipsychotic medications. A trial court's erroneous conclusion it has authority to impose conditions, after the expiration of the statutory maximum, raises an issue of continuing and substantial public interest that is likely to evade review. Review is therefore appropriate. See In re Restraint of Mattson, 166 Wn.2d 730, 736-37, 214 P.3d 141 (2009); In re Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002); State v. McCarter, 91 Wn.2d 249, 588 P.2d 745 (1978); see also, In re Detention of M.K., 168 Wn. App. 621, 625-26, 279 P.3d 897 (2012) (review of commitment order

is not moot “where collateral consequences flow from the determination authorizing such detention”). If DSHS instead wishes to concede this error and save this Court’s resources for other issues, that concession likely would render this matter moot. At that point DSHS would then be estopped from asserting contrary future claims in this case in the trial court.<sup>5</sup>

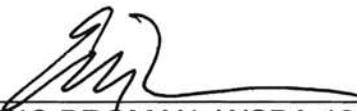
D. CONCLUSION

This Court should vacate the trial court’s orders ruling the court had jurisdiction to consider the DSHS petition, and granting the DSHS petition.

DATED this 8<sup>th</sup> day of February, 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
ERIC BROMAN, WSBA 18487  
OID No. 91051  
Attorneys for Appellant

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<sup>5</sup> DSHS may also decide to propose an order in the trial court that would concede this error and vacate the two erroneous orders that are the subject of this appeal. The appellant might well agree to presentation of such an order, which could then be formally entered on this Court’s authority under RAP 7.2(e), and moot this appeal.

APPENDIX A

No. 68663-1-I

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KING COUNTY  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON

Plaintiff

v.

Defendant

Cause No:84-1-01573-6 SEA

ORDER OF TERMINATION AND  
QUASHING WARRANT

HAYDEN, Donald Murray  
DOC No:297656

Offense:TMVW/OPOO, count II

Date of Report: 02/20/02

DOB: 11-9-50

Date of Sentence:10-4-84

Date of Inactive Status: 10-5-84

Mr Hayden was sentenced on November 11, 1977 and was supervised by DOC until June 12,1984 when he was sentenced under KC 84-1-01573-6 SEA, T&RIMVW/OP, which was inactivated, and was committed to Western State Hospital. His supervision under #83100 was inactivated at that time also. A record check was returned 1-31-02 and both NCIC and WASIS reported no new convictions.

.THIS MATTER having come on regularly before the undersigned judge of the above-entitled Court upon the motion of the State of Washington, plaintiff, for an order of termination in the above-entitled cause on the basis that, the defendant has not been apprehended and successful supervision is no longer possible, and the Court being fully advised in the premises; now, therefore,

*DP* IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the supervision of the above cause (as to the above defendant) is hereby terminated and the warrant herein is quashed. This order does not restore the right to own, possess, or control firearms or explosives.

DONE IN OPEN COURT this

1st day of March, 2002  
*Donald Haley*

HONORABLE: Donald Haley

PRESENTED BY:

*M. Jule*  
DEPUTY PROSECUTING ATTORNEY

*Peter W Patrick*  
Peter W Patrick  
COMMUNITY CORRECTIONS OFFICER III

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD HAYDEN,

Appellant.

COA NO. 68663-1-I

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 8<sup>TH</sup> DAY OF FEBRUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT ANTANAITIS  
OFFICE OF THE ATTORNEY GENERAL  
7141 CLEARWATER DR. SW  
P.O. BOX 40124  
OLYMPIA, WA 98504  
[RobertA1@atg.wa.gov](mailto:RobertA1@atg.wa.gov)

[X] DONALD HAYDEN  
WESTERN STATE HOSPITAL  
9601 STEILACOOM BOULEVARD SW  
LAKEWOOD, WA 98498

SIGNED IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2013.

X *Patrick Mayovsky*

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STATE OF WASHINGTON  
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