

COA No. 68873-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON

Respondent,

v.

DONNA L. HOWLAND,
Appellant

STATE'S RESPONSE BRIEF

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ORIGINAL

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I. INTRODUCTION

Donna Howland is civilly committed as a criminally insane person under RCW 10.77. She filed a one-page Petition for Conditional Release in King County under RCW 10.77.200(5) without any evidence supporting her conditional release. DSHS Secretary/Western State Hospital opposed her petition for conditional release. The court dismissed her petition because without expert testimony, in light of the Secretary's opposition, there was no basis for the court to conditionally release her.

The trial court should be affirmed because, pursuant to RCW 10.77.150(3)(a), the court has discretion not to hear petition for conditional release that is not supported by the Secretary and 2) in order for the court to conditionally release an insanity acquittee, expert testimony supporting conditional release is necessary.

II. FACTS

A. Crime

On October 15, 1988, Donna Howland stabbed her live-in boyfriend, Albert King, fifteen to twenty times in the chest as he dozed on the couch. CP 2-5. He was able to fight her off and he ran for help into the middle street, where he collapsed. *Id.*

After he fell, Donna Howland went back inside her apartment and cleaned off the knife. CP 2. Reports indicate that she approached her boyfriend as he lay dead in the street and tried to move his body but it was too heavy. CP 2. When police arrived she admitted stabbing Mr. King telling the police that the “voice” of the victim’s sister told her to kill him. CP 2.

Ms. Howland had a three year history of repeated hospitalizations for suicide gestures and psychotic ideation. She had just been released from Harborview after attempting suicide. CP 2.

Ms. Howland was charged with Murder in the First Degree CP 1. On April 24, 1989 she was found Not Guilty By Reason of Insanity and committed to the care custody of the Department of Social and Health Services for hospitalization at Western State Hospital. CP 6.

B. NGRI History

Donna Howland remained in the Center for Forensic Services (locked ward) at Western State Hospital until January 12, 1999. CP 7-11 That is when the court granted her a conditional release, based on a recommendation from Western State Hospital, and she was subsequently transferred to the Community Program at Western State Hospital. *Id.* In early May of 2005, she transitioned into an apartment in West Seattle. CP 43.

Ms. Howland voluntarily returned to WSH from June 18, to July 30, 2009. CP 43. She was struggling with delusions, depression and diabetes. *Id.*

Then, on February 25, 2010, after refusing to take her medication and becoming increasingly angry, agitated and anxious, she was involuntarily returned to Western State Hospital. CP 44. She told staff her apartment had been poisoned by formaldehyde gas. She thought another patient at the hospital had beaten her with a baseball bat causing her continued back pain. She was so angry and uncooperative that the Risk Review Board did not feel the need to meet with her determining that her conditional release should be revoked. CP 47-48.

The court revoked her conditional release on May 28, 2010 and she has remained at Western State Hospital since. CP 26-29. Reports indicate that she continues to exhibit acute psychotic symptoms. CP 83. She refuses to participate in her treatment classes. CP 82 She struggles with managing her emotional lability. CP 83.

On January 20, 2011, Ms. Howland filed a one page Petition for Conditional Release. CP 31. The Risk Review Board at Western State Hospital met to consider her petition on February 9, 2011 and unanimously opposed it. CP 47-50. Her therapist, Elliot Libman, MSW, reported that Ms. Howland often became loud, agitated and angry with

him and could not be redirected. *Id.* She continued to endorse long standing fixed delusions. *Id.* One of those delusions is that she is married to WSH staff person, who was also her lawyer. *Id.* That person bought the facility in which she was living before being returned to WSH. *Id.* She will not attend treatment at the Treatment and Recovery Center (TRC) to address her delusions and anger. *Id.* When confronted with reality, she becomes upset and angry. *Id.*

At her hearing on March 18, 2011, Ms. Howland called her therapist, Elliot Libman, and Jill Young from the Risk Review Board to testify. Both testified that they did not support her petition for conditional release. CP 51-54. The State moved to dismiss pursuant to CR 41. *Id.* The court granted the State's motion finding that Ms. Howland failed to present a prima facia case to support conditional release. *Id.*

On December 2, 2011, the court issued an order appointing an independent expert or professional person to evaluate Ms. Howland. Supp. CP ____ (Sup# 98, Motion and Protective Order for Expert Witness and Services Funding Reuqest), Supp. CP ____ (Sup #100 Order Appointing Expert Sealed Per Sub 97).

Then, on February 7, 2012, Ms. Howland filed a one page Petition for Conditional Release. CP 64. Western State Hospital again opposed it. CP 80-83. The report from Western State Hospital indicates that Ms.

Howland continued to exhibit acute symptoms of her major mental illness. *Id.* She continued to endorse long standing fixed delusions including the belief that she was returned to CFS in 2010 because she was being poisoned by her neighbors. *Id.* She had made no progress in treatment, primarily because she refused to attend. *Id.* She now believed someone would hurt her if she went to treatment classes. *Id.* She lacked insight into her mental illness, her risk factors and warning signs of possible relapse. *Id.* Under these circumstances, the Risk Review Board deemed Donna Howland a substantial danger to other persons and a substantial threat to public safety. *Id.* It did not support her conditional release. *Id.*

The State filed a motion to dismiss Ms. Howland's Petition on the grounds that 1) she was not entitled to a full evidentiary hearing without the support of DSHS/Western State Hospital; and 2) as a matter of law, she cannot satisfy her burden of proof without qualified expert testimony supporting her conditional release. CP 65 – 83.

On March 23, 2012, the court heard arguments on the State's Motion to Dismiss. Ms. Howland suggested for the first time since filing her petition that she be conditionally released to the community program. 3/23/12 VRP 1-15. Ms. Howland argued she had a right to an evidentiary hearing. *Id.* at 5. She conceded her petition was not supported, but asked the court to indulge her, as it did last year under the exact same

circumstances, by listening to her presentation. *Id.* at 3. The court reserved ruling and requested additional briefing. *Id.* at 11-14.

On April 10, 2012, the court issued its Order Granting State's Motion to Dismiss Petition for Conditional Release. CP 106-108. The court held that in light of the fact that Western State Hospital opposed Howland's Petition for Conditional Release, and without expert testimony to support her conditional release, her petition was frivolous. *Id.*

This appeal followed. However, Ms. Howland does not have a right to a direct appeal under RAP 2.2(a)(13). An order denying a Petition for Conditional Release is not a final judgment. An order denying a Petition for Conditional Release is subject only to discretionary review. See Commissioners Ruling attached as Appendix A.

Even if the court were to decide that Ms. Howland is entitled to review de novo on a direct appeal, the trial court properly dismissed her petition.

III. LEGAL ARGUMENT

A. The Court is Not Required to Convene an Evidentiary Hearing Based on the Filing of a Petition for Conditional Release That is Opposed by the Secretary.

Appellant seems to believe that the mere filing of her one-page Petition for Conditional Release entitled her to a full evidentiary hearing. She is wrong.

A civilly committed individual has no constitutional right through due process to a less restrictive alternative release. *In re the Detention of J.S.*, 124 Wn.2d 689, 696, 880 P.2d 976 (1994)("we find the respondents are not constitutionally entitled to less restrictive treatment"). Rather, the right to conditional release is established by statute. RCW 10.77.150.

1. The Statutory Conditional Release Process.

There are two statutory routes to obtain a conditional release under RCW 10.77. Only one entitles the defendant to a full evidentiary hearing. First, the defendant may apply to the DSHS Secretary¹ for conditional release. RCW 10.77.150(1). Only when the Secretary, after consideration the reports of *experts* or *professional persons* conducting an exam pursuant to RCW 10.77.140, recommends conditional release (subject to review by the Public Safety Review Panel)² *must* the court provide the hearing for the individual. RCW 10.77.150(3)(a); *State v. Platt*, 143 Wn.2d 242, 248, 19 P.3d 412 (2001).

¹ Secretary" means the secretary of the Department of Social and Health Services or his or her designees. RCW10.77.010(21). Under WAC 388-875-0090 either the Superintendent of the treatment facility (Western State Hospital) or the director of the division is authorized to act on application for conditional release on behalf of the Secretary.

² The PSRP was established by the Legislature in 2010, in response to incidents involving the criminally insane that placed public safety at risk. The PSRP safeguards the public by providing an independent risk assessment in all cases where Western or Eastern State Hospital recommends a change a criminally insane defendant's commitment status. RCW 10.77.270(1)(a) and (3).

At this hearing, the State will bear the burden of proving the person is not entitled to conditional release. RCW 10.77.150(3)(c); *State v. Platt*, 143 Wn.2d 242, 248, 19 P.3d 412 (2001).

The second route to obtain conditional release is by directly petitioning the court for conditional release. RCW 10.77.200(3). If the secretary does not recommend a conditional release, the court “may” schedule a hearing. RCW 10.77.150(3)(a). Thus, the court has discretion whether to convene a hearing under these circumstances. *State v. Platt*, 143 Wn.2d 242, 248, 19 P.3d 412 (2001).

In this case, Donna Howland’s petition for conditional release was opposed by WSH. CP 80-83. Therefore, she was not entitled to a full evidentiary hearing. The court had discretion to determine whether a full evidentiary hearing was appropriate.

2. The Burden of Proof

When the secretary does not recommend conditional release, the person seeking conditional discharge bears the burden of proving entitlement to a conditional release. *State v. Platt*, 143 Wn.2d 242, 251, 19 P.3d 412 (2001).

In every case, there is both a burden of production and a burden of persuasion. *State v. Paul*, 64 Wn. App. 801, 806, 828 P.2d 594 (1992) citing E. Cleary, *McCormick on Evidence*, § 336, at 946-48 (3d ed. 1984); 9 J.

Wigmore, *Evidence* §§ 2487-88 (rev. ed. 1981); *In re C.B.*, 61 Wn. App. 280, 282-83, 810 P.2d 518 (1991).

a. The Burden of Persuasion

The burden of persuasion defines the level of certainty the trier of fact must be before resolving an issue of fact in favor of the party having the burden of proof. *State v. Paul*, 64 Wn. App. 801, 807, 828 P.2d 594 (1992). When the secretary opposes conditional release, the person seeking conditional discharge bears the burden of proving entitlement by a preponderance of the evidence. *Id.*

b. Burden of Production

The function of the burden of production is to identify whether there is an issue of fact to be submitted to the trier of fact for decision. *State v. Paul*, 64 Wn. App. 801, 806, 828 P.2d 594 (1992) *citing* E. Cleary, § 338, at 952-56; 9 J. Wigmore, § 2485. The court further explained:

In order to get to the trier of fact and bring into play the burden of persuasion, both parties must first satisfy the court that they have a *quantity* of evidence fit to be considered by the trier of fact. Up to that point, the party with the burden of proof is subject to a ruling of law which would put an end to the case. If the burden of production is met, the issue is deferred to the trier of fact for decision.

State v. Paul, 64 Wn. App. 801, 806, 828 P.2d 594 (1992).

Therefore, Howland was required to prove by a preponderance of the evidence that conditional release was appropriate because, despite her

mental illness, the danger she would present to public safety could be adequately controlled by the imposition of appropriate conditions. *State v. Reid*, 144 Wn.2d 621, 629, 30 P.3d 465 (2001). But, in this case, it was not even a close call. Donna Howland presented no evidence whatsoever. All she did was file a one-page petition.

The court found that without evidence to support Howland's petition, the court has no basis to conditionally release her. Without this evidence, the court also found that her petition was frivolous and it was dismissed. CP106-108. The Court did not err. This appeal should be dismissed.

B. Expert Testimony Supporting Howland's Petition for Conditional Release is Necessary for an Evidentiary Hearing.

The criminally insane are presumed to have a mental illness that makes them dangerous until the Secretary and/or the court conclude otherwise. *State v. Platt*, 143 Wn.2d 242, 252, 19 P.3d 412 (2001). Thus, when expert testimony is offered in support of conditional release the court will grant a hearing, even if the petition is opposed by the secretary.

For example, in *State v. Platt*, where the secretary opposed conditional release, the trial court determined that an evidentiary hearing was appropriate. *State v. Platt*, 143 Wn.2d 242, 248, 19 P.3d 412 (2001). Platt's attorney had arranged for Platt to be evaluated by a psychologist,

pursuant to RCW 10.77.140. *Id.* at 252. Platt's doctor testified that Platt's mental illness was in remission and no longer required hospitalization. *Id.*

Timothy Sommerville was also granted an evidentiary hearing regarding his petition for conditional release that was opposed by Eastern State Hospital. *See, State v. Sommerville*, 86 Wn. App. 700, 705, 937 P.2d 1317 (1997). Sommerville presented the testimony of an outside doctor who had reviewed his records. *Id.* That doctor reached the conclusion that Sommerville could be released under specific conditions without presenting a danger to the community. *Id.*

Clearly, psychiatric or psychological testimony is central to the issue of whether, given the danger the defendant presents because of his mental illness, he can be conditionally released. In cases where psychiatric or psychological testimony is central to the ultimate issue expert testimony is necessary. *In re Twining*, 77 Wn. App. 882, 890, 894 P.2d 1331 (1995), *reversed on other grounds*.

Expert testimony is required when the ultimate question before the trier of fact is best established by an opinion which is beyond the expertise of a layperson or court. *Berger v. Sonneland*, 144 Wn.2d 91, 110, 26 P.3d 257 (2001). This rule is based on the premise that jurors and courts do not usually have sufficient knowledge and training to make such a determination. *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995).

Failure to present expert testimony under these circumstances openly subjects the case to dismissal. *Haubry v. Snow*, 106 Wn. App. 666, 678-679, 31 P.3d 1186, 1193 (2001).

Here, the court needed an expert who had evaluated Ms. Howland and reached the opinion that under certain conditions it would be safe to release her. Without expert testimony the court had no basis to consider any type of conditional release, especially in light of the experts from Western State Hospital opposing her conditional release.

Clearly, expert testimony is necessary in order for the court to consider whether the criminally insane can be conditionally released. Without expert testimony, Howland could not carry her burden of persuasion or her burden of proof. She was not entitled to an evidentiary hearing and it was entirely appropriate for the court to dismiss her appeal.

C. Expert Testimony Supporting Conditional Release is Necessary for the Court to Order Conditional Release.

It appears Ms. Howland believes that court could have ordered her conditional release even though the experts at Western State Hospital report that because of her ongoing fixed delusions and acute psychotic symptoms she remains a substantial danger to others. Ms. Howland presents no authority to support this position. This argument also contradicts the whole purpose of civil commitment: *public safety*.

A criminally insane person is a special category of persons presenting a danger because of their mental disease or defect. *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983); *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984). For the criminally insane, the risk of danger is more apparent and a judge's need to protect the public is more urgent. *State v. Keller*, 98 Wn.2d 725, 730, 657 P.2d 1384 (1983).

Without expert testimony, Howland's suggestions about how the court could have granted conditional release are merely speculative at this juncture. The trial court does not have statutory authority to order medication or make specific placement of those placed in the care, custody and control of the Department of Social Health Services. *In re: J.S.*, 124 Wn.2d 689, 880 P.2d 976 (1994); *In re Eaton*, 110 Wn.2d 892, 899, 757 P.2d 961 (1988); *In re Lowe*, 89 Wn.2d 824, 827, 576 P.2d 65 (1978). The Supreme Court has authorized DSHS to go through its own procedures to determine the most appropriate location for individuals placed in its care. *In re: J.S.*, 124 Wn.2d 689, 880 P.2d 976 (1994);

Here, the experts and professionals at Western State Hospital have already determined that the Community Program is not the appropriate location for Ms. Howland.

Moreover, it makes no sense that the court would dispose of the need for expert opinion for a conditional release when expert opinion is

required for every other determination the court makes under RCW 10.77. Expert opinion was necessary for the trier-of-fact to find the defendant not guilty by reason of insanity in the first place. RCW 10.77.060.

The statute requires the defendant undergo a mental health evaluation and the evaluation submit a report that includes a diagnosis or description of the defendant's current mental status, and an opinion that:

[t]he defendant was criminally insane at the time of the alleged offense, an opinion as to the defendant's sanity at the time of the act, and an opinion as to whether the defendant presents a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions. . . .

RCW 10.77.060(3)(d).

Similarly, when the Secretary recommends conditional release under RCW 10.77.150(1) and (2) it is based on the opinion of an expert or professional person who has conducted a mental health examination:

(1) . . . The secretary shall, after considering the reports of *experts or professional persons* conducting the examination pursuant to RCW 10.77.140, forward to the court . . . the person's application for conditional release as well as the secretary's recommendation . . .

(2) In instances in which persons examined pursuant to RCW 10.77.140 have not made application to the secretary for conditional release, but the secretary, after considering the reports of *experts or professional persons* conducting the examination pursuant to RCW 10.77.140, reasonably believes the person may be conditionally released, the secretary may submit a recommendation for release to the court

Pursuant to RCW 10.77.010(18), a qualified professional person is:

- (a) A psychiatrist licensed as a physician and surgeon in this state who has, in addition, completed three years of graduate training in psychiatry in a program approved by the American medical association or the American osteopathic association and is certified or eligible to be certified by the American board of psychiatry and neurology or the American osteopathic board of neurology and psychiatry;
- (b) A psychologist licensed as a psychologist pursuant to chapter 18.83 RCW; or
- (c) A social worker with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW 18.320.010.

Finally, the legislature expressly provided for those civilly committed under RCW 10.77 to be able to seek independent examinations from a qualified expert or professional person. RCW 10.77.140. Those examined under RCW 10.77.140 may make application for a conditional release under RCW 10.77.150.

Ms. Howland obviously recognized the need for expert/professional evaluation because she obtained expert services on December 2, 2011. Supp. CP ____ (Sup# 98, Motion and Protective Order for Expert Witness and Services Funding Reuquest), Supp. CP ____ (Sup #100 Order Appointing Expert Sealed Per Sub 97). One can only assume that even her own expert did not support her conditional release.

IV. CONCLUSION

For the foregoing reasons, the trial court should be affirmed.

DATED this 1st day of April, 2013.

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CASE #: 59071-5-I
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The following notation ruling by Commissioner Mary Neel of the Court was entered on December 20, 2006:

Gail Coleman appeals a trial court order denying her petition for conditional release from Western State Hospital under RCW 10.77.150. The court set a motion to determine appealability.

In December 2005 Coleman was found not guilty by reason of insanity of attempted murder in the second degree, while armed with a handgun. In February 2006, the court committed Coleman to Western State Hospital. On March 3, 2006, Coleman filed a notice of appeal, which is pending in No. 57826-0-I. In that appeal she challenges her initial commitment to Western State on the ground that she should be placed in a less restrictive setting. Respondent's brief is due tomorrow, December 21, 2006.

Meanwhile, on October 2, 2006, Coleman filed a petition for conditional release. Because DSHS opposes release, the burden is on Coleman to prove by a preponderance of the evidence that she may be conditionally released without being a substantial danger to other persons or presenting a substantial likelihood of committing criminal acts that jeopardize public safety. Western State did not recommend conditional release. On October 25, 2006, the trial court denied the petition, with findings of fact and conclusions of law to follow. On December 14, 2006, the court entered detailed findings and conclusions that address, among other things, Coleman's current delusions and behavior at hospital.

She contends that the order denying release is appealable under RAP 2.2(a)(13), a rule made after judgment which affects a substantial right." She argues: that RAP

2.2 contemplates appeal as of right of other mental health treatment orders, *i.e.*, orders of incompetency ((a)(7)), and orders of commitment ((a)(8)); that the rule contemplates appeal as of right of various orders entered after trial, ((a)(9), (10), (11), and (12)); that in practice appellate courts have found orders similar to the order denying conditional release appealable under (a)(13), indicating that confinement is a "substantial right" within the meaning of (a)(13); that she seeks to vindicate rights that were not adjudicated by the earlier judgment of not guilty by reason of insanity; and that appellate courts have previously considered a challenge to denial of conditional release on direct appeal, citing State v. Sommerville, 86 Wn. App. 700, 701, 937 P.2d 1317 (1997).

The State contends that the order denying release is not appealable under RAP 2.2(a); that only two subsections, (a)(8) and (a)(13), are even arguably applicable; that (a)(8) provides only for appeal of an order of commitment, which is already the subject of appeal in No. 57826-0-1; and that the order denying conditional release is not a final order because the court maintains jurisdiction over Coleman and may subsequently modify her status. The State cites In re Detention of Peterson, 138 Wn.2d 70, 87-88, 980 P.2d 1204 (1999).

Persons committed to a hospital shall have a current examination of his or her mental condition at least once every six months, RCW 10.77.140, and a person examined under this statute may make application for conditional release. RCW 10.77.150.

A party may appeal as of right only from the superior court decisions listed in RAP 2.2(a). An order of commitment is specifically listed in RAP 2.2(a)(8) as an appealable order. Indeed as noted above, Coleman's appeal of the commitment order is pending in this court. But an order denying a petition for conditional release is not listed. The failure to mention a particular proceeding in RAP 2.2(a) generally indicates the Supreme Court's intent that the matter be reviewable only by discretionary review under RAP 2.3. In re Chubb, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). RAP 2.2(a)(13) provides for an appeal from "[a]ny final order made after judgment which affects a substantial right." The trial court's findings indicate that Coleman's mental health status is not static, and she may petition for conditional release at least every six months, providing new evidence directed to the statutory criteria for release. See Chub, 112 Wn.2d at 724. The Division Three opinion in Sommerville did treat an order denying conditional release as an appealable order, but there is no indication the issue of appealability was ever raised and the opinion neither considered nor addressed the issue of appealability. The order denying Coleman's petition for conditional release is not a final judgment and may not be appealed as of right under RAP 2.2(a)(13). See In re Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999) (a decision under the sexually violent predator statute finding no probable cause is not a final order after judgment in light of the court's continuing jurisdiction over the committed person until his unconditional release). See also State v. Campbell, 112 Wn.2d 186, 190, 770 P.2d 620 (1989) (a final order entered after judgment is appealable under RAP 2.2(a)(13) only if it affects a right other than those adjudicated by the earlier judgment).

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The order denying Coleman's petition for conditional release is subject only to discretionary review. If Coleman intends to seek discretionary review, by January 5, 2007 she shall file and note her motion for discretionary review.

Now, therefore, it is hereby

ORDERED that the order denying conditional release is not appealable as of right and is subject only to discretionary review; and it is further

ORDERED that if Coleman intends to seek discretionary review, by January 5, 2007 she shall file and note her motion for discretionary review.

Sincerely,

A handwritten signature in black ink, appearing to read "R. D. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

twg

APPENDIX A

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,)
)
) No. 68873-1-I
 vs.)
)
 DONNA HOWLAND) Declaration of Service
)

DAN KATZER, being first duly sworn on oath, deposes and states that I arranged for service of a copy of the following documents by ABC Legal messenger delivery:

State's Response Brief
on:

Maureen Cyr
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3635

Under penalty of perjury under the laws of the State of Washington, I certify the foregoing is true and correct.

Signed and dated by me this 1ST day of April, 2013 at Seattle, Washington.


DAN KATZER

FILED
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2013 APR - 1 PM 4:43

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