

NO. 36273-2-II

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

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IN RE THE DETENTION OF C.D.

STATE OF WASHINGTON,  
Respondent,

v.

C.D.  
Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Leonard W. Costello, Judge

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REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	<b>I</b>
<b>TABLE OF AUTHORITIES</b> .....	<b>II</b>
<b>A. ARGUMENT IN REPLY</b> .....	<b>1</b>
1. DOC'S FAILURE TO ACT ON C.D.'S RELEASE PLAN IN A TIMELY MANNER DEPRIVED HIM OF EARNED EARLY RELEASE CREDITS IN VIOLATION OF DUE PROCESS.....	1
2. PHENIX'S OPINION INVADED THE PROVINCE OF THE JURY AND SHOULD HAVE BEEN EXCLUDED.....	4
3. THE EVIDENCE IS INSUFFICIENT TO SUPPORT COMMITMENT.....	6
<b>B. CONCLUSION</b> .....	<b>8</b>

## TABLE OF AUTHORITIES

### Washington Cases

<u>In re Detention of Albrecht</u> , 147 Wn.2d 1, 51 P.3d 73 (2002).....	6
<u>In re Detention of Marshall</u> , 156 Wn.2d 150, 25 P.3d 111 (2005).....	7
<u>In re Henrickson</u> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	6
<u>In re Personal Restraint of Liptrap</u> , 127 Wn. App 463, 111 P.3d 1227 (2005).....	1
<u>In re Personat Restraint of Dutcher</u> , 114 Wn. App. 755, 60 P.3d 635 (2002).....	1
<u>State v. Dunn</u> , 125 Wn. App. 582, 105 P.3d 1022 (2005).....	5
<u>State v. Fitzgerald</u> , 39 Wn. App. 652, 694 P.2d 1117 (1985).....	6
<u>State v. Florczak</u> , 76 Wn. App. 55, 882 P.2d 199 (1994), <u>review denied</u> , 126 Wn.2d 1010 (1995).....	6

### Federal Cases

<u>Foucha v. Louisiana</u> , 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).....	6
---	---

### Statutes

RCW 71.09.020(16).....	6
RCW 9.94A.728(2).....	1
RCW 9.94A.728(2)(a).....	1
RCW 9.94A.728(2)(c).....	1

A. ARGUMENT IN REPLY

1. DOC'S FAILURE TO ACT ON C.D.'S RELEASE PLAN IN A TIMELY MANNER DEPRIVED HIM OF EARNED EARLY RELEASE CREDITS IN VIOLATION OF DUE PROCESS.

An inmate has a limited, but protected, liberty interest in his earned early release credits. In re Personal Restraint of Dutcher, 114 Wn. App. 755, 758, 60 P.3d 635 (2002). Sex offenders who earn time for good behavior may be transferred to community custody status prior to their release date, in lieu of earned early release. RCW 9.94A.728(2)(a). Even offenders being considered for civil commitment under RCW 71.09 have a due process right to consideration for transfer to community custody. In re Personal Restraint of Liptrap, 127 Wn. App 463, 466, 111 P.3d 1227 (2005).

Before a sex offender can be released to community custody, he or she must submit a release plan indicating where the offender will reside, and DOC must approve the residence. RCW 9.94A.728(2)(c); 3RP 76. The department must act on a proposed release plan in a timely manner, and delaying decision on a release plan until the SVP referral process is complete deprives the inmate of earned early release credits in violation of due process. Liptrap, 127 Wn. App. at 476.

In this case, C.D. was assigned an earned early release date of May 23, 2005, based on his good time credits. 3RP 76. In March 2005, C.D. proposed a release plan under which he would reside with his wife. 3RP 77. The plan was submitted to a community corrections officer for investigation on March 18, 2005. 3RP 78. Because of DOC's failure to carry out a timely investigation of the plan and its application of an invalid policy, C.D. was incarcerated beyond his earned early release date, depriving him of earned early release credits in violation of due process.

In its brief, the state argues that C.D.'s continued incarceration was not unlawful because DOC acted on his release plan in a timely manner. Br. of Resp. at 23. The state's argument is not supported by the record. First, the community corrections officer assigned to investigate the case failed to complete the investigation in the required 30-day period.<sup>1</sup> Although the investigating officer approved the release plan on April 12, 2005, he had made no record of visiting the proposed residence, contacting the sponsor, or conducting the necessary assessment of risk to victims and potential victims, all of which were required under DOC policy. 3RP 84.

Because the investigation was not complete, Kimberly Acker, the DOC End of Sentence Review and SVP program manager, withdrew

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<sup>1</sup> DOC policy requires that investigation of a proposed release plan be completed in 30 days. 3RP 96.

approval of the release plan and resubmitted the plan, starting the investigation process over again. 3RP 81, 84, 85, 105. The investigating officer's arbitrary failure to follow DOC's clearly established policy was one factor in the unreasonable delay in final approval of C.D.'s plan, and thus the loss of earned early release credits. 3RP 83-84.

An additional factor contributing to the unreasonable delay was DOC's application of the policy invalidated in Liptrap. This policy prohibited a final decision on any release plan submitted by an offender being considered for SVP commitment until a forensic psychological evaluation had been reviewed. 3RP 82. Since no evaluation had been completed in C.D.'s case, Acker withdrew approval of C.D.'s release plan, delaying a final decision until the forensic evaluation was obtained. 3RP 85, 99. The SVP subcommittee did not even contract with Dr. Phenix to conduct a forensic psychological evaluation of C.D. until May 20, 2005. 3RP 90. Thus, application of this unlawful policy assured that C.D. would not receive the benefit of his earned early release credits.

When Acker withdrew approval of C.D.'s release plan on April 15, 2005, she immediately resubmitted it for investigation. 3RP 85. Even then, a timely investigation would have been completed by May 15, eight days prior to C.D.'s earned early release date. Although DOC policy

required that the investigation be completed in 30 days, C.D.'s plan was not approved for the second time until June 1, 2005. 3RP 88, 110.

No changes were ever made to C.D.'s release plan, and it was approved as originally submitted. 3RP 105. If properly investigated in a timely manner, there is no reason the plan could not have been approved and implemented by C.D.'s scheduled earned early release date. The unreasonable delay was at the very least negligent and resulted in the loss of C.D.'s earned early release, in violation of due process.

2. PHENIX'S OPINION INVADED THE PROVINCE OF THE JURY AND SHOULD HAVE BEEN EXCLUDED.

Dr. Amy Phenix, the state's expert, was permitted to testify, over C.D.'s objection, that she diagnosed C.D. with pedophilia based on the sexual abuse described D.L., Kindra M., and M.S., who were all under the age of 14 at the time of the alleged abuse. 9RP 477-79. C.D. categorically denied any arousal or sexual activity with prepubescent girls, and Phenix formed her opinion based solely on the witnesses' allegations. 9RP 476, 480-81.

In its brief, the state attempts to establish a foundation for Phenix's testimony which does not depend on Phenix's determination that C.D.'s accusers were more credible than C.D. It points out that Phenix reviewed court documents, police reports, presentence investigation reports,

criminal history information, DOC records, SCC records, and deposition testimony. Br. of Resp. at 34. The state admits that C.D. has never been convicted of sexually assaulting or molesting anyone under the age of 14, but argues that, “based on all the records and information [Phenix] had available,” she concluded that he had such urges and acted on them. Br. of Resp. at 34-35.

What the state fails to mention is that not only was C.D. never convicted of any sexual offenses against victims under the age of 14, he was never charged with any such conduct, there was no physical evidence of abuse, and no allegations were ever investigated. Thus, there were no police reports, court documents, criminal history or DOC records relating to such conduct. The only “records and information” Phenix had which would support her conclusions were the uncorroborated allegations of D.L., Kindra M., and M.S., which were sharply refuted by the defense evidence at trial and all of C.D.’s statements.

When an expert’s opinion as to an ultimate issue of fact is based solely on the expert’s perception of another witness’s truthfulness, that opinion must be excluded. State v. Dunn, 125 Wn. App. 582, 592-93, 105 P.3d 1022 (2005); State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994) (by stating that diagnosis of posttraumatic stress syndrome was secondary to sexual abuse, expert gave opinion that sexual abuse occurred,

which was for the jury to decide), review denied, 126 Wn.2d 1010 (1995); State v. Fitzgerald, 39 Wn. App. 652, 694 P.2d 1117 (1985) (pediatrician could not testify based solely on interviews with alleged victims that she believed allegations of rape). Because Phenix's diagnosis of pedophilia was dependent upon her evaluation of the truthfulness of the various witnesses, her testimony usurped the exclusive function of the jury to weigh the evidence and determine credibility, and its admission is constitutional error. See Dunn, 125 Wn. App. at 593.

3. THE EVIDENCE IS INSUFFICIENT TO SUPPORT COMMITMENT.

While the state has a legitimate interest in treating the mentally ill and protecting society from their actions, a statute providing for involuntary civil commitment satisfies due process only if the individual committed is both mentally ill and currently dangerous. In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002); In re Henrickson, 140 Wn.2d 686, 692, 2 P.3d 473 (2000); accord Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). A person may not be committed as an SVP unless the state proves beyond a reasonable doubt that the person suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16). The

statute is premised on a finding that the person subject to commitment is presently dangerousness. Henrickson, 150 Wn.2d at 692. This tie to present dangerousness is constitutionally required. In re Detention of Marshall, 156 Wn.2d 150, 157, 25 P.3d 111 (2005).

There was no evidence in this case that a mental illness makes C.D. currently dangerous. The only evidence the state presented of a mental illness was Phenix's diagnosis of pedophilia, which requires actions taken on a sexual arousal to prepubescent children, generally under the age of 14. 9RP 473-74. The state argues in its brief that there was abundant evidence to support Phenix's opinion that C.D.'s pedophilia continues to cause him serious difficulty in controlling sexually violent behavior, noting that various witnesses testified about sexual contact with C.D. between 1970 and 1997. Br. of Resp. at 38-39. Even so, the record contains no evidence of any pedophilic conduct or thoughts after 1987, 14 years before C.D. was incarcerated. 9RP 587. Phenix admitted that there was no evidence of recurrent sexual fantasies, urges, or behaviors involving children during that time. 9RP 588.

Even if all the allegations presented at trial were true, the evidence was insufficient to establish that C.D. is presently dangerous due to a mental illness. Because proof of present dangerousness is constitutionally required for commitment, C.D.'s commitment must be reversed.

B. CONCLUSION

For the reasons stated above and in the opening brief of appellant,  
the order of commitment must be reversed.

DATED this 20<sup>th</sup> day of February, 2008.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Reply Brief in *In re the Detention of C.D.*, Cause No. 36273-2-II, directed to:

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



Catherine E. Glinski  
Done in Port Orchard, WA  
February 20, 2008

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