

81644-1  
NO. 35805-1-II

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

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In re the Detention of:

DAVID W. McCUISTION,

Appellant.

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RESPONDENT'S MOTION RE:  
DISMISSAL OF APPELLANT'S APPEAL

- Respondent's Brief -

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### **I. IDENTITY OF PETITIONING PARTY**

The petitioning party is the State of Washington, Respondent herein.

### **II. STATEMENT OF RELIEF SOUGHT**

The State moves the Court for an order on the merits dismissing Mr. McCuiston's appeal because this Court lacks jurisdiction to consider an "appeal" from a determination of the trial court finding no probable cause to hold an unconditional release trial pursuant to RCW 71.09.090(2). There is no final decision as required by RAP 2.2(a).

### **III. STATEMENT OF THE CASE**

Mr. McCuiston was committed as a Sexually Violent Predator pursuant to RCW 71.09 on October 3, 2003. CP at 584. Pursuant to RCW 71.09.090(5), "[t]he jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged."

Since his commitment, Mr. McCuiston's case has been reviewed on an annual basis as provided in RCW 71.09.090. In 2004, Carole DeMarco, Ph.D. evaluated Mr. McCuiston and determined that he continued to suffer from Paraphilia, Not Otherwise Specified (Rape) and Antisocial Personality Disorder. CP at 19. Dr. DeMarco further concluded that those conditions

continued to cause Mr. McCuiston serious difficulty controlling his sexually violent behavior, and that he remained more likely than not to engage in acts of sexual violence if not confined. CP at 23. In 2005, Mr. McCuiston's case was reviewed by Carla van Dam, Ph.D. Dr. van Dam reached conclusions that were substantially comparable to those of Dr. DeMarco. *See* CP at 68-72. During both of the review periods, Mr. McCuiston chose not to participate in sex offender treatment. CP at 12, 71.

Under RCW 71.09.090(2)(a), an individual may request that the superior court hold a hearing to determine if there is probable cause to hold a trial to consider an unconditional release of a person committed as a sexually violent offender. Specifically, subsection (2)(b) and (c) includes the following:

(b) . . . At the show cause hearing, the prosecuting attorney or attorney general shall present prima facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. In making this showing, the state may rely exclusively upon the annual report prepared pursuant to RCW 71.09.070. The committed person may present responsive affidavits or declarations to which the state may reply.

(c) If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator and that no proposed less restrictive alternative is in the best interest of the person and

conditions cannot be imposed that would adequately protect the community; or **(ii) probable cause exists to believe that the person's condition has so changed that:** (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community, then the court shall set a hearing on either or both issues. [Emphasis added.]

A review hearing concerning both the 2004 and 2005 review periods was held on October 27, 2006. CP at 584. The State relied upon the van Dam and DeMarco reports while Mr. McCuiston presented a number of declarations in support of his request for a release trial. Regarding the issue of mental condition, Mr. McCuiston offered the declaration of Dr. Lee Coleman, M.D. who opined, in part, that there was insufficient evidence to conclude that Mr. McCuiston had ever suffered from a Paraphilia. CP at 617. Additionally, Mr. McCuiston submitted declarations from staff members at the Special Commitment Center who stated that they had not observed Mr. McCuiston exhibit any inappropriate sexual or assaultive behavior during his time there. *See e.g.* CP at 639-640.

At the conclusion of the hearing, the trial court found that Mr. McCuiston's condition remained such that he continued to meet the SVP definition and that Mr. McCuiston had not provided prima facie evidence that his condition had changed. CP at 586.

On January 17, 2007, Mr. McCuiston, pro se, filed a Notice of Appeal and a Motion for Discretionary Review, seeking review of a December 6, 2006, letter from the Hon. James Orlando denying Mr. McCuiston's request for a trial on the matter of unconditional release. This Court responded by opening the case and assigning a Court of Appeals cause number, but informed Mr. McCuiston that the trial court's order of which he sought review was not a decision of the trial court appealable as a matter of right, citing RAP 2.1(a) and 2.2(a), and instructed him to obtain a final order from the trial court. See letter of Jan. 23, 2007, from David Ponzoha, attached as Exhibit A. On Jan. 26, 2007, Mr. Ponzoha again wrote to Mr. McCuiston, indicating that, pursuant to the letter dated Jan. 23, 2007, he was placing the motion for discretionary review in the file without action. See Exhibit B.

An order on the October 27, 2006, show cause hearing was entered on February 20, 2007. CP at 584. Subsequently, assigned counsel appeared in the case and on August 20, 2007, filed an Opening Brief. There has been no further motion seeking discretionary review or otherwise invoking the jurisdiction of this Court, and the brief filed by counsel does not make reference to any of the criteria for discretionary review set forth in RAP 2.3(d).

#### IV. ARGUMENT

Mr. McCuiston seeks review of a trial court order denying his request for a new trial pursuant to RCW 71.09.090(2). The law is well settled that review of such orders is by Motion for Discretionary Review, and that there is no right of direct appeal. *In re Petersen*, 138 Wn.2d 70, 90, 980 P.2d 1204 (1999). As such, this Court does not have jurisdiction to consider his appeal.

In *Petersen*, the Washington State Supreme Court considered Mr. Petersen's contention that he was entitled to appeal the trial court's RCW 71.09.090(2) probable cause decision as a matter of right pursuant to RAP 2.2(a)(1), RAP 2.2(a)(8), and RAP 2.2(a)(13). *Petersen*, 138 Wn.2d at 83-84. The Court rejected all of these arguments. First, the Court noted that RAP 2.2(a)(8) (allowing direct appeal of the original order of commitment) did not apply to review of .090(2) probable cause orders because, by their very nature, "they take place in an ongoing process, the review hearings and the orders issued from them are interlocutory: they are not final, but await possible revision in the next hearing." *Id.* at 85, citing *In re Dependency of Chubb*, 112 Wn.2d 719, 724-25, 773 P.2d 851 (1989).

Next, the Court rejected Mr. Petersen's argument that the trial court's probable cause decision under RCW 71.09.090(2) is a final

judgment under RAP 2.2(a)(1). The Court noted that “the statute provides for continuing court jurisdiction over committed persons until their unconditioned release... In view of the statutory declaration that the courts have continuing jurisdiction of committed sexually violent predators, the order in this case cannot be a final judgment.” *Id.* at 88 (internal citations omitted). *See also* RCW 71.09.090(5) (expressly providing for the trial court’s continuing jurisdiction).

Finally, the Court considered Mr. Petersen’s contention that RAP 2.2(a)(13), which permits appeal from “any final order made after judgment affecting a substantial right,” applied to his situation. The Court determined that “a decision under RCW 71.09.020(2) finding no probable cause is not a final order after judgment in light of the court’s continuing jurisdiction over the committed persons until their unconditional release...It disposes only of the petition before the trial court and achieves no final disposition of the sexually violent predator.” *Id.* at 88.

It is clearly settled law that Mr. McCuiston does not have a right to appeal from a determination of the trial court finding no probable cause pursuant to RCW 71.09.090(2). This Court should therefore grant the State’s motion to dismiss for lack of jurisdiction.

V. CONCLUSION

This Court has no appellate jurisdiction over Mr. McCuiston's current appeal. Accordingly, the appeal should be dismissed.

RESPECTFULLY SUBMITTED November 13, 2007.

A handwritten signature in cursive script, appearing to read "Sarah B. Sappington".

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Washington State Court of Appeals  
Division Two

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General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

January 23, 2007

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Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
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Tacoma, WA, 98402-2171

CASE #: 35805-1-II/State of Washington, Respondent, v. David McCuiston, Petitioner  
Re: Pierce County. No. 98-2-11149-1

Dear Mr. McCuiston:

This Court is in receipt of your Notice of Appeal filed January 17, 2007. It appears, however, the notice was filed prematurely. The letter dated December 6, 2006, from Hon. James R. Orlando is not a decision of the trial court appealable as a matter of right. RAP 2.1(a) and 2.2(a).

This Court has opened your case under the above referenced Court of Appeals cause number. If you wish to proceed with your appeal, you must obtain a final order from the Superior Court pertaining to the letter dated December 6, 2006, from Hon. James R. Orlando. You have 45 days from the date of this letter to do so. If you do not file a final order with the Superior Court within 45 days and forward a copy to this Court, the matter will be set on the Clerk's motion calendar for dismissal. The Clerk will decide the motion to dismiss without further notice and without oral argument. If you file a final order with the Superior Court within 45 days, your Notice of Appeal will become effective the day after the Superior Court's decision is entered. All time requirements for perfecting your appeal will be determined from that date.

Also, if you file a final order within 45 days, please provide either the \$250 filing fee or an order of indigency in this case. If you have any questions concerning your appeal, please contact either the Case Manager identified above or me. Thank you for your attention to this matter.

Very truly yours,

David C. Ponzoha,  
Court Clerk

DCP:c

cc: Pierce County Clerk  
Sarah Sappington

EXHIBIT NO. A



Washington State Court of Appeals  
Division Two

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January 26, 2007

David McCuiston  
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Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
930 Tacoma Ave S Rm 946  
Tacoma, WA, 98402-2171

CASE #: 35805-1-II

State of Washington, Respondent, v. David McCuiston, Petitioner

Mr. McCuiston:

This court is in receipt of Appellant's Motion for Discretionary Review. Pursuant to letter dated January 23, 2007, from this court, I am placing the motion for discretionary review in the file without action.

Very truly yours,

David C. Ponzoha  
Court Clerk

DCP:c  
e: Sarah Sappington

EXHIBIT NO B