

No. 87726-2
(Ct. App. No. 65537-0-1)

WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

BAO DINH DANG,

Appellant.

STATE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ISSUES PRESENTED FOR REVIEW1

III. THE SUBSTANTIVE DUE PROCESS REQUIREMENT OF A MENTAL CONDITION AND DANGEROUSNESS WERE SATISFIED WHEN DANG WAS CIVILLY COMMITTED AS CRIMINALLY INSANE AND DO NOT NEED TO BE REPROVED WHEN REVOKING HIS CONDITIONAL RELEASE STATUS.....2

IV. BECAUSE DANG WAS ALREADY CIVILLY COMMITTED AS CRIMINALLY INSANE, THE DUE PROCESS STANDARD APPLICABLE TO REVOKE HIS CONDITIONAL RELEASE STATUS WAS BY “A PREPONDERANCE OF THE EVIDENCE”6

V. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ALLOWED HEARSAY EVIDENCE DURING THE REVOCATION PROCEEDING12

VI. CONCLUSION.....17

TABLE OF AUTHORITIES

<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)3, 6	
<i>Alter v. Morris</i> , 85 Wash.2d 414, 536 P.2d 630 (1975).....	7
<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 608, 260 P.3d 857, 864 - 865 (2011).....	11
<i>Hardee v. State, Dept. of Social and Health Services</i> , 172 Wn.2d 1, 10, 256 P.3d 339, 344 (2011).....	8, 9
<hr/> <i>In re Detention of Stout</i> , 159 Wn.2d 357, 372-374, 150 P.3d 86, 94 - 96 (2007).....	13
<i>In re McCuiston</i> , 174 Wn.2d 369, 275 P.3d 1092 (2012)	4
<i>In re Young</i> , 122 Wn.1, 26, 857 P.2d 989 (1993).....	10
<i>Jones v. United States</i> , 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983).....	3
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	passim
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 480, 92 S.Ct. 2593, 2600 (1972)..	4, 8, 13, 15
<i>Parham v. J.R.</i> , 442 U.S. 584, 605-06 (1979).....	15
<i>People v. Studdard</i> , 51 Ill.2d 190, 281 N.E.2d 678 (1972)	4
<i>Post v. City of Tacoma</i> , 167 Wn.2d 300, 313, 217 P.3d 1179 (2009)	8
<i>State v. Bao Dinh Dang</i> , 168 Wn.App. 480, 484, 280 P.3d 1118, 1121 (2012).....	6
<i>State v. Canfield</i> , 154 Wn.2d 698, 705-706, 116 P.3d 391, 395 (2005).....	8
<i>State v. Dahl</i> , 139 Wash.2d 678, 683, 990 P.2d 396, 399 (1999). 12, 13, 15	
<i>State v. McCormick</i> , 166 Wn.2d 689, 702-703, 213 P.3d 32, 38 (2009)...	8, 11
<i>State v. Platt</i> , 143 Wn.2d 242, 251 n. 4, 19 P.3d 412 (2001)	5, 7

I. INTRODUCTION

In 2007, after pleading not guilty by reason of insanity to Attempted Arson, Petitioner Boa Dinh Dang was civilly committed under Washington's criminal insanity commitment law. RCW 10.77.110. The trial court placed Dang on conditional release status. CP 7-10. Following several violations of his release conditions and other serious behavior supporting decompensation of his mental condition, in August 2008, Dang was placed in Western State Hospital pending revocation of his conditional release. The trial court agreed that revocation was appropriate and the Court of Appeals affirmed. Because the conditional release revocation process authorized by RCW 10.77 is appropriate both for public safety and the necessary treatment of the criminally insane, this court should affirm revocation of Dang's conditional release.

II. ISSUES PRESENTED FOR REVIEW

A. Do substantive due process requirements that govern Dang's initial civil commitment have any application to revocation of Dang's conditional release when Dang has remained civilly committed as a criminally insane person during the conditional release period and he has violated the conditions of his conditional release? No.

B. When Dang has remained civilly committed during the period of conditional release, does substantive due process create an obligation to prove the grounds for revocation under the initial commitment

standard of “clear and convincing evidence”, especially when procedural due process requires only proof by a “preponderance of the evidence” in revocation proceedings? No.

C. Did the trial court commit reversible error by considering otherwise reliable hearsay evidence during a civil revocation hearing, especially when the defense had a full opportunity to compel the witness’ attendance if it was believed that further cross-examination was necessary? No.

III. THE SUBSTANTIVE DUE PROCESS REQUIREMENT OF A MENTAL CONDITION AND DANGEROUSNESS WERE SATISFIED WHEN DANG WAS CIVILLY COMMITTED AS CRIMINALLY INSANE AND DO NOT NEED TO BE REPROVED WHEN REVOKING HIS CONDITIONAL RELEASE STATUS

Dang confuses the important difference between commitment *status* and commitment *disposition*. A person’s commitment *status* is determined by initial proceedings to civilly commit a person following a plea of not guilty by reason of insanity. Under RCW 10.77.110, in accord with the substantive due process cases cited by Dang, a person who is acquitted of a crime by reason of insanity who “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” is civilly committed as criminally insane. *See* RCW 10.77.010 (A “criminally insane” person means a person who meets the above commitment standard.). Dang was committed under this statutory

standard following his acquittal by reason of insanity. CP 7.

Once person is deemed to meet commitment criteria, the court then has jurisdiction to determine the appropriate commitment *disposition* – total confinement or conditional release. Under RCW 10.77.110, once the trial court has determined that the person meets commitment criteria, it is then required to determine whether the criminally insane person requires “hospitalization, or any appropriate alternative treatment less restrictive than detention in a state mental hospital, pursuant to the terms of the chapter.” In Dang’s case, he was allowed immediate conditional release under the strict terms of the court’s conditional release order. CP 7-10. Indeed, a “conditional release” does not end the commitment itself, but “means modification of a court-ordered commitment, which may be revoked upon violation of any of its terms.” RCW 10.77.010(3).

Because Dang remained committed during his conditional release and the revocation proceedings, there was no requirement for the State to re-prove the substantive due process basis for his civil commitment – mental condition and dangerousness. Substantive due process does not support Dang’s attempt to equate “revocation of conditional release” with “commitment.” Pet. for Review at 14. The cases cited by Dang, including *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), and *Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), were satisfied with Dang’s initial and continuing commitment as a

criminally insane person. As the United State Supreme Court pointed out in the context of parole revocation, “the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.” *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600 (1972). *See also People v. Studdard*, 51 Ill.2d 190, 281 N.E.2d 678 (1972) (rejecting need to support revocation with dangerousness showing because the person was already committed).

Moreover, there is no need for the State to reprove dangerousness in order to revoke Dang because the dangerousness finding from his initial commitment remains in effect. As this court pointed out in the context of the highly similar civil commitment law for sexually violent predators, “once a fact-finder has determined that an individual meets the criteria for commitment as a SVP, the court accepts this initial conclusion as a verity in determining whether an individual is mentally ill and dangerous as a later date.” *In re McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012).

If Dang believes he is no longer dangerous, the statutory release process puts the burden on him to prove that he is no longer dangerous and subject to civil commitment.¹ Dang’s effort to import substantive due

¹ Dang makes much of the claim that he was evaluated for possible civil commitment under RCW 71.05 after being detained at Harborview and before his transfer to Western State Hospital. However, there would be no basis to commit Dang under RCW 71.05 when he was already committed under RCW 10.77 as criminally insane. Under RCW 71.05.150, a

process standards applicable to the initial civil commitment into a revocation proceeding is contrary to the release standards in RCW 10.77.200. If Dang believes that he is no longer dangerous or mentally ill, RCW 10.77.200 places the burden on him prove “by a preponderance of the evidence that the petitioner no longer presents, as a result of a mental disease or defect, a substantial danger to other persons, or 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.” This court approved RCW 10.77.200 against constitutional challenge in *State v. Platt*, 143 Wn.2d 242, 251 n. 4, 19 P.3d 412 (2001), noting that “Washington law since 1905 has presumed the mental condition of a person acquitted by reasons of insanity continues and the burden rests with that individual to prove otherwise.”

Under the revocation statute, “[t]he issue to be determined is whether the conditionally released person did or did not adhere to the terms and conditions of his or her release, or whether the person presents a threat to public safety.” RCW 10.77.190. The Court of Appeals correctly determined that this statute does not require the State to reprove

designated mental health professional may act to detain a person only if the person presents a likelihood of serious harm himself or others. As a matter of law, such harm would not be present for a person who is already committed under RCW 10.77 as criminally insane and under the control of Western State Hospital following his transit from Harborview. In other words, there is no need to detain someone who is already detained under a parallel civil commitment statute.

dangerousness in order to revoke Dang's conditional release. *State v. Bao Dinh Dang*, 168 Wn.App. 480, 484, 280 P.3d 1118, 1121 (2012). It also correctly held that Dang failed to cite any cases applicable to revocation proceedings, and thus, "failed to prove the unconstitutionality of RCW 10.77.190 beyond a reasonable doubt." *Id.* at 485. Proof of dangerousness is not necessary to revoke conditional release when a committed person has failed to adhere to the terms of that release.²

IV. BECAUSE DANG WAS ALREADY CIVILLY COMMITTED AS CRIMINALLY INSANE, THE DUE PROCESS STANDARD APPLICABLE TO REVOKE HIS CONDITIONAL RELEASE STATUS WAS BY "A PREPONDERANCE OF THE EVIDENCE"

Dang's claim that the trial court should have determined his revocation by "clear and convincing evidence" is largely derivative of his claim that the substantive due process standards applicable to an initial civil commitment govern revocation of his conditional release. Although "clear and convincing evidence" is the constitutional standard of proof for an initial civil commitment, *see Addington*, 441 U.S. at 432-33, Dang fails to cite a single case applying this standard as a matter of constitutional

² Of course, as the Court of Appeals points out, the trial court did make an affirmative finding that Dang was dangerous: "Conclusion of Law No. 5 provides: The defendant cannot be conditionally released without presenting a substantial danger to other persons, and he presents a substantial likelihood of committing criminal acts jeopardizing public safety and security." *State v. Bao Dinh Dang*, 168 Wash.App. 480, 484, 280 P.3d 1118, 1121 (2012). In his petition for review, Dang did not challenge the decision below to supplement the record under RAP 9.11 in order to consider the trial court's actual findings.

right to revocation of conditional release.

As the Court of Appeals points out, Dang's citation to MPR 4.5 is inapposite because those court rules apply only to persons civilly committed under RCW 71.05. Dang raises no claim that this violates his equal protection rights. Such a claim would not prevail because this court has already "rejected equal protection arguments that individuals detained under chapter 10.77 RCW should be treated as people detained under chapter 71.05 RCW, Washington's civil commitment law." *State v. Platt*, 143 Wash.2d 242, 247, 19 P.3d 412, 414 (2001). "[I]t is logical that those who have reached the attention of the State because of serious antisocial acts, would be subject to more procedural burdens in obtaining their release than are those whose acts are less threatening to the public safety." *State v. Platt*, 143 Wash.2d at 247 (quoting *Alter v. Morris*, 85 Wash.2d 414, 536 P.2d 630 (1975)).

Dang fails to demonstrate any error in application of the preponderance standard to prove revocation of conditional release. As set forth in the State's response brief, the preponderance standard is commonly applied to revocation situations. See Response at 26-28. It should also apply to a revocation under RCW 10.77.190.

Determination of the appropriate burden of proof is a procedural due process question. In order to determine the appropriate burden of proof, the court considers the three factors set out in *Mathews v. Eldridge*,

424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976):

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Hardee v. State, Dept. of Social and Health Services, 172 Wn.2d 1, 10, 256 P.3d 339, 344 (2011) (quoting *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009)).

Dang's private interests in a higher burden of proof for a revocation hearing are mixed. Because Dang was *conditionally* release, his private interest in liberty is truncated. Like a person facing parole revocation, a civilly committed person on conditional release enjoys only a conditional liberty interest: "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *State v. Canfield*, 154 Wn.2d 698, 705-706, 116 P.3d 391, 395 (2005) (quoting *Morrissey*, 408 U.S. at 489. *See also State v. McCormick*, 166 Wn.2d 689, 702-703, 213 P.3d 32, 38 (2009) ("McCormick's rights are already diminished significantly as he was convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions:").

Moreover, with regard to civilly committed individuals, the

purpose of revocation is not merely public safety, but also to provide Dang with important mental health treatment. Dang has a concrete interest in restoring his mental health. *See* RP 100-101 (Dang testifying to the value of stabilizing his mental condition.)

The second *Mathews* factor weighs in the State's favor toward application of a preponderance standard. The risk of erroneous deprivation is minimal given the protections enjoyed by Dang both at his initial commitment hearing and at the revocation hearing. Dang has the full panoply of rights, including the right to counsel, to the assistance of an expert, to call witnesses, to testify on his behalf, etc. Dang has failed to make any showing that "requiring the additional procedural safeguard of a different evidentiary standard is necessary to curtail erroneous deprivations." *Hardee v. State, Dept. of Social and Health Services*, 172 Wn.2d 1, 11, 256 P.3d 339, 345 (2011) (rejecting need for higher burden of proof to revoke home child care license). As this court observed in *Hardee*:

While additional procedural safeguards will always decrease the likelihood of revocation, that fact alone does not justify their adoption. Rather, the current procedures must suffer from inadequacies that make erroneous deprivations readily foreseeable. The current procedural protections in place sufficiently protect against erroneous deprivations.

Id. Dang has made no showing that current procedures are inadequate.

In the context of civil commitment, a higher burden of proof is also unnecessary under the second *Mathews* prong because Dang has a full

opportunity to again seek conditional release after an additional six months of inpatient treatment, or sooner if recommended by DSHS. RCW 10.77.150(2), (5). In other words, revocation is not an end point in the commitment process, but an opportunity for additional treatment and a subsequent conditional release. This represents an additional procedural safeguard against the erroneous deprivation of Dang's conditional liberty.

The third *Mathews* factor heavily favors revocation under a preponderance standard. The State's two compelling interests in any civil commitment scheme are public safety and treatment of the committed individual. *In re Young*, 122 Wn.1, 26, 857 P.2d 989 (1993). Revocation or modification of a conditional release is in the discretion of the court if "the released person is failing to adhere to the terms and conditions of his or her conditional release or is in need of additional care and treatment." RCW 10.77.190. The level of flexibility afforded by a preponderance standard allows a trial court to act to quickly preserve public safety or ensure additional treatment opportunities for a committed person where necessary.

Public safety would be unnecessarily placed at risk if a person who has already been deemed "a substantial danger to other persons" or who "presents a substantial likelihood of committing criminal acts jeopardizing public safety or security" can be removed from the community only with proof of the second highest litigation burden. The public should not be

exposed to this level of risk. It is important that trial courts be able to place the conditionally released person in a secure setting on the advice of mental health professionals in order to resolve treatment and public safety concerns.

If the preponderance standard is met, it demonstrates that the person “more likely than not” is not adhering to the terms of his conditional release or is in need of additional care and treatment. *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857, 864 - 865 (2011)(“[I]n most civil matters, the standard of confidence required is a “preponderance,” or more likely than not, or more than 50 percent.”). It is unreasonable to require the public to bear the risk up to the “clear and convincing” threshold of proof. *See State v. McCormick* 166 Wn.2d 689, 703-704, 213 P.3d 32, 39 (2009)(noting the strong concerns against maintaining a community placement when the conditionally released person is not following the release order).

For these reasons, the preponderance standard is sufficient to satisfy procedural due process. In order to protect public safety and ensure that appropriate mental health treatment is available, a person should be returned to a secure hospital setting upon a preponderance level of proof. The Court of Appeals decided this issue correctly.

V. **THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT ALLOWED HEARSAY EVIDENCE DURING THE REVOCATION PROCEEDING**

Dang complains that testimony was allowed regarding an out-of-court statement from a Harborview case worker that Dang had made threats about setting a gas station on fire. *See* RP 32, 44-45. Prior to the testimony on pages 44-45, the defense made a hearsay objection. RP 44. The trial court allowed the testimony under a “relaxed evidentiary standard. The defense did not request, nor did the trial court make a finding about the difficulty of calling the witness who had heard Dang’s threat about the gas station.

It is well established that a person facing revocation has only minimal due process rights. *State v. Dahl*, 139 Wash.2d 678, 683, 990 P.2d 396, 399 (1999). Although confrontation rights are accordingly limited, this court has indicated that there should be “good cause” for a decision to forgo live testimony:

Courts have limited the right to confrontation afforded during revocation proceedings by admitting substitutes for live testimony, such as reports, affidavits and documentary evidence. *See Nelson*, 103 Wash.2d at 764, 697 P.2d 579 (citing *United States v. Penn*, 721 F.2d 762, 763 (11th Cir.1983); *United States v. Burkhalter*, 588 F.2d 604, 607 (8th Cir.1978); *United States v. McCallum*, 677 F.2d 1024, 1026 (4th Cir.1982), *cert. denied*, 459 U.S. 1010, 103 S.Ct. 365, 74 L.Ed.2d 400 (1982)). However, hearsay evidence should be considered only if there is good cause to forgo live testimony. *Nelson*, 103 Wash.2d at 765, 697 P.2d 579. Good cause is defined in terms of “difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ evidence.” *Id.* *Dahl* asserts that the court considered the hearsay evidence regarding the exposure and note incidents

without first determining that good cause existed to do so.

Id. In this case, the trial court erred by not making a good cause finding.

Nevertheless, the trial court's decision to admit testimony on Dang's statements without a good cause finding is subject to harmless error analysis. As this court explained:

Violations of a defendant's minimal due process right to confrontation are subject to harmless error analysis. *Badger*, 64 Wash.App. at 909, 827 P.2d 318. *See State v. Powell*, 126 Wash.2d 244, 267, 893 P.2d 615 (1995) ("Reversal is merited when an error, such as improperly admitting hearsay evidence, deprives the defendant of the right to confrontation, unless the error is harmless."); *State v. Hieb*, 107 Wash.2d 97, 108, 727 P.2d 239 (1986); *State v. Dupard*, 93 Wash.2d 268, 271, 609 P.2d 961 (1980). In revocation cases, the harm in erroneously admitting hearsay evidence and thus denying the right to confront witnesses is the possibility that the trial court will rely on unverified evidence in revoking a suspended sentence. *Boone*, 103 Wash.2d at 235, 691 P.2d 964. *Morrissey* requires that a finding of a parole violation be "based on verified facts and that the [court's] exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." 408 U.S. at 484, 92 S.Ct. 2593. "Unreliable hearsay may not be the sole basis for revocation...." *Nelson*, 103 Wash.2d at 765, 697 P.2d 579 (emphasis omitted).

Id. at 688. Here, the trial court error was harmless.

In the civil commitment context, confrontation rules are less stringent. In *In re Detention of Stout*, 159 Wn.2d 357, 372-374, 150 P.3d 86, 94 - 96 (2007), this court rejected reliance on *Dahl* to support a confrontation right outside the criminal context. The *Dahl* case failed to engage "in a *Mathews* balancing test, which is the appropriate test to use in determining what process is due in a given context, particularly where civil commitments are concerned." *Stout*, 159 Wn.2d at 373. The failure

to engage in a *Mathews* test rendered *Dahl* “legally distinct from Stout’s case” and “factually dissimilar.” *Id.*

Application of the *Mathews* factors in a civil commitment context supports deeming the trial court’s error harmless. As to the first factor, Dang has an interest in being revoked only on the basis of reliable evidence. Although a good cause finding helps to preserve this interest, it is more directly vindicated through the ability to cross-examine witnesses.

With regard to the second *Mathews* factor, the lack of a good cause finding somewhat harms Dang’s interests in being revoked only due to reliable evidence. Nonetheless, another mechanism is available to Dang to prevent a revocation based on potentially unreliable evidence: the right to subpoena witnesses and to examine those witnesses. These two procedural protections make up for the trial court’s error. If Dang was concerned that he was being incorrectly quoted on his threats to set fire to a gas station, it was well-within Dang’s procedural right to call the witness and examine the witness on the statement.

It is unlikely that Dang disagreed with the accuracy of the statements that were attributed to him. Other non-hearsay evidence quoted Dang as saying that “he was going to do something big” and “he needed to go back to Western State Hospital.” RP 48.

When Dang himself took the stand, he first indicated that he “couldn’t remember” making a statement about setting fire to a gas

station, but then testified on direct that he had no intent to follow through on statements to set a gas station on fire:

Q. (by Dang's counsel) Do you have any intent to do what you say as far as say damaging a gas station or wanting to live in a shelter?

A. (by Dang) No, I did not.

RP 102. On cross, when asked about setting fire to a gas station, Dang said, "I cannot remember saying that. I don't think I said things like that at all." RP 105. But when asked "if somebody else thinks that you did, do you think you might have?," Dang answers, "[i]t could be." *Id.* Dang then points out, in accord with his criminal history, that "I've done that before" i.e. set a gas station on fire.

As for the State's interest – the third *Mathews* factor -- it also shares Dang's interest in ensuring the use of accurate information at a revocation proceeding. *Morrissey*, 408 U.S. at 483-84. It also has a substantial interest in being able to return a conditionally released person to a secure setting without the burden of a full adversarial proceeding. *Id.* at 483. The State also has a substantial interest in allowing mental health professionals to spend their time treating patients, rather than testifying in court. *See Parham v. J.R.*, 442 U.S. 584, 605-06 (1979).

When these interests are weighted, the *Dahl* requirement of a written finding of unavailability is unnecessary in the civil commitment context – especially with regard to statements of the committed person

that were recorded by a mental health case worker. The interests of Dang and of the State to accurate evidence are sufficiently served in this instance by Dang's existing right to subpoena and examine witnesses. Revocation should be an abbreviated proceeding that is subject to relaxed evidentiary rules. Those relaxed evidentiary rules are sufficient when either side has the ability to rebut hearsay statements by calling the out-of-court declarant and subjecting that witness to an examination. Such an approach has the virtue of allowing a streamlined hearing for uncontested hearsay evidence and an opportunity to rebut contested hearsay evidence.

In this case, the trial court's error was harmless because Dang had the ability to contest the testimony if he disagreed with its substance. Such a protection is sufficient under *Mathews* to balance the interests of both Dang and the State.

Moreover, the evidence apart from the gas station was substantial. Dang was decompensation and in need of hospitalization both for public safety and his own treatment. The only psychologist to testify at the proceeding, Dr. Norma Martin, supported the need for Dang to remain at Western State hospital. RP 77. The trial court acted appropriately in revoking Dang's conditional release.

VI. CONCLUSION

For the foregoing reasons, this court should affirm the decision of the Court of Appeals.

DATED this 30th day of January, 2013.

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