

No. 66653-3-1

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

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STATE OF WASHINGTON,

Respondent,

v.

KYLE WARREN DAVIS,

Appellant.

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

The Honorable Steven J. Mura

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. WHILE TECHNICALLY MOOT, THE ISSUE OF INVOLUNTARY MEDICATION OF NGRI DETAINEES IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST

The Department of Health and Social Services (the Department) moves to dismiss this matter as moot, noting that the superior court's order authorized involuntary medication of Mr. Davis from February 19, 2011, August 18, 2011, an order which the court stayed. Brief of Respondent at 7-8. The Department notes the order has now expired. *Id.*

Where a matter is technically moot, this Court may still decide a moot issue if the case involves an issue of "substantial public interest" that warrants appellate review. *See In re Personal Restraint of Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (this court may decide a moot case involving an issue "of substantial public interest"). Whether a moot case involves an issue of substantial public interest involves a determination regarding: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination that will provide future

guidance to public officers, and (3) the likelihood that the question will recur. *Id.*<sup>1</sup>

The Department argues that since Division Two has already decided the issue presented in the Department's favor, this case no longer involves a matter of continuing or substantial public interest, citing *State v. C.B.*, \_\_\_ Wn.App. \_\_\_, 2011 WL 5842788, slip op at 5 (No. 40558-0-II, November 22, 2011). The Department claims the decision in *C.B.* was an "authoritative determination from the Court of Appeals." Brief of Respondent at 8. The Department's argument is overly broad as this Court has not issued a decision on this issue, nor has the Supreme Court. See CAR 3 ("The judgments and decrees of the Court of Appeals shall be final and conclusive upon all parties except when the Supreme Court has assumed jurisdiction of the cause."); SAR 3 ("The judgments and decrees of the Supreme Court shall be final and conclusive upon all the parties properly before the court.").

Secondly, the Court in *C.B.* provided a detailed analysis of its determination of whether the issue is a matter of substantial public interest:

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<sup>1</sup> In addition, "[w]here a technically moot issue implicates due process rights, it is one in which there is sufficient public interest to warrant deciding it." *In re Dependency of H.*, 71 Wn.App. 524, 528, 859 P.2d 1258 (1993).

First, the Department's ability to petition for the involuntary medication of criminally insane individuals committed to state institutions is a matter of public concern. See, e.g., *In re Det. Of C.M.*, 148 Wn.App. 111, 115, 197 P.3d 1233, review denied, 166 Wn.2d 1012, 210 P.3d 1018 (2009) ("Cases involving mental health procedures . . . frequently present exceptions to the mootness doctrine.") It is an issue that implicates an individual's rights to refuse medical treatment and the State's interest in providing effective medical treatment to individuals in its care. Second, as the Department notes, similar issues have arisen in at least two superior court cases and in one unpublished Division One case in the last two years, suggesting that this issue will continue to recur. Finally, because there are no binding court decisions on this issue, a decision on the merits will provide future guidance for public officers.

*Id.*

Further, resolution of the issue regarding whether this issue will recur turns upon how this Court views the decision in *C.B.* As the issue now stands, only Division Two of this court has addressed the issue of whether RCW 10.77.120 authorizes forcible medication of Not Guilty by Reason of Insanity (NGRI) detainees and Mr. Davis submits the issue has sufficient merit to warrant review by a second division of the Court. *State v. Veazie* 123 Wn.App. 392, 399, 98 P.3d 100 (2004) (where court agreed to decide moot issue despite the issue being decided by another Division of the Court).

Cases involving the Department's efforts to forcibly medicate NGRI detainees will continue to appear in the superior courts and this Court, and since the Supreme Court has not yet rendered a decision on this issue, the rationale still applies as it did in *C.B.* for determining this issue to be a matter of substantial public interest. In addition, should Mr. Davis again refuse to voluntarily take his medication, the Department will again necessarily be requesting an order to involuntarily medicate Mr. Davis. Despite being technically moot, this Court should still decide this matter.

2. THERE IS NO AUTHORITY IN CHAPTER  
10.77 RCW TO INVOLUNTARILY MEDICATE  
A NGRI DETAINEE

a. RCW 10.77.120 unambiguously does not authorize involuntary medication of NGRI detainees. The Department argues that RCW 10.77.120 provides *explicit* statutory authority for the forcible medication of NGRI detainees, relying on the decision in *C.B.*. Brief of Respondent at 8-10.

In *C.B.*, the Court concluded RCW 10.77.120 provided explicit authority to involuntarily medicate NGRI detainees, relying not on the statutory scheme adopted by the Legislature but on the dictionary definition of "treatment" and "medication":

In our view, the legislature's command that the secretary "provide adequate care and individualized treatment" to criminally insane individuals in state institutions constitutes statutory authorization for the secretary to administer medication involuntarily to criminally insane individuals who are under the secretary's control. The dictionary defines "treatment" as "the action or manner of *treating a patient medically* or surgically" and "medication" as "*treatment* with a medicament." Webster's Third New Int'l Dictionary 1402, 2435 (2002) (emphases added). Medication, in other words, is a form of treatment that may be appropriate to a specific individual depending on his or her medical circumstances. As such, it clearly falls within the statute's reach. Accordingly, CB's argument that the Department lacked statutory authority to treat her with antipsychotic medications fails.

C.B., slip op at 7.

Initially, the Court incorrectly engaged in statutory construction without first determining that RCW 10.77.120 was ambiguous. To the contrary, RCW 10.77.120 is unambiguous in excluding forcible medication as an option for those committed pursuant to an NGRI finding. Chapter 10.77 RCW does not contain provisions for involuntary medication for those committed as NGRI but does provide for involuntarily medicating those awaiting trial and only for the purpose of restoring competency to stand trial. *Compare* RCW 10.77.092-.093 and RCW 10.77.120. RCW 10.77.120 does not contain any mention of involuntary medication.

The Court was thus barred from engaging in statutory construction since the RCW 10.77.120 was unambiguous.

The *C.B.* Court necessarily acknowledged that RCW 10.77.120 does not specifically address forcible medication, thus in interpreting the statute to allow forcible medication, the Court necessarily read wording into the statute that does not exist. Appellate courts do not supply omitted language even when the Legislature's omission is clearly inadvertent, unless the omission renders the statute irrational. *State v. Taylor*, 97 Wn.2d 724, 729, 649 P.2d 633 (1982).

Further, allowing forcible medication under RCW 10.77.120 would provide NGRI detainees less protection than those civilly committed. Compare 10.77.120 and RCW 71.05.217. Western State Hospital (WSH) is not a prison but a hospital in which mental illness is treated in fundamentally similar ways regardless of the reason for the patient's commitment.

The right of civilly committed patients to refuse psychiatric medications is explicitly protected by statute and Department rule. RCW 71.05.215; WAC 388-865-0570. Under this scheme, medications can be administered on an emergency basis for up to 24 hours and for a short-term basis for up to 30 days under an

internal hospital administrative process. Any longer term forced medication requires a judicial order, following a hearing in which the patient is provided a full panoply of due process protections including the right to counsel, to present evidence, to cross examine witnesses, to have the rules of evidence enforced, to remain silent, to review and copy information from the court file, and to receive adequate notice and opportunity to prepare for the hearing. RCW 71.05.217(7)(c). The standard of proof in such a hearing is “clear, cogent and convincing evidence” and the substantive standard for issuance of an order is “that there is a compelling state interest that justifies overriding the patient’s lack of consent . . . , that the proposed treatment is necessary and effective, and that medically acceptable forms of alternative treatment are not available, have not been successful, or are not likely to be effective.” RCW 71.05.217(7)(a).

Under *C.B.*, far fewer procedural safeguards are provided and a much less stringent set of substantive standards for the forced administration of psychiatric medications is available to NGRI patients than to civilly committed patients. These differences are contrary to the statutory scheme for commitment and treatment of NGRI detainees, which commits them to the DSHS’s custody for

treatment of their mental illness in fundamentally the same way as if they had been civilly committed.

b. In superior court, the Department relied on the procedure provided in RCW 71.05.217 for authority to forcibly medicate Mr. Davis, not RCW 10.77.120. Recognizing that RCW 10.77.120 does not authorize forcible medication, the Department relied below upon the procedure for authorization to forcibly medicate those civilly committed under RCW 71.05.217 in order to obtain authority to forcibly medicate Mr. Davis. CP 27-32. The Department now relies solely upon RCW 10.77.120 for authority.

Interestingly, while the Department relies on the majority decision in *C.B.*, the Department fails to acknowledge Judge Van Deren's concurrence which supports Mr. Davis' argument concerning the fact that involuntary medication is excluded in RCW 10.77.120 but explicitly *included* in RCW 71.05.217.

Thus, [C.B.]'s argument that the legislature must intend that the criminally insane not be involuntarily medicated may be supported by the lack of reference to involuntary medication administration for those individuals and their exclusion from the procedures the Department can use for those committed under RCW 71.05.217.

*C.B.*, slip op at 10.

RCW 10.77.120 and RCW 71.05.271 were enacted during the same legislative session. Laws 1973 1<sup>st</sup> ex.s. c 142 § 142 (RCW 71.05.217); Laws 1973 1<sup>st</sup> ex.s. c 117 §12 (RCW 10.77.120). Under the doctrine of *expressio unius est exclusio alterius*, since the Legislature chose to include the forcible medication process in one statute and omit it from the other necessarily means the Legislature intended to omit the provision regarding involuntary medication from RCW 10.77.120. As a consequence, this Court's inquiry must end with the plain language of RCW 10.77.120. This Court cannot engraft the forcible medication provision onto RCW 10.77.120 even if this Court believes the statute should be rewritten to comply with the Department's request. See *State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) (“[H]owever much members of this court may think that a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be .... even if the results appear unduly harsh.” (citations omitted)).

3. THE DEPARTMENT'S RELIANCE ON THE *IN PARENS PATRIAE* DOCTRINE IN THE ABSENCE OF STATUTORY AUTHORITY SHOULD BE REJECTED AS SETTING A DANGEROUS PRECEDENT

By relying on the *in parens patriae* doctrine in the absence of any statutory authorization, the Department asks this Court to “trust us, we’re the State.” In relying upon decisions rarely followed in the modern era and arising from scenarios now covered by statutory authority, the Department is asking this Court to do something courts have been loathe to do; act in the absence of statutory authority. See *Weber v. Doust*, 84 Wn. 330, 341 (1915) (Parker, J. dissenting) (emphasis added) (“I dissent upon the grounds stated in the former opinion. *I regard the majority opinion as establishing a rule of law endangering constitutional liberty*, in view of the fact that the plaintiff was not arrested or detained as a suspected criminal, but in defiance of the plain procedure expressly provided by the statute.”).

The majority recognizes that it has no real statutory authority to act in this area. It cites no authority supporting the proposition that the ordering of sterilization of human beings is among the inherent powers reserved to the courts. As stated in 20 Am.Jur.2d Courts § 78 (1965), the inherent powers of a court do not increase its jurisdiction; they are limited to such powers as are essential to the existence of the court and the orderly and efficient exercise of its

jurisdiction. As is made clear in section 79 of that encyclopedia, the powers pertain to matters procedural rather than substantive. They do not include the power to determine what laws will best serve the public welfare.

The majority's position, as I read it, is simply that the court has power to grant relief in any case that comes before it, whether or not that relief is authorized by constitution, statute, or principle of common law. If a complaint is filed, the majority indicates, the court can give a remedy. The need to state a claim "upon which relief can be granted" is eliminated from the requirements for maintaining an action.

My great concern is that the courts do not become "an imperial judiciary," a phrase coined, I believe, by Nathan Glaser. In his book *Power*, written late in his career, Adolph Berle spoke of the United States Supreme Court as a benevolent dictatorship. And Phillip Kurland has often traced the Supreme Court's wandering in the political thicket with no compass for a guide, save its own subjective fancies.

The rule of law is not well served by handing unrestricted policymaking power to a shifting majority of as few as five whose judgment, as Justice Jackson would say, is not final because it is infallible, but infallible because it is final.

*Matter of Guardianship of Hayes*, 93 Wn.2d 228, 243, 249, 608

P.2d 635 (1980) (Rossellini, J. dissenting).

Here, the Legislature has provided a statutory scheme for the treatment and care of NGRI detainees that does *not* provide for the forcible medication of those detainees. See RCW 10.77.120.

This Court should not second-guess the Legislature and impose a

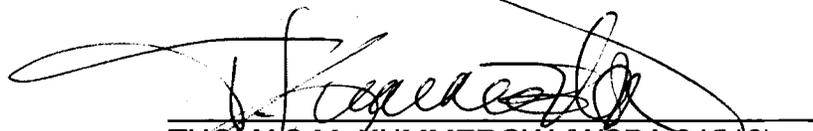
process which it defines as in the public welfare in the absence of statutory authority. Instead of urging this Court to act on its own in the absence of statutory authority, the Department should be seeking relief from the Legislature for amendments to RCW 10.77.120. This Court should reject the Department's invitation to act in the absence of statutory authority and find RCW 10.77.120 does not authorize the involuntary medication of NGRI detainees.

B. CONCLUSION

For the reasons stated in the opening brief as well as this reply brief, Mr. Davis requests this Court reverse the superior court and find the Department lacks statutory authority to forcibly medicate him.

DATED this 6th day of January 2012.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 66653-3-I
	)	
KYLE DAVIS,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X \_\_\_\_\_ 