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No. 71460-1-I

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

IN RE THE DETENTION OF RICHARD ALLEN RUDE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN RUDE,

Petitioner/Appellant.

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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

The Honorable John Meyer

PETITIONER/APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

Richard Rude appeals from the denial of his petition for release to a less restrictive alternative to secure confinement (“LRA”) brought pursuant to RCW 71.09.090(2)(d). As the State acknowledges, under this statutory provision, “the court shall consider whether release to an LRA would be in the best interest of the person and whether conditions can be imposed that would adequately protect the community without considering whether the person’s condition has changed.” Br. Resp. at 4.

Mr. Rude proposed an LRA that fully complied with the criteria set forth in RCW 71.09.092, and included a detailed treatment plan with a DSHS-approved provider, and comprehensive, 24-hour supervision in a placement with individuals with twenty years of experience housing sex offenders. The proposed LRA would also have enabled Mr. Rude to participate in intensive one-on-one treatment, which he had requested at the Special Commitment Center (SCC) and which was not made available to him.

The State offered no evidence to suggest that an LRA which would have enabled Mr. Rude to participate in treatment was not in his best interests, or that conditions could not be imposed that would adequately protect the community. The State nevertheless contends its proof was “overwhelming” that it was not in Mr. Rude’s best interest to be released

to his proposed LRA. Br. Resp. at 6. The State's contentions in large part depend upon two false premises: that despite the plain language of RCW 71.09.090(2)(d), it is proper for a trial court to consider whether a committed person has changed through treatment in deciding whether to grant an LRA, and that Mr. Rude's treatment plan was somehow suspect given his stated preference for individual as opposed to group treatment. The State's claims must fail.

1. RCW 71.09.090(2)(d) does not require a committed person to demonstrate change through treatment to establish that release to an LRA is in his or her best interests.

The State's principal argument is predicated on the flawed and statutorily-unsupported assumption that Mr. Rude's lack of participation in sex offender treatment *ipso facto* demonstrates that release to an LRA was not in Mr. Rude's best interests, and that the LRA does not contain conditions that could adequately protect the community. Br. Resp. at 8, 12-14. In support of the contention that "[t]he 'best interest' inquiry ... necessarily must consider treatment", the State quotes this Court's opinion in In re Detention of Bergen, 146 Wn. App. 515, 195 P.3d 529 (2008), rev. denied, 165 Wn.2d 1041 (2009). But the quoted portion in Bergen deals with the statutory intent behind amendments to the statutory provision dealing with the right to petition for an LRA under RCW 71.09.090(2)(c),

which obligates the petitioner to demonstrate his or her condition has changed as a predicate to securing a trial on the issue. As argued in Mr. Rude's opening brief, ascribing a similar requirement of change through treatment to RCW 71.09.090(2)(d) renders the statutory provision a nullity, and is contrary to settled rules of statutory construction. See Br. App. at 20.

The State contends that Mr. Rude is advocating for the adoption of "a sweeping rule prohibiting a trial court from considering relevant treatment or evidence of changes in an LRA trial." Br. Resp. at 11. Mr. Rude is simply asking for a straightforward application RCW 71.09.090(2)(d), which directs:

The court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, **without considering whether the person's condition has changed.**

RCW 71.09.090(2)(d) (emphasis added); see Erection Co. v. Dep't of Labor and Industries of State of Wash., 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (reiterating the "well-settled" principle that "the word 'shall' in a statute is presumptively imperative and operates to create a duty").

While implicitly conceding that the plain language of the statute is contrary to its position, Br. Resp. at 6, the State nevertheless maintains that the fact that Mr. Rude did not engage in treatment is a sufficient basis,

on its own, to conclude that the proposed LRA did not contain conditions adequate to protect the community. Br. Resp. at 13. But, as this Court stated in Bergen,

[T]he ‘adequate community safety’ determination necessarily assumes that Bergen is likely to reoffend and the question then becomes whether the proposed LRA will prevent an otherwise-likely offense if he is released. **The focus of this determination is therefore on the plan, not the person[.]**

Bergen, 146 Wn. App. at 533 (emphasis added). The State has not cited to any evidence in the extensive trial court record showing that Mr. Rude’s release *plan* did not contain conditions adequate to protect community safety.

2. The State has failed to credibly rebut Mr. Rude’s arguments that release to an LRA in which Mr. Rude would engage in individual treatment was not in his best interests, or that conditions could not be imposed to adequately assure community safety.

The State energetically defends the trial court’s misplaced focus on Mr. Rude’s lack of participation in group treatment. Br. Resp. at 14-16. The State largely glosses over the fact that Mr. Rude repeatedly, consistently, and credibly sought individual treatment. The State instead reiterates the false premise that individual treatment may be less effective “because of the potential for manipulation of the therapist and the absence

of peer feedback.” Br. Resp. at 15. The available data, however, contradicts this premise.

In his opening brief, Mr. Rude cited to a recent article in Psychology Today evaluating a meta-study published in the British Medical Journal. Br. App. at 16. The meta-study, after analyzing 1447 abstracts and 167 full-text studies, found little correlation between reduced recidivism and participation in group therapy of the kind available at SCC. Niklas Langstrom, Pia Enebrink, et al., “Preventing Sexual Abusers of Children from Reoffending: Systematic Review of Medical and Psychological Interventions”, British Medical Journal (August 9, 2013).¹

The State does not cite to any studies that contradict or take a differing view.² Instead, the State tries to cast the court’s endorsement of SCC’s position as a “credibility” determination. Br. Resp. at 16. The State misunderstands the issue. Mr. Rude’s challenge targets whether there is substantial evidence to support the court’s findings of fact. See Miles v. Miles, 128 Wn.2d 64, 69, 114 P.3d 671 (2005) (“Substantial evidence is evidence sufficient to persuade a fair-minded, rational person

¹ Available at <http://www.bmj.com/content/347/bmj.f4630>, last visited October 17, 2014.

² The State notes that the article focused on the treatment of child molesters, but fails to explain why this emphasis would render the study’s conclusions regarding the limited efficacy of existing treatment modalities inconsequential.

of the finding's truth"). Given the absence of clinical support for the propositions that one-on-one treatment carries a risk that the therapist will be manipulated or that group therapy is more effective than individual therapy, the evidence is insufficient to support the findings that rest on this premise. The several findings stemming from this flawed viewpoint must be stricken.³

In sum, the State failed to prove that Mr. Rude's proposed LRA was not in his best interests and or that it did not contain conditions adequate to protect the community. The order denying the LRA should be reversed.

³ Among others, Mr. Rude has assigned error to Findings of Fact 7, 9, 11, 12, 17, 18, 19, and 20 – all of which to varying extents revolve around the court's perception of Mr. Rude's "attitude" towards treatment and the efficacy of group as opposed to individual therapy.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, the trial court's order denying Mr. Rude's petition for release to an LRA should be reversed, and this matter remanded with direction that Mr. Rude be conditionally released.

DATED this 20th of October, 2014.

Respectfully submitted:



Susan F. Wilk (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner/Appellant

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DIVISION ONE**

IN RE THE DETENTION OF)	
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APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 20TH DAY OF OCTOBER, 2014, 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:

<p>[X] MARY ROBNETT, AAG [mary.robnett@atg.wa.gov] [crjsvpef@atg.wa.gov] OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL</p>
<p>[X] RICHARD RUDE SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF OCTOBER, 2014.

x _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711