69506-1

69506-1

NO. 69506-1-I

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

In re Detention of Charles Post,

STATE OF WASHINGTON,

Respondent,

v.

CHARLES POST,

Appellant.

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

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment and revoking Post's release to a Less Restrictive Alternative (LRA). CP 1180.[1]

2. The trial court erred in determining there was no issue of material fact as to whether the treatment provider terminated the treatment program due to "noncompliance or lack of progress." CP 1178-80.

3. The trial court erred to the extent it found[2] that Post "put himself in a position where he is not amenable to treatment in the community and therefore can make no progress in treatment." CP 1179.

4. The trial court erred by failing to enforce paragraph 24 of the LRA order, which required several state agencies to work together with Post in good faith to locate another treatment provider. CP 356, 1178-80.

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[1] The court's order and letter explanation are attached in appendix A.

[2] The court entered no formal findings of fact or conclusions of law. CP 1178-80.

5. To the extent the trial court reasoned the state was fraudulently induced to enter the stipulation and agreed order, the correct remedy is to vacate the agreement and return the case to pre-stipulation status.

Issues Related to Assignments of Error

1. Paragraph 24 of the LRA conditional release order directed a specific process that required several state entities to work with Post in good faith to secure a new treatment provider if the initial provider terminated her treatment program for a reason other than "noncompliance or lack of progress." Where the trial court did not find that Post violated any LRA condition, and where its revocation order was based on a single treatment provider's refusal to treat Post in the community, did the court err in revoking the LRA?

2. Where the court refused to enforce paragraph 24, or to allow Post to propose a different treatment provider, did the court err in prematurely determining that Post was not amenable to treatment in the community?

3. Where the trial court reasoned the state had been fraudulently induced to enter the stipulation and agreed order, did the court err by picking and choosing which provisions of the LRA order it

would and would not enforce, rather than vacating the stipulation and order and returning the case to pre-stipulation status?

B. STATEMENT OF THE CASE

The state filed a petition seeking Post's commitment on January 13, 2003. CP 1-63. The initial commitment trial in July, 2004 resulted in a hung jury. In re Detention of Post, 170 Wn.2d 302, 306, 241 P.3d 1234 (2010). A jury reached a verdict after a second trial, and the court entered a commitment order December 17, 2004. Due to prejudicial error, this Court reversed that order in 2008.[3] The Supreme Court granted review on two issues and agreed that trial error required reversal. Post, 170 Wn.2d at 312-17. The mandate issued November 23, 2010. CP 267-68.

On remand, the parties entered a stipulation to resolve the case and avoid the risks of an adverse decision at a third trial. 1RP[4] 18-19. The stipulation agreed that Post met the criteria for commitment under RCW 71.09. CP 303. The parties and the court signed the stipulation July 15, 2011, but the commitment order

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[3] In re Detention of Post, 145 Wn. App. 728, 758, 187 P.3d 803 (2008), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010).

[4] This Brief refers to the transcripts as follows: 1RP: July 15, 2011; September 15 and 24, 2011; 2RP: January 28, 2013.

resulting from the stipulation would be entered nunc pro tunc to the original December 2004 order. CP 302-03, 308. The nunc pro tunc order would allow Post's commitment and immediate release to a less restrictive alternative (LRA), rather than another year of total confinement at the Special Commitment Center. CP 299-334.

The stipulation waived Post's trial rights on the question whether the state could prove the criteria for commitment under RCW Chapter 71.09. Post also waived the right to petition for an unconditional release trial until March, 2014. CP 300-01.

The parties agreed it would be appropriate to release Post immediately to an LRA. He had participated in the SCC's treatment program for years. The stipulation incorporated Post's petition for an LRA. As part of the conditions for that release, Post would receive sex offender treatment through Dr. Myrna Pinedo. CP 302, 309-13.

A paragraph titled "Termination of Stipulation" provided:

> 12. This stipulation is contingent upon the court's conditional release of Mr. Post to the proposed Less Restrictive Alternative under the terms of this stipulation and order. Should the court reject Mr. Post's placement in the proposed Less Restrictive Alternative under the terms of this stipulation and order, the stipulation and order shall be subject to vacation upon the request of either party. The parties will then be placed in the same position as they were prior to the stipulation, and the matter may be set for a trial within the time frames provided under RCW 71.09.050.

CP 304 (referred to herein as paragraph 12).

Dr. Pinedo authored a report supporting the LRA and agreed to provide sex offender treatment while Post was released to the LRA. CP 317-23. Pinedo was familiar with Post's treatment and offense history and had met with him on numerous occasions. Based on his offense history and prior use of alcohol and valium, the conditions of release and her treatment contract rules would require him to abstain from alcohol and any non-prescribed controlled substance. CP 313, 317-23, 361, 917, 967, 1008; 1RP 19-20.

Post entered a treatment contract with Pinedo, and stated that he understood strict compliance would be expected in the community. CP 314, 325-33, 944-46; 1RP 4-5; 1RP 16-17, 19-21. In addition to numerous other conditions, Post agreed "to abstain from all drugs and alcohol (they are disinhibitor) unless prescribed by a physician." CP 326, 1008.

At the hearing on July 15, 2011, the court engaged in a colloquy to ensure the stipulation was entered knowingly and voluntarily. 1RP 6-9. The court found knowing and voluntary waivers, entered findings and conclusions consistent with the stipulation, then reinstated the original commitment order dated December 16, 2004.

CP 302; 1RP 11. The court directed the Department of Corrections (DOC) to immediately investigate the proposed LRA and to submit a report no later than August 15, 2011. CP 302.[5] The stipulation would be effective contingent on the court's conditional release of Post to the proposed LRA under the terms of the stipulation and order. CP 304.

In anticipation of Post's release, the SCC directed a urinalysis (UA) on September 10, 2011. The results from that were negative for alcohol or controlled substances. CP 961-62, 970, 1065-66.

Following the hearing on September 15, 2011, the court entered the conditional release order. CP 345-58. One condition prohibited the use of alcohol or any non-prescribed controlled substance. CP 354.[6] The order also required Post to engage in Dr. Pinedo's treatment program, and to comply with the rules in the treatment agreement. CP 346, 349-51. The treatment rules further stated that Post would abstain from all alcohol and non-prescribed drugs. CP 368. The rules also required complete and honest

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[5] The DOC report was dated August 17, 2011. CP 907-25.

[6] There order contains dozens of conditions; this brief references only those relevant to the trial court's decision to revoke the LRA. CP 348-57.

disclosures, to break offense patterns of secrecy. CP 899, 1009, 1029. Post agreed with the rules by signature dated August 2, 2011. CP 375, 905, 944.

In the event that Dr. Pinedo terminated the treatment program, the release order provided for Post to be taken into custody and a revocation hearing to be scheduled. CP 356, 1006. If Dr. Pinedo discontinued treatment for any reason other than "non compliance or lack of progress," the order required Post, DOC, DSHS and the prosecutor's office to "work together to retain a new treatment provider and secure an interim provider where necessary so as to avoid revocation of the LRA and respondent being taken into custody." CP 356, 941, 1006.

The SCC did not conduct another UA before Post's release. The state therefore could not establish any baseline data on the possible use of Valium before Post's release to the LRA. CP 1048-49, 1049-50, 1072; 1RP 38-39; 2RP 12-13.

Post was released to the community on September 20, 2011, and he immediately reported to Patricia Turner, his community corrections officer at the Department of Corrections (DOC). CP 1038-39, 1048-49. Turner saw him again on September 22. However, the next UA did not occur until September 28, at the DOC office. Based

on positive preliminary results for benzodiazepines (Valium metabolites), Post was returned to SCC custody on September 28. A second UA conducted several hours later at the SCC also tested positive for Valium metabolites. CP 983-89, 1039-43. The state sought to revoke the LRA. CP 500-04.

Post did not dispute the use of Valium, but testified he took the pills before his release. CP 947-54.[7] Post consistently denied any use after his release. CP 1051, 1133, 1138-39.

At an evidentiary hearing held December 19, 2011,[8] the parties litigated the question whether the Valium use occurred while Post was still at the SCC, or while he was released to the LRA. In addition to Post's testimony,[9] the defense offered expert testimony to show that

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[7] Post admitted he did not tell Dr. Pinedo or the LRA substance abuse treatment provider about his Valium use at the SCC. He also was not truthful about his Valium use during an SCC polygraph. CP 964-66, 968-69.

[8] The hearing transcript is included in the clerk's papers at CP 930-1140.

[9] Lay witnesses also testified no Valium was available to Post during his release. CP 1123-27, 1136-38. Despite a search by five DOC officers, no contraband was found at Post's LRA residence. CP 1052-53, 1128-32. Post's possessions at the SCC also were thoroughly searched before he was allowed to take them to his LRA residence. CP 1060-63, 1072.

the Valium metabolite levels were consistent with use while Post was still at the SCC.[10] In contrast, the state's expert theorized the levels were consistent with post-release use.[11] The court did not resolve this factual question. CP 1178-79; 1RP 35-36, 41-42; 2RP 9-10, 14.

In a written report dated September 20, 2011, Dr. Pinedo informed the court that she would be terminating Post from treatment based on her belief that he violated the treatment rules by ingesting Valium. He signed the treatment contract on August 2, and she believed the rules were binding at that time and prohibited drug use whether inside or outside the SCC. It was her opinion that Post's behavior placed the community at risk and she was no longer willing to provide treatment in the community. CP 502, 1004-16, 1168-70.

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[10] The defense offered Dr. Robert Julian, an expert on psychopharmacology, including the body's metabolism of Valium and its metabolites. Dr. Julian believed the reported UA levels of the metabolites temazepam and oxazepam were consistent with Post's use of Valium at the SCC. CP 1080-1118.

[11] Burt Toivola, technical director for Sterling Laboratories, thought the UA results showed Valium use to be "fairly recent" or "seven to ten days prior to – to one sample's collection. Could – it could be more recent." CP 985. He thought the second sample was collected "probably within five to seven days, maybe ten days" after use. CP 988, 995. He did not think the results were consistent with last use being September 14, 2011, before Post's release. CP 990-91. He admitted that other factors could slow the metabolism of the drug and make it take longer for the body to break it down. CP 985, 996.

Dr. Pinedo had no personal knowledge and could only speculate as to when and where the Valium use occurred. CP 1168.

But Dr. Pinedo admitted she did not provide sex offender treatment while a person still resided at the SCC. She did not know if she tells her patients that treatment rules are binding while the patient still resides at the SCC. CP 1002-04, 1029-31.

The state asserted Post violated the conditions of release by consuming valium between September 10 and September 28, 2011, by failing to comply with treatment rules, and by being terminated from the treatment program. CP 500-04, 414-15. On December 16, 2011, the state filed its memorandum seeking to revoke the LRA. CP 438-506.

The defense response did not dispute the valium use, but stated it occurred before release. CP 415-17. The low metabolite levels in the UA samples showed the valium was taken long before September 28. Valium use is common at the SCC and the SCC did not conduct a pre-release UA to establish a baseline. CP 415-18, 431-33. In the context of rampant valium use at the SCC, where the staff had an incentive to look the other way, the defense argued the UA was not the kind of new information that could justify LRA revocation. CP 418-22. Because Post did not use drugs when he

was released to the LRA, he did not violate LRA conditions or treatment rules and revocation was inappropriate. A new treatment provider should be substituted for Dr. Pinedo. CP 420-29.

The state asserted that revocation was appropriate because Dr. Pinedo had terminated the treatment program based on Post's undisclosed drug use. The state opposed a substitute provider, and argued the court was required to return Post to the SCC if it determined the violation occurred. CP 438-41, 544-47, 806-08.

Although the court heard testimony at the December 19, 2011 hearing, final consideration of the state's motion was delayed by the withdrawal of Post's attorneys. They had a conflict of interest due to representation of the other SCC resident who had provided Post the Valium. CP 520-21, 531-32, 540-41, 799-800, 806-07; 2RP 9. Craig McDonald then represented Post for several months, but new counsel was appointed after it was determined that McDonald was not approved under a new OPD system for handling RCW 71.09 cases. CP 536-37, 798-803, 819-27, 1142, 1146; 1RP 26; 2RP 9-10.

On May 25, 2012, the court held a telephonic conference to set a summary judgment hearing. The court determined it should first resolve the legal question whether it could order a change in treatment providers, before taking additional testimony on any other

factual questions. Supp. CP __ (sub no. 392, Order Setting Summary Judgment Hearing). The briefing schedule was modified after new counsel appeared. CP 1144-45.

On June 12, 2012, the state filed its verified motion for summary judgment. CP 832-1141. The state asserted Dr. Pinedo had withdrawn as Post's treatment provider, and because there was no dispute about that single material issue of fact, the court should revoke the LRA. CP 832. The state argued that only the state could choose between the potential remedy of revocation or modification. Because the state sought revocation, the state argued the court could not modify the LRA or authorize a new treatment provider. CP 835-36 (citing RCW 71.09.098(5)). Because Pinedo was no longer willing to provide treatment, there was no longer a legally sufficient LRA. CP 837-38 (citing, inter alia, In re Wrathall, 156 Wn. App. 1, 8-9, 232 P.3d 569, 572 (2010)); 1RP 28-34, 45-47.

The state also asserted that Pinedo also believed Post was not candid and transparent when the valium use was discovered. The state contended this could justify the court in finding a violation of the treatment contract. 1RP 30, 33, 45-46; CP 964-66, 1009-1014, 1164.

The defense argued revocation was not appropriate. Post presented evidence that he took the valium because of anxiety as to

whether the LRA would actually happen. CP 948-52, 1150. The SCC staff was fully aware of Post's drug use while at the SCC, and Dr. Pinedo was aware of it too. This was one reason the DOC and the SCC did not support the LRA. CP 917-21, 1148-49, 1155-56; 1RP 36-37.

The defense did not dispute that Dr. Pinedo was personally no longer willing to provide treatment. But the state had not established whether she withdrew due to "non compliance or lack of progress" or for a different reason, such as pre-release behavior at the SCC. CP 1151; 1RP 40-43. Post did not violate any treatment rule when he took the Valium because he was not yet in treatment and not yet subject to the LRA. CP 1030-31, 1152, 1174. Unless the state could establish that Post took the Valium after his release, or that he was bound by the terms of a community outpatient treatment contract before his release, then revocation was inappropriate. CP 1152, 1173-74; 1RP 38.

This was a material fact under paragraph 24 of the LRA order, which required a sixty-day notice period if Dr. Pinedo discontinued treatment for "any reason other than noncompliance or lack of progress." CP 356, 1151. The court retained authority to substitute a

new treatment provider under paragraph 24 of the order. CP 1151 n.1, 1172 n.1 (distinguishing Wrathall).

Post also argued that due process required the court to determine whether he violated a condition of the LRA order before revoking the LRA. Without proof of such a violation, the court must allow the parties to pursue a substitute treatment provider before revocation may be considered. CP 1153, 1171-72.

On October 3, 2012, the court entered its order and letter explanation granting summary judgment and revoking the LRA. The court concluded the only question was whether Dr. Pinedo terminated Post from treatment because of "'noncompliance or lack of progress' or for some other reason." CP 1178, 1180.

The court entered no finding as to when the Valium use occurred. The court instead reasoned that Post admitted using Valium after signing the treatment contract on August 2, 2011. He admitted he lied to Dr. Pinedo that his last drug use was in 2008. There was no dispute that Valium use was part of Post's offense cycle, and in Dr. Pinedo's professional opinion Post would not be amenable to treatment until his substance abuse issues were adequately addressed. CP 1179.

The court summarized the defense position as an argument that Dr. Pinedo could not withdraw her agreement to provide treatment even though her agreement had been based on Post's "lies and deception." CP 1179. The court reasoned that without a treatment provider, Post was "not amenable to treatment in the community and therefore can make no progress in treatment." CP 1179. Without Pinedo to provide treatment, the court concluded there could be no LRA. Id. (citing In re Wrathall, supra, and In re Detention of Enright, 131 Wn. App. 706, 715, 123 P.3d 1266 (2006)).

On October 15, 2012, Post moved to set aside the stipulation pursuant to paragraph 12. CP 1181-86. That paragraph provided that the stipulation would not take effect until the court's conditional release of Post to the proposed LRA. CP 304, 1182. Because the stipulation did not allow revocation based on behavior occurring before release, and because the court found no violation based on post-release conduct, the stipulation should be set aside pursuant to its own terms. It made no sense to revoke an LRA for conduct that occurred before the LRA took effect. CP 1182-85; 2RP 12-13. The case should be returned to the status before the stipulation was entered. CP 1181-86; 2RP 13, 21.

In response, the state argued that pre-release conduct was contemplated in paragraph 5 of the stipulation, which required Post, pending conditional release, to "continue to participate fully in treatment at the SCC and to follow all treatment recommendations and requirements." CP 302. Because the court accepted the LRA, rather than reject it, the state asserted the conditions were triggered at that point. 2RP 16-17

Following a hearing held January 28, 2013, the court denied the motion to vacate the stipulation. Supp. CP __ (sub no. 435). The court again did not make a factual determination whether the Valium use took place before or after Post's release. 2RP 15. The prosecution appeared to concede that the Valium use took place before Post's release. 2RP 19.

Instead, the court contended that Post was not arguing that he did not understand the stipulation or that he was misled, or any reason that might undermine its voluntary nature. The court reasoned that Post's actions had made compliance with the agreement impossible, and that paragraph 12 did not apply because he was in fact released into the community. 2RP 22-23.

Post timely appealed both orders. CP 1203-04; Supp. CP __ (sub no. 439).

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REWRITING THE RELEASE ORDER AND TREATMENT RULES, IN GRANTING SUMMARY JUDGMENT, AND IN REFUSING TO ENFORCE PARAGRAPH 24.

This appeal requires a straightforward reading of the trial court's conditional release order. Dr. Pinedo unilaterally terminated the treatment program based on pre-release conduct that did not violate the LRA order or community treatment rules. Because Pinedo terminated treatment for a reason other than "noncompliance or lack of progress," the trial court erred when it failed to follow the procedures of paragraph 24, which required the parties to work together to locate another therapist to avoid revocation of the LRA. CP 356.

Summary judgment is not appropriate unless the pleadings raise no issues of material fact and the moving party shows it is entitled to judgment as a matter of law. CR 56(c). A trial court's grant of summary judgment is reviewed de novo, and should be reversed where the trial court errs as a matter of law or erroneously determines there are no material issues of fact. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004); Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

Because this summary judgment order revoked the LRA, the order also raises due process issues. A person released from the SCC to an LRA has a liberty interest similar to that of a parolee. In re Detention of Wrathall, 156 Wn. App. at 7 & n.14 (citing Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and State v. McCormick, 166 Wn.2d 689, 700, 213 P.3d 32, 37 (2009)). In this context

> minimal due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts. Id. at 484, 92 S.Ct. 2593.

State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); accord, McCormick, 166 Wn.2d at 700.

The terms of an agreed order are interpreted as are the terms of a contract. Martinez v. Kitsap Pub. Servs., 94 Wn. App. 935, 942, 974 P .2d 1261 (1999). Settlement agreements are considered contracts and are construed under contract principles. Trotzer v. Vig, 149 Wn. App. 594, 605, 203 P.3d 1056 (2009). A court's duty is to

interpret the words of a contract as it is written, not as one party might have wished it was written. Berg v. Hudesman, 115 Wn.2d 657, 668-69, 801 P.2d 222 (1990). A contract's plain language will be enforced. Summers v. Great Southern Life Ins. Co., 130 Wn. App. 209, 213-17, 122 P.3d 195 (2005) (court refused to rewrite "permanent" in insurance policy where term was unambiguous); Syrovy v. Alpine Resources, 122 Wn.2d 544, 551, 859 P.2d 51 (1993) (where contract language is unambiguous, court should not read ambiguity into the contract); Mayer v. Pierce County Medical Bureau, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) ("'If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.'") (quoting Voorde Poorte v. Evans, 66 Wn. App. 358, 362, 832 P.2d 105 (1992)); see also Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995) (construction of an unambiguous contract is a matter of law). Courts review all contract language and avoid surplusage. Stokes v. Polley, 145 Wn.2d 341, 346-47, 37 P.3d 1211 (2001); Summers, 130 Wn. App. at 213.

By its plain terms, the "Conditional Release Order" was effective on Post's release, not during his custody at the SCC. The order "determine[d] the final conditions that will govern Respondent's

release to an LRA." CP 345. The court found Post had satisfied the terms of the stipulation and was "entitled to transition to an LRA[.]" CP 346. The court concluded the LRA was in Post's best interests, and the order's conditions adequately protected the community. CP 347.

The relevant treatment-related conditions required Post to cooperate with Dr. Pinedo and comply with the requirements in the treatment agreement and the conditional release order. CP 346, 350. Post also agreed to engage in substance abuse treatment with Denise Hill of Bridgeway Treatment Services. CP 351. Both the release order and treatment rules prohibited him from possessing alcohol or non-prescribed controlled substances while he was released to the LRA. CP 354, 368.

Given this language, the state cannot seriously contend that the court or the parties intended the order and its post-release conditions to reach back in time to govern Post's pre-release custodial status at the SCC. To the extent the order could be considered ambiguous, the terms should be construed against its drafter, the

state. Pierce County v. State, 144 Wn. App. 783, 813, 185 P.3d 594 (2008).[12]

Nor do the treatment rules support the state's claim that they applied before Post's release. The agreement's first page states the "rules are necessary conditions to ensure community safety." CP 367 (emphasis added). It would be impossible for anyone still residing at the SCC to comply with several of the rules. See e.g., CP 369 (requiring Post "to be on time and attend 100% of my scheduled therapy sessions" with Dr. Pinedo in the community).[13]

As a general rule, oral testimony cannot modify the terms of a written agreement.[14] Nonetheless, Dr. Pinedo made it clear she did not provide treatment to persons who still resided at the SCC. "He's not in treatment with me until he's out in the community and coming to my groups and my office[.]" CP 1030. She said she "won't treat somebody while they're at the SCC" because different therapists can

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[12] See CP 345-58 (order drafted and presented on King County Prosecuting Attorney pleading paper).

[13] The complete rules are set forth at CP 367-75.

[14] See generally, Ebling v. Gove's Cove, Inc., 34 Wn. App. 495, 499, 663 P.2d 132 (1983) (While parties may modify a contract by subsequent agreement, an oral modification to a written contract must be shown by clear and convincing evidence).

have contradictory programs "and it usually just ends up making a mess." CP 1030. Where Pinedo herself admitted she did not provide treatment to people who still resided at the SCC, it is not reasonable to conclude that rules designed to govern a community treatment program would apply to a person still confined at the SCC.

Nonetheless, Pinedo did claim she personally believed Post was bound by the agreement at the time he signed it – seven weeks before his release. CP 1030. But she admitted she did not know if she made that clear to Post, or to any of her other patients. CP 1002-04, 1029-31. This post-hoc testimonial interpretation was subjective, internally inconsistent, and an unreasonable view of the agreement's clear language. It certainly was not clear and convincing proof of an oral modification, nor did the trial court find the state satisfied that burden of proof.

Given the weakness of the state's position, it is not surprising the court did not find that Post violated the treatment rules or the release order, or that it declined to decide whether the Valium use occurred before or after Post's release. But this also left the court unable to conclude that Pinedo terminated Post based on "noncompliance or lack of progress." Therefore, paragraph 24 of the release order applies. That paragraph provides:

> If Respondent is terminated from treatment with Dr. Pinedo, the Respondent shall, consistent with RCW 71.09.098(2), immediately be taken into custody and a hearing scheduled to determine whether the Respondent's LRA will be revoked. RCW 71.09.098(3). If Dr. Pinedo decides to discontinue treatment for any reason other than Respondent's non compliance or lack of progress, Dr. Pinedo must give sixty (60) days written notice to the Court, the prosecutor, the supervising CCO, counsel for respondent and the SCC representative. In this situation, Respondent, DSHS, DOC, and KCPAO[15] will work together to retain a new treatment provider and secure an interim provider where necessary so as to avoid revocation of the LRA and respondent being taken into custody.

CP 356.

Because Dr. Pinedo did not (and could not) terminate Post's treatment for "noncompliance or lack of progress," the various state agencies – DOC, DSHS, and the prosecutor's office – were all contractually obligated to work with Post in good faith to locate another treatment provider.[16] There is no question the state failed in this duty. The prosecutor's office immediately moved for revocation and consistently opposed the court's consideration of any different

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[15] KCPAO is the King County Prosecuting Attorney's Office. CP 299.

[16] See generally, Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356, 360 (1991) (every contract contains an implied duty of good faith and fair dealing which obligates the parties to cooperate with each other so that each may obtain the full benefit of performance).

treatment provider. See e.g., CP 438-41, 832-38. None of the named entities did anything to work with Post to secure alternative treatment in the community.

The trial court therefore erred in refusing to enforce paragraph 24 and in prematurely concluding Post was not amenable to treatment in the community. CP 1179. The court properly determined the LRA order adequately protected the community, but the court erred by refusing to follow the order's agreed-upon remedy for this situation.

This Court should vacate the trial court's revocation order and remand with directions to enforce paragraph 24 and require the identified entities to "work together to retain a new treatment provider and secure an interim provider where necessary so as to avoid revocation of the LRA and respondent being taken into custody." CP 356.

2. THE REMEDY FOR ANY FRAUDULENT INDUCEMENT IS TO VACATE THE STIPULATION.

The trial court's letter explanation also reasoned that Dr. Pinedo's "commitment to provide treatment in the community was based on [Post's] lies and deception." CP 1179. But if the state was fraudulently induced to enter the stipulation and agreed order, the

appropriate remedy is to vacate the stipulation and order.[17] In fact, this was the fall-back remedy Post sought when he moved to strike the stipulation. CP 1181-86. The court's refusal to follow the clear terms of paragraph 24, while binding Post to other claimed provisions of the order, was not an available or appropriate remedy.

D. CONCLUSION

This Court should reverse the trial court's revocation order and remand for further proceedings to enforce paragraph 24. In the alternative, this Court should vacate the stipulation and return the case to its pre-stipulation status.

DATED this 29th day of December, 2014.

Respectfully Submitted,

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[17] See Thompson v. Huston, 17 Wn.2d 457, 463, 135 P.2d 834, 837 (1943) ("Fraud vitiates everything, and a contract obtained by fraud is, the fraud being established, a nullity. Producers' Grocery Co. v. Blackwell Motor Co., 123 Wash. 144, 212 P. 154 (1923)").

APPENDIX A

No. 69506-1-I

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Detention of CHARLES POST Respondent	No 03-2-15442-3 SEA ORDER GRANTING SUMMARY JUDGMENT AND REVOKING LRA

This matter came before the court through the State's Motion For Summary Revocation of Respondent's LRA Having considered the State's motion, respondent's response, the State's reply, and all declarations on file with the court, IT IS HEREBY ORDERED THAT

The State's motion is GRANTED Respondent's LRA is revoked due to his termination from treatment by Dr Myrna Pinedo Respondent is remanded to the care, custody and treatment of DSHS in a total confinement facility

DONE in open court this 3 day of ~~July~~ October, 2012

H. Halpert
JUDGE HELEN HALPERT

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Superior Court of the State of Washington
for the County of King

Helen L Halpert
Judge

King County Courthouse
Seattle, Washington 98104

October 3, 2012

Mr David Hackett
Senior Deputy Prosecuting Attorney
5th Floor King County Courthouse
Seattle, Washington 98104

Ms Amy Kaestner
Ms Christine Sanders
Snohomish County Public Defender
1721 Hewitt Avenue, Suite 200
Everett, Washington 98201

Re In re the Detention of Charles Post, No 03-2-15442-3 SEA

Counsel

This letter will serve as a brief explanation of the Court's order granting the petitioner's motion for summary judgment In deciding this issue, the court reviewed the following submissions

1 The State's Verified Motion for Summary Revocation, and the following exhibits thereto
   a Exhibit One The Stipulation and Order of Commitment Nunc Pro Tunc
   b Exhibit Two The Conditional Release Order
   c Exhibit Three Transcript of Phase I of the Revocation Hearing held on December 19, 2011

2 The Response to the State's Verified Motion for Summary Revocation, and the exhibits attached thereto[1]
   a Exhibit One Report of Daniel Yanisch, Dated August 3, 2011
   b Exhibit Two A letter from Denise Hipp, of Bridgeway Treatment Services, Dated September 8, 2011

3 The State's Verified Reply in Support of Summary Revocation and Exhibit 4, the treatment termination letter of Dr Myra Pinedo, attached thereto

4 The Respondent's Reply to State's Reply in Support of Summary Revocation [2]

The only question to be resolved in the State's motion is whether there exists a material issue of fact as to whether Dr Pinedo terminated the respondent from treatment because of "noncompliance or lack of progress" or for some other reason It is undisputed that respondent

[1] The State initially objected to the consideration of these exhibits as non-sworn and hearsay but in oral argument at the motion for summary revocation, conceded their authenticity and simply argued that they were irrelevant

[2] Although the civil rules do not contemplate the filing of a sur-reply, there was no motion to strike and given the serious consequences of granting the motion for summary revocation, the court did review and consider this document

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ingested a non-prescribed mood altering drug (diazepam/valium) after signing his treatment contract with Dr Pinedo on August 2 2011 It is undisputed that Mr Post lied to Dr Pinedo about his drug use and told her that he had last used non-prescribed drugs in 2008 (Exhibit 3, Testimony of Charles Post, p 35) It is undisputed that use of mood altering drugs, and in particular, valium is part of respondent's offense cycle, and it is undisputed that in Dr Pinedo's professional opinion, respondent will not be amenable to sex offender until his substance abuse issues are adequately addressed

Reduced to its essence, respondent is arguing that, although Dr Pinedo's commitment to provide treatment in the community was based on his lies and deception, her withdrawal of this commitment is not a violation of the Stipulation Such an assertion is unsupportable

By his own actions, respondent has put himself in a position where he is not amenable to treatment in the community and therefore can make no progress in treatment His treatment provider has withdrawn Without a treatment provider, there can be no less restrictive alternative *In re Wrathall,* 157 Wn App 1 (2010), *In re Detention of Enright*, 131 Wn App 706, 715 (2006)

The motion for summary revocation is granted

Very truly yours,

Helen L Halpert
Judge

C Court file

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

In re Detention of Charles Post,	)	
	)	
STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	NO. 69506-1-I
v.	)	
	)	
CHARLES POST,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANDREA VITALICH
KING COUNTY PROSECUTOR'S OFFICE
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104

[X] CHARLES POST
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF DECEMBER 2014.

X Patrick Mayovsky