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COA NO. 71606-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALFONZIA ALLEN,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

AS A MATTER OF DUE PROCESS AND EQUAL PROTECTION, TIME SPENT IN JAIL MUST BE CREDITED TOWARD ALLEN'S TERM OF COMMITMENT IN CALCULATING HIS MAXIMUM RELEASE DATE.

a. The Appeal Is Timely.

The State argues the appeal is untimely because in 2006 Allen withdrew his appeal from the January 13, 2006 order that set his maximum release date as ten years "beginning 6/1/05." Brief of Respondent (BOR) at 7-9; CP 430-32. The State is mistaken.

The State made the same kind of argument in State v. Reanier, 157 Wn. App. 194, 204, 237 P.3d 299 (2010), review denied, 170 Wn.2d 1018, 245 P.3d 773 (2011). It lost.

In that case, Reanier appealed from a June 1, 2009 order that denied his release from commitment. Reanier, 157 Wn. App. at 202. He did not earlier appeal a May 2005 order that contained an unlawful term of maximum confinement. Id. The State argued Reanier's appeal from the 2009 order was untimely because he did not appeal the May 2005 order of commitment within the 30-day period allowed for filing a notice of appeal under RAP 5.2(a). Id. at 202. This Court held Reanier's failure to appeal the earlier order was not fatal to his appeal of the 2009 order. Id. The timely appeal of the 2009 order brought up for review the trial court's most

recent decision denying Reanier's request for release because the arguments focused on RCW 10.77.025 and whether the court's authority to return Reanier to commitment could exceed five years. Id. Moreover, Rainier raised a proper collateral attack on the May 2005 order of commitment under CrR 7.8(b)(4) to the extent that order was a void judgment. Id.

Similarly, Allen timely appealed from the trial court's order denying his release from commitment under RAP 5.2(a). The argument below centered on whether the maximum release date had been exceeded and whether Allen was entitled to release under RCW 10.77.025 in light of constitutional requirements. There is no way to meaningfully distinguish Reanier from Allen's case. The State does not cite Reanier on this issue in its response brief. The omission is telling.

Further, the 2006 order does not address the credit for time served issue that is now on appeal. CP 430-32. Simply stating the maximum term begins on June 1, 2005 says nothing about whether Allen was entitled to credit for pre-trial jail time. CP 432. The order was the result of the parties arguing whether Allen's maximum term of commitment was life because he was charged with a third strike offense under the Persistent Offender Accountability Act. CP 393, 444-55, 451. Neither party argued about credit for time served and the court's 2006 order does not address it.

Furthermore, any appeal of the 2006 order on the basis that Allen should have received credit for time served against the statutory maximum term would have been futile because Allen was not yet an aggrieved party under RAP 3.1. "Only an aggrieved party may seek review by the appellate court." RAP 3.1. An aggrieved party is "one whose personal right or pecuniary interests have been affected." State v. Taylor, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). Back in 2006, there was no way of knowing whether Allen would remain in custody until the 10-year statutory maximum release date, however calculated. It was not until Allen was held past his statutory maximum release date under his credit for time served theory that he suffered a violation of his personal right to liberty. At that point, he became an aggrieved party, appropriately challenged his confinement in the trial court, and then timely appealed from the trial court's order denying release.

For similar reasons, the 2006 order was not ripe for review back in 2006. The credit for time served issue required further factual development before it was ripe. The 2006 order, in setting the maximum term to start on June 1, 2005, did not place an immediate restriction on Allen. The issue required further factual development, i.e., Allen remaining in confinement until he exceeded the statutory maximum date under his credit for time served theory and a trial court order denying his

release when presented with that theory. See State v. Valencia, 169 Wn.2d 782, 788-89, 239 P.3d 1059 (2010) (claim not ripe for review where further factual development is needed; i.e., actual enforcement of challenged order that causes harm).

For these reasons, an appeal from the 2006 order raising the credit for time served issue would have been futile. The rules of appellate procedure do not require futile acts to preserve an issue for later review. The trial court reached the merits of Allen's argument that is now on appeal. This Court should too. Indeed, the trial court encouraged Allen to appeal because appellate guidance is needed. 1RP 24. This Court should decline the State's invitation to duck the issue.

b. Confinement Is The Touchstone For Time Served Credit, Including Jail Time Spent Prior To Commitment As An Insanity Acquittee.

The State's position is that Allen is simply out of luck: yes, he was incarcerated before commitment, but no, he is not entitled to any credit for that incarceration. BOR at 1. In the State's view, Allen's pre-commitment jail time has no constitutional significance and can safely be disregarded because civil commitment under chapter 10.77 RCW is not criminal punishment under the Sentencing Reform Act (SRA). It's not that simple.

It is indisputable that Allen's confinement in jail prior to his commitment as an insanity acquittee constitutes a deprivation of liberty.

See In re Pers. Restraint of Knapp, 102 Wn.2d 466, 471, 687 P.2d 1145 (1984) ("denial of presentence jail time involved both a deprivation of liberty in addition to that which would otherwise exist, and a classification based solely on wealth," citing State v. Phelan, 100 Wn.2d 508, 671 P.2d 1212 (1983)). In Knapp, the State argued time spent in involuntary treatment at a mental hospital need not be credited toward the maximum term of a criminal sentence because jail time was "punishment" while treatment time served the principal purpose of "rehabilitation." Knapp, 102 Wn.2d at 473. The Supreme Court rejected the asserted distinction: "The distinction urged by the state ignores the fact that, like confinement in a prison or jail, a person committed to a mental hospital pursuant to a valid criminal conviction is subject to a massive curtailment of liberty." Id. at 475. "[U]nder Knapp there is no distinction between pretrial, postconviction, and post-imprisonment time spent in a state mental hospital." State v. Anderson, 132 Wn.2d 203, 212, 937 P.2d 581 (1997).

Allen was likewise subject to a massive curtailment of liberty while he was in jail pending trial and commitment. That deprivation of freedom cannot be ignored consistent with constitutional mandate. Allen was not ultimately sentenced under the SRA. Yet his loss of liberty remains real.

According to the State, no credit for time served is due unless a person is convicted and subject to punishment through a criminal sentence. BOR at 1. The premise of the State's argument is that credit for time served only makes sense in the context of criminal sentencing. That premise is incorrect.

RCW 10.77.025(1) provides for credit for time served to insanity acquittees in some circumstances. Lee v. Hamilton, 56 Wn. App. 880, 881, 884-85, 785 P.2d 1156 (1990). Credit for time served is not limited to the SRA context. The question, not answered by the statute or Lee, is whether poor insanity acquittees can be held longer than rich insanity acquittees when both classes remain in confinement up to the maximum statutory release date. Is there a valid constitutional basis to draw a distinction between the two by refusing to give credit for time served for pre-trial jail time to the poor insanity acquittee?

While the legislature remains free to draw many distinctions, the Supreme Court's decision in Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974) "absolutely bars the legislature from distinguishing between rich defendants and poor defendants for the purpose of credit for time served." State v. Medina, 180 Wn.2d 282, 292-93, 324 P.3d 682 (2014). The touchstone is deprivation of liberty due to total confinement. See Harris v. Charles, 171 Wn.2d 455, 470, 256 P.3d 328 (2011) ("When

determining whether a defendant is constitutionally entitled to credit for presentencing time spent subject to restrictive conditions, this court has recognized a clear distinction between jail time and nonjail time.").

Those principles do not only hold sway in the context of criminal sentencing under the SRA. Allen was subject to a massive loss of liberty while he was in jail pending trial. And he was in jail because he was too poor to make bail. Without credit for time served for his jail time, he is being treated differently than richer insanity acquittees that are able to bail out. Two classes of similarly situated individuals are treated differently. Insanity acquittees with money are able to bail out and escape confinement prior to the insanity adjudication. Insanity acquittees without money are not able to bail out and remain in jail prior to the insanity adjudication. When both classes of insanity acquittees are held up to their statutory maximum release date under RCW 10.77.025(1), the net result is that insanity acquittees without money are held in confinement longer than insanity acquittees with money.

The State emphasizes that the purpose of an insanity acquittee's commitment under chapter 10.77 RCW is treatment for dangerousness due to mental illness. BOR at 1. But both the rich insanity acquittee and the poor insanity acquittee are entitled to final discharge upon reaching the maximum term of commitment, even where neither has been successfully

treated. In that circumstance, the only reason why the poor person ends up being confined longer than the rich person is that the latter is able to make bail prior to commitment. That is a due process and equal protection violation if the poor person is not given credit for jail time. It is precisely because the maximum discharge date is *not* dependent on successful treatment for a dangerous mental illness that the credit for time served issue takes on constitutional dimensions.

The State cites a number of non-Washington cases in an attempt to support its contrary argument. BOR at 15, 17, 25-26; Franklin v. Berger, 211 Conn. 591, 592, 604, 560 A.2d 444 (Conn. 1989); State v. Bomar, 199 Ariz. 472, 19 P.3d 613 (Ariz. Ct. App. 2001).State v. Tuomala, 104 Ohio St.3d 93, 818 N.E.2d 272 (Ohio 2004); People v. Leppert, 105 Ill.App.3d 514, 434 N.E.2d 21 (Ill. Ct. App. 1982). These non-binding cases are distinguishable.

In Franklin, the court held the right to equal protection did not require credit for pretrial jail time against the length of an insanity acquittee's commitment to a mental hospital. Franklin, 211 Conn. at 592, 604. That holding is based on the premise that, under Connecticut statutory law, "an acquittee will not be released from confinement until he is no longer a danger to himself or others, regardless of the maximum term." Id. at 600. That is the crucial point. The court rejected the

argument that the refusal to credit jail time against the fixed maximum term creates distinctions in the calculation of confinement time based on wealth because "the fixed maximum term set by the court does not determine the date an acquittee will be discharged from confinement." Id. at 601.

The Connecticut court explained: "Subtracting an indigent acquittee's pretrial jail time from the fixed maximum term will not secure his discharge from confinement any sooner than if he were not credited with jail time. Jail time credit is irrelevant in calculating the release of an insanity acquittee because he is confined or released based on his dangerousness. There is, therefore, no difference in the treatment of wealthy and indigent acquittees under § 17-257n. The discharge of all insanity acquittees from confinement, rich or poor, is based on their ability to prove that they are no longer a danger to themselves or others, not on a lapse of time." Id.

The law in Washington is different. Unlike in Connecticut, subtracting an indigent acquittee's pretrial jail time from the fixed maximum term will secure his discharge from confinement under chapter 10.77 RCW sooner than if he were not credited with jail time where, as here, the insanity acquittee is not released before the possible maximum release date. A person who serves the maximum sentence for the

underlying criminal offense for which he was acquitted by reason of insanity is entitled to final discharge, without regard to whether he still presents a danger to himself or others. RCW 10.77.025(1); Reanier, 157 Wn. App. at 214. Under that statutory scheme, the rich acquittee who escapes pre-trial jail time is confined for a shorter overall duration than the acquittee unable to make bail when both end up committed to the statutory maximum term.

The State argues there is no federal constitutional right to be released from civil commitment unless the committed person is no longer mentally ill or dangerous. BOR at 9 (citing Jones v. United States, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)). But under Washington statutory law, insanity acquittees are entitled to final discharge under chapter 10.77 RCW even if they remain dangerous due to mental illness. That legislative choice has constitutional consequences.

Whether a person is entitled to credit for time served impacts the calculation of the maximum discharge date. The legislature's decision to create an absolute maximum release date creates a liberty interest in being released on that date. "Once a state has granted a liberty interest by statute, 'due process protections are necessary to insure that the state-created right is not arbitrarily abrogated.'" State ex rel. T.B. v. CPC Fairfax Hosp., 129 Wn.2d 439, 453, 918 P.2d 497 (1996) (quoting Vitek v. Jones, 445 U.S.

480, 489, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980)). The state-created right under RCW 10.77.025(1) to release from commitment upon reaching "the maximum possible penal sentence for any offense charged for which the person was committed, or was acquitted by reason of insanity" requires that right not be arbitrarily denied by reason of wealth-based distinctions.

In Washington, a pure lapse of time requires discharge of all insanity acquittees who reach the statutory maximum release date. That release is not dependent on the ability to prove they are no longer dangerous by reason of mental illness. That is why Franklin is distinguishable. Franklin, 211 Conn. at 601.

Bomar is distinguishable for the same reason. In that case, the Arizona court held the denial of presentence incarceration credits to guilty-except-insane defendants sentenced to commitment in a secure mental health facility did not violate equal protection because such defendants are not to be released from commitment until they have remedied the reason for their commitment. Bomar, 199 Ariz. at 476-79. As stated, "[t]he legislature obviously did not intend to release a person before treatment is successfully completed." Id. at 476-77. Under that scenario, all insanity acquittees are treated the same because release is solely dependent on no longer being dangerous due to mental illness.

But in Washington, the legislature intended to tie the maximum term of commitment under chapter 10.77 RCW to a maximum possible release date, which applies even when an insanity acquittee has not yet been successfully treated. RCW 10.77.025(1); Reanier, 157 Wn. App. at 214. "The maximum penal term is not simply a predictive tool as to dangerousness, but a legislative recognition of the constitutional problems inherent in any other rule." In re Pers. Restraint of Kolocotronis, 99 Wn.2d 147, 152, 660 P.2d 731 (1983). The legislature's primary purpose in tying confinement to the maximum penal term is to give recognition to the constitutional problems associated with indefinite commitment. Kolocotronis, 99 Wn.2d at 152; Reanier, 157 Wn. App. at 204.

The Arizona legislature, like the Connecticut legislature, had no problem with the notion of indefinite commitment. The Washington legislature took a different tack. It placed an absolute limit on commitment under the insanity acquittee statute with regard to those, like Allen, charged with class B or C felonies.

The State claims "The Washington Supreme Court has ruled that the maximum term of civil commitment should not be tied to the maximum penal term." BOR at 23 (citing Kolocotronis, 99 Wn.2d at 157). The Washington Supreme Court held no such thing.

This was the issue in Kolocotronis: does a subsequent reduction in the maximum penal term for a given crime entitle one committed pursuant to the criminal insanity statute to the benefit of the lower term? Kolocotronis, 99 Wn.2d at 150. In answering no, the Court considered various statutory and constitutional arguments, one of which involved the cruel punishment provision of article I, section 14 of the Washington Constitution. Id. at 157-58. The Court declined to apply article I, section 14 to judge the length of confinement because confinement to mental institutions was sufficiently unlike incarceration. Id. at 157. Allen does not make an article I, section 14 argument, so that holding is inapposite. Allen's case involves different constitutional considerations.

The State also claims Kolocotronis shows Allen suffers no due process violation. BOR at 23-24. Credit for time served was not at issue in that case. The due process argument is different because it involves a different issue. Allen, unlike the petitioner in Kolocotronis, does not raise a procedural due process claim, and so the question of whether chapter 10.77 RCW contains sufficient procedures is irrelevant. Id. at 155.

Kolocotronis also rejected the substantive due process argument that confinement cannot exceed the period for which the crime retains predictive value. Id. Allen's argument does not rely on the incorrect premise that the link between maximum penal term and maximum

confinement rests on the predictive value of the crime. The lapse of time in commitment under the insanity acquittee statute does not ensure treatment success. That goes for both the rich insanity acquittee who spends no pre-trial time in jail and the poor insanity acquittee who does. Yet the poor insanity acquittee unable to make bail spends more time locked up.

The State notes chapter 71.05 RCW provides a basis for further commitment when the maximum possible release date is reached under the insanity acquittee statute. BOR at 14, 21. Commitment under chapter 71.05 RCW, however, involves a separate procedure under a separate statutory scheme. Significantly, to justify commitment under 71.05, the State must prove dangerousness as evidenced by a recent overt act. In re Detention of Harris, 98 Wn.2d 276, 284-85, 654 P.2d 109 (1982); RCW 71.05.020(25); RCW 71.05.150(10); RCW 71.05.240(3); RCW 71.05.310.

The State acts as if an insanity acquittee who has not been successfully treated upon reaching the maximum release date under RCW 10.77.025(1) automatically remains committed upon invocation of the 71.05 commitment procedure. From that, the State argues no constitutional concerns are presented because civil commitment is actually indefinite. But that is not true. The potential transition from commitment under chapter 10.77 to commitment under chapter 71.05 is not automatic.

Quite the opposite. "Once the maximum term of imprisonment has expired . . . the criminally insane person is entitled to automatic release, unless the State can prove, in civil commitment proceedings, that the individual is still dangerous." Kolocotronis, 99 Wn.2d at 150. "In these proceedings, 'the State must prove continued dangerousness by clear, cogent and convincing evidence' if the patient is to be kept confined." Id. (quoting State v. McCarter, 91 Wn.2d 249, 254, 588 P.2d 745 (1978)). Commitment does not continue based merely on the State's judgment that it should continue, but rather on its ability to meet a different burden of proof, which includes the showing of a recent overt act evidencing dangerousness. Harris, 98 Wn.2d at 284-85.

The other two cases cited by the State — Tuomala and Leppert — have no comparative value. Leppert provides no guidance because it only addressed whether the state statute authorized credit. Leppert, 105 Ill.App.3d at 520. There was no constitutional challenge raised in Leppert.

Tuomala was also a pure statutory interpretation case. No constitutional challenge was raised. The Ohio statute at issue required the Department of Rehabilitation and Correction to reduce a prisoner's stated prison term by the total number of days of presentence confinement "arising out of the offense for which the prisoner was convicted and sentenced." R.C. 2967.191. Under the statute, the insanity acquittee was

not entitled to credit for time served for time spent in jail prior to acquittal because, under the plain language of the statute, acquittal by reason of insanity was not a conviction and his confinement in mental health facility was not a sentence. Tuomala, 104 Ohio St.3d at 97, 100. The Ohio statute does "not entitle mentally ill persons subject to court-ordered hospitalization or those adjudicated not guilty by reason of insanity to any reduction in the term of their court-ordered commitment at a behavioral health facility" because it only applies to those who have been "convicted and sentenced." Id. at 100.

Using the same reasoning, the State contends Allen is not entitled to credit for time served because acquittal by reason of insanity is not a criminal conviction and Allen did not receive a criminal sentence. BOR at 1. But Allen's argument does not depend on whether acquittal by reason of insanity is equivalent to a criminal conviction or whether civil commitment is equivalent to a criminal sentence. There is no Washington statute comparable to the Ohio statute at issue in Tuomala. And Allen raises a constitutional challenge, which did not arise in Tuomala.

B. CONCLUSION

For the reasons stated above and in the opening brief, Allen requests that this Court reverse the trial court's order denying immediate release and remand for entry of an order directing final discharge.

DATED this 29th day of December 2014

Respectfully Submitted,

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DIVISION ONE

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	)	
Respondent,	)	
	)	
v.	)	COA NO. 71606-9-I
	)	
ALFONZIA ALLEN,	)	
	)	
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 **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALFONZIA ALLEN
WESTERN STATE HOSPITAL
9601 STEILACOOM BOULEVARD SW
TACOMA, WA 98498

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

X Patrick Mayovsky