

SUPERIOR COURT OF WASHINGTON FOR BENTON COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

Dominic Kirk,

Defendant.

NO. 24-1-00436-03

STATE'S MEMORANDUM
OPPOSING DISMISSAL OR
RELEASE PURSUANT TO
BETSCHART

The Ninth Circuit Case, *Betschart v. Oregon*, No. 23-2270 (9th Cir. 2024), decided May 31, 2024, does not require dismissal of cases in Benton County, Washington, nor it does not require release of defendants in Benton County, Washington.

First, there is no mandate issued in the case. As such, Oregon DOJ's position is also that defendants should not be released because a final mandate order needs to be issued in order for the ruling to go in effect. "In an emailed statement, a spokesperson with the Oregon Judicial Department noted that this decision 'does not require any case to be dismissed' and does not prevent judges

from imposing conditions of release.”

<https://www.opb.org/article/2024/05/31/appellate-court-affirms-ruling-releasing-defendants-from-jail-with-no-public-defender>. The case is still subject to review by the Supreme Court of the United States if a writ petition is filed and accepted. “When asked whether the state would appeal, a spokesperson for the Oregon Department of Justice said they’re reviewing the decision.” *Id.* If the case is appealed, Oregon could seek a stay of the mandate pending the writ petition.

Second, the case was a federal habeas corpus case, brought by a class of incarcerated indigent defendants in Oregon. *Betschart v. Oregon*, No. 23-2270, 2024 WL 2790334, at *2 (9th Cir. May 31, 2024). After extensive litigation, a federal district court judge issued an injunction requiring that counsel be provided within seven days of the initial appearance, and failing this, defendants must be released from custody subject to reasonable conditions imposed by Oregon Circuit Court judges. *Id.* Those charged with murder and aggravated murder were excluded. *Betschart v. Garrett*, No. 3:23-CV-01097-CL, 2023 WL 7621969, at *1 (D. Or. Nov. 14, 2023). In addition, if a petitioner violated the conditions or fires their attorney, they would not be entitled to a new seven-day period. *Id.*

Oregon appealed the injunction, and the injunction was stayed pending the appeal. *Betschart v. Oregon*, No. 23-2270, 2024 WL 2790334, at *2.

There is no similar injunction here. The Ninth Circuit affirmed the injunction that was in place in Oregon. The Court specifically stated that the question before it was a “narrow one” – whether the district court abused its “considerable discretion” in issuing the preliminary injunction. *Id.* at *15. It made no ruling about any other injunctions. It was very specific to that injunction and the court held that the injunction was allowed and that the federal district court did not abuse its discretion in ordering the injunction. There is no injunction at issue here in Benton County.

The injunction was a result of *extensive* litigation with briefing and argument. After that extensive litigation, the district court issued a preliminary injunction requiring, among other things, that “counsel . . . be provided within seven days of the initial appearance,” and “[f]ailing this, defendants must be released from custody, subject to reasonable conditions imposed by [Oregon] Circuit Court judges.” *Id.* at *2.

The opinion relied heavily on Oregon’s criminal justice statistics. By September 2023, there were almost 3,000 people awaiting appointment of counsel. *Id.* at *3. That is not the case here. Oregon also did not dispute that its failure to provide counsel lengthens pretrial detention. *Id.* at *7.

As part of the injunction and the extensive litigation prior to that injunction going into effect, the steps taken to assign each defendant an attorney at public

expense were outlined for the Court. Here, there are only generalized statements, not defendant specific statements, that there is a “significant lack of resources and available counsel at this time” in Benton County. There have also been no statistics presented to the Court.

The standard of review used to review the injunction was abuse of discretion. *Id.* at *6. The district court abuses its discretion when it makes an error of law. *Id.* The district court’s legal conclusions are reviewed de novo, and its factual findings for clear error. *Id.* The abuse of discretion standard is “highly deferential to the district court.” *Id.* This means that all the Ninth Circuit was saying was that the solution created by the federal district court in Oregon to a problem specific to Oregon criminal defendants was not an abuse of the court’s discretion, giving much deference to the district court.

There was no blanket rule issued by the Ninth Circuit that every case must be dismissed after seven days or every defendant be released after seven days if they have no counsel. *See id.* at *13. The Court *merely* held that the Oregon injunction, based on facts specific to Oregon, was not an abuse of discretion. *Id.* The Ninth Circuit specifically stated it was *not* deciding whether a bail hearing is a critical stage requiring an attorney. *Id.* at *11. All the Court found was that the court’s factual findings regarding bail hearings were not clearly erroneous. *Id.* at *13.

The Ninth Circuit also did not rule on any Sixth Amendment claims. The procedural posture of the case is important here. The Ninth Circuit, in affirming the injunction, merely found that the petitioners would likely succeed on the merits of their Sixth Amendment argument. *Id.* at *9. The Court did not rule on any Sixth Amendment issues, find a Sixth Amendment violation, or create any new case law in this area.

In fact, the Court rejected the notion that any “brightline rule” was created, stating:

“The dissent’s insistence that today we establish a ‘brightline rule that the Sixth Amendment right to counsel is violated by a seven-day gap’ is a gross mischaracterization” that demonstrates the dissent’s confusion over our standard of review. We merely hold that it was not an abuse of discretion for the district court...”

Id. at *13. As such, there is no basis to dismiss or release any defendant in Benton County based on *Betschart*.

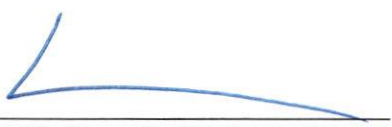
If the Court is considering a change in conditions of release due solely to a delay in appointing counsel, the court should consider electronic home monitoring paid for by the defendant. RCW 10.21.015 specifically allows pretrial release in certain situations and includes electronic monitoring (EM). Home detention is a subset of EM. RCW 10.21.017. There are very specific requirements for the supervising agency, as set forth in RCW 9.94A.736. However, a pretrial release program may not supervise someone awaiting trial for a violent offense or sex

offense as defined in RCW 9.94A.030, who has been convicted of a prior violent or sex offense conviction within 10 years, unless the offender's release before trial was secured by paying bail. RCW 10.21.015(2); 10.21.090.

Washington's authority for EM fees is found in RCW 10.01.160(1). That statute states that "(1) Except as provided in subsection (3) of this section, the court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for... costs imposed upon a defendant for pretrial supervision..." Washington limits the costs to those specially incurred by the state in administering pretrial supervision. RCW 10.01.160(2). There is no requirement that the court factor in ability to pay, as there is for costs incurred at the time of sentencing. *See* RCW 10.01.160(3).

Respectfully submitted this 7th day of June, 2024

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