

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20030210

IN THE INTEREST OF

J.S.,

RESPONDENT AND APPELLANT.

) District Court Case # 2003-R-213

) Supreme Court No.

)

)

)

FILED
IN THE OFFICE OF THE
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STATE OF NORTH DAKOTA

BRIEF OF RESPONDENT/APPELLANT

APPEAL FROM CONTINUING TREATMENT ORDER
DATED JUNE 16, 2003,
WITH THE DISTRICT COURT,
SOUTHEAST JUDICIAL DISTRICT,
HONORABLE JAMES BEKKEN, JUDGE

KROPP LAW OFFICES, P.C.

Thomas J. Glass

105 Tenth Street SE

Jamestown, ND 58401

(701) 252-5505

Attorney for Appellant

Leo Ryan

Special Assistant Attorney General

208 2nd Ave S.W.

PO Box 1727

Jamestown, ND 58402-1727

(701) 252-6688

Attorney for Appellee

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105 Tenth Street SE
Jamestown, ND 58401
(701) 252-5505
Attorney for Appellant

Leo Ryan
Special Assistant Attorney General
208 2nd Ave S.W.
PO Box 1727
Jamestown, ND 58402-1727
(701) 252-6688
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	iii
STATEMENT OF THE CASE.	1
STATEMENT OF THE FACTS	1
ARGUMENT AND AUTHORITIES	2
I. WHETHER THE DISTRICT COURT ERRED IN FAILING TO ORDER THE LEAST RESTRICTIVE ALTERNATIVE TREATMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	<u>Page(s)</u>
Dayap v. Kupperion , 331 N.W.2d 22 (N.D. 1983).	3
In the Interest of Goodwin , 366 N.W.2d 809 (N.D. 1985).	2
In the Interest of J.A.D. , 492 N.W.2d 82 (N.D. 1992).	2, 5
Schmidt v. Daugherty , 332 N.W.2d 217 (N.D. 1983).	4
STATUTES:	
N.D.C.C. § 25-03.1-02(11)	3
N.D.C.C. § 25-03.1-21(1)	4
N.D.C.C. § 25-03.1-40(2)	6
RULES:	
N.D.R.App.P. 2.1(d)	1

ISSUE PRESENTED

- I. **WHETHER THE DISTRICT COURT ERRED IN FAILING TO ORDER THE
LEAST RESTRICTIVE ALTERNATIVE TREATMENT.**

STATEMENT OF THE CASE

After a hearing on June 11, 2003, the Stutsman County District Court, on June 16, 2003, entered a Continuing Treatment Order for the respondent to be committed to the North Dakota State Hospital for a period of one year. On July 15, 2003, the matter was appealed to this Court at the specific request of the respondent.

A recording from the proceedings held on June 11, 2003 before the Stutsman County District Court shall be filed with the Supreme Court as provided by Rule 2.1(d) of the North Dakota Rules of Appellate Procedure.

STATEMENT OF THE FACTS

After a hearing on June 11, 2003, the Stutsman County District Court, on June 16, 2003, entered a Continuing Treatment Order for the respondent to be committed to the North Dakota State Hospital for a period of one year. J.S. has been a resident at the State Hospital since October 6, 1989. This is his seventh appeal of continuing treatment orders since his admission in 1989.

The following facts are based on the Court Reporter's audio recording of the Continuing Treatment Hearing and the undersigned's recollection and notes of June 11, 2003 hearing.

Testifying at the hearing was Dr. Bayani Alberto Abordo, a psychiatrist, licensed in North Dakota, practicing at the North Dakota State Hospital, and considered an expert in the field of mental health.

Dr. Abordo testified that he has examined J.S. as his physician and gave him a mental status examination. Dr. Abordo opined that J.S. suffered from Schizophrenia, a mental illness, and Type II Diabetes, a physical illness. He stated that this schizophrenia

produced symptoms of internal preoccupation, agitation, impulsivity, and threatening behaviors such as physical and verbal confrontations.

However, Dr. Abordo acknowledged: that J.S. has been making progress since 1999; that J.S. has had full privileges in the past without incident; that J.S. has outstanding academic credentials; and that J.S. generally is easy to converse with as long as his mental and physical illnesses were not the topic of discussion. He testified that the hospital is a safe haven for J.S. because he lacks insight into his mental and physical illnesses and that unless J.S. acknowledges his mental and physical illnesses that there is a reasonable expectation of serious risk of harm to either J.S. or others.

Dr. Abordo and the district court both acknowledged the fact that J.S. is suitable for alternative treatment if he were only willing to verbalize and acknowledge his mental and physical illnesses, as well as agree to take his medications if he were to be discharged to a lesser restrictive alternative form of treatment. Both Dr. Abordo and the district court acknowledged that there are facilities outside the State Hospital that could meet J.S.'s needs.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT ERRED IN FAILING TO ORDER THE LEAST RESTRICTIVE ALTERNATIVE TREATMENT.

Before a treatment order can be issued by a court, it must be established by clear and convincing evidence that the respondent requires treatment. In re Goodwin, 366 N.W.2d 809 (N.D. 1985). The burden of proof in these proceedings is with the petitioner and there is a presumption that the respondent does not require treatment. In re J.A.D., 492 N.W.2d 82, 85 (N.D. 1992). The trial court's finding that a respondent is a "person

requiring treatment” will not be set aside unless it is “clearly erroneous”. **Dayap v.**

Kupperion, 331 N.W.2d 22 (N.D. 1983).

A “person requiring treatment” is defined in N.D.C.C. § 25-03.1-02(11), which states:

“Person requiring treatment” means a person who is mentally ill or chemically dependent, and there is a reasonable expectation that if a person is not treated there exists a serious risk of harm to the person, other, or property. “Serious risk of harm” means a substantial likelihood of:

- a. Suicide, as manifested by suicidal threats, attempts, or significant depression relevant to suicidal potential;
- b. Killing or inflicting serious bodily harm on another person or inflicting significant property damage, as manifested by acts or threats;
- c. Substantial deterioration in physical health, or substantial injury, disease, or death, based upon recent poor self-control or judgment in providing one's shelter, nutrition, or personal care; or
- d. Substantial deterioration in mental health which would predictably result in dangerousness to that person, others, or property, based upon acts, threats, or patterns in the person's treatment history, current condition, and other relevant factors.

To summarize this statute, in order for a person to be considered a “person requiring treatment”, it must be shown by “clear and convincing evidence” that, if the respondent is not treated, there exists a serious risk of:

1. Suicide;
2. Harm to others;

3. Harm or dangerousness to oneself; or
4. Harm to property.

There was no testimony in regard to J.S. physically harming anyone since the issuance of the last continuing treatment order. J.S. has not been physically aggressive since 1999. There was one instance in September of 2002 where J.S. stated that he was going to slap the occupational therapy group leader for suggesting that his blood sugars were too high.

Although there was no testimony in regard to J.S. physically harming anyone since 1999, the aforementioned incident cannot necessarily be interpreted as not evidencing any potential for future physical aggression. However, there was not “clear and convincing” evidence that the J.S. would present a “serious risk of harm” to others if he were to be discharged to a lesser restrictive alternative treatment facility.

N.D.C.C. § 25-03.1-21(1) requires courts to determine the appropriateness of alternative treatment for a respondent deemed to be a “person requiring treatment”. The trial court’s determination in regard to the appropriateness of alternative treatment is subject to the “clearly erroneous” standard. Schmidt v. Daugherty, 332 N.W.2d 217 (N.D. 1983). Section 25-03.1-21(1) states in relevant part:

Before making its decision in an involuntary treatment hearing, the court shall review a report assessing the availability and appropriateness for the respondent of treatment programs other than hospitalization which has been prepared and submitted by the state hospital or treatment facility. If the court finds that a treatment program other than hospitalization is adequate to meet the respondent's treatment needs and is sufficient to prevent harm or injuries which the individual may inflict upon the individual or others, the court shall order the respondent to receive whatever treatment is appropriate.

The district court erred in not directing the State Hospital to pursue such alternative treatment in light of the fact that “(the respondent) has the right to the least restrictive conditions necessary to achieve the purposes of treatment”. See In the Interest of J.A.D., 492 N.W.2d 82,86 (N.D. 1992). The district court acknowledged that there were alternative facilities that could meet the mental and physical needs of J.S. However, the district court was reluctant to order such alternative treatment because J.S. was unwilling to acknowledge his mental and physical illnesses and to agree to take medications.

Additionally, Dr. Abordo testified that J.S. would be suitable for alternative treatment if he were to acknowledge his illnesses and agree to take his medications. He testified that J.S. has threatened suicide, if forced to take medication, if he were to be discharged. He also testified that when questioned about these threats of suicide that J.S. acknowledges no plan for suicide and that he has never attempted suicide in the past. Dr. Abordo acknowledged that this may just be a defense tactic that J.S. is exhibiting due to his reluctance to take medication. Although J.S. complains about being medicated he nonetheless takes his medication voluntarily.

In December of 2002 the district court requested a report on the status and possibility of J.S. being discharged to a lesser restrictive alternative form of treatment. A seven page letter report was compiled by two State Hospital psychologists. On page five of the North Dakota State Hospital report it states:

In summary, J.S. has shown progress over the years. He has not gone AWOL since 1991 and has not been physically aggressive since 1999. He will now perform hygiene tasks without prompts on occasion. He has become more social and will initiate conversation with certain staff

members, is less isolative, and now enjoys playing cards and going out to eat. He has become more tolerant of discussions regarding his mental illness and medical needs although he still becomes quite angry at times when such topics are discussed and may become threatening. While the current level of functioning that he currently displays within the hospital would allow him to be discharged even though he remains psychotic, his insistence upon not taking medication after discharge prevents any plans for possible placement from advancing. Persistent efforts on the part of numerous staff members over the years to educate him regarding his illness have failed to alter his resolute stance against taking medication. [Appendix page 19.]

Currently J.S. takes his medications voluntarily and there is no reason to believe that he would not continue to take the medications voluntarily if he were to be discharged. Dr. Abordo acknowledged that this may just be a defense tactic by J.S. without any serious intent to substantiate his threat of not taking his medications if discharged. J.S. has a history of complaining about taking his medications, but he still voluntarily takes his required medications. J.S. has made substantial progress at the State Hospital over the years. Previously, J.S. was granted full privileges at the State Hospital and there was no incident that required his privileges to be revoked.

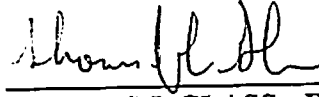
Lastly, lesser restrictive alternative treatment is available and appropriate. J.S. is entitled to the least restrictive conditions necessary to achieve the purpose of treatment. N.D.C.C. § 25-03.1-40(2). Thus, the district court's decision not to order alternative treatment was clearly erroneous.

CONCLUSION

WHEREFORE, J.S. requests that adequate alternative treatment be ordered. J.S. has the right to lesser restrictive treatment and there are lesser restrictive treatment facilities available that could provide everything J.S. needs.

Dated this 15th day of July, 2003.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Thomas J. Glass", written in black ink.

THOMAS J. GLASS - ID #05882
KROPP LAW OFFICES, P.C.
105 Tenth Street SE
Jamestown, ND 58401
(701) 252-5505
Attorney for Respondent/Appellant

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COUNTY OF STUTSMAN)

BRIEF and APPENDIX OF RESPONDENT/APPELLANT

Leo Ryan
Special Assistant Attorney General
P.O. Box 1727
Jamestown, North Dakota 58402-1727

To the best of your affiant's knowledge, information and belief, such address as given above was the actual address of

the party intended to be served.

Shari L. Dumdai
Shari L. Dumdai

SUBSCRIBED and SWORN to before me this 15th day of
July, 2003.

(SEAL)

Mary E. Kropp
Mary E. Kropp, Notary Public
Stutsman County, North Dakota
My Commission Expires: 06/20/09

