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20040183

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE INTEREST OF J.S

BAYANI ALBERTO Y. ABORDO, M.D., Petitioner/Appellee,	Supreme Court No. 20040183 District Court No. 2004-R-227
-vs-	
J.S., Respondent/Appellant.	

BRIEF OF PETITIONER/APPELLEE

APPEAL FROM CONTINUING TREATMENT ORDER

DATED JUNE 9, 2004,

WITH THE DISTRICT COURT,

SOUTHEAST JUDICIAL DISTRICT

HONORABLE JAMES M. BEKKEN, JUDGE

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ISSUE PRESENTED

I. WHETHER J.S. CAN BE FORCED TO TAKE MEDICATION UNDER THE CONTINUING TREATMENT ORDER.

II. WHETHER THE COURT ERRED IN FAILING TO ORDER LESS RESTRICTIVE ALTERNATIVE TREATMENT.

STATEMENT OF THE CASE

The appellee, the North Dakota State Hospital, hereinafter "Hospital", adopts the statement of the case of the respondent/appellant, hereinafter "J.S.". As to the nature of the case, the course of proceedings, and its disposition below. Hospital does not adopt the statement of the facts of J.S. and sets out now herein Hospital's statement of the facts.

STATEMENT OF THE FACTS

Pursuant to Rule 2.1, N.D.R.App.P., this statement of facts is taken from the tape recordings of the proceedings, which was provided as a substitute for the transcript.

J.S. has resided at the North Dakota State Hospital since 1989. That admission was his 10th admission to the State Hospital.

Dr. Bayani Alberto Abordo, a psychiatrist at the North Dakota State Hospital, is an expert examiner as defined by NDCC § 25-03.1-02(6). Dr. Abordo did not testify at the hearing on June 9, 2004, but did provide supporting documentation to the district court to include a Report of Examination, Certificate of Continuing Treatment, Report Assessing Availability and Appropriateness of Alternate Treatment, and Diagnostic Intake and Plan (Assessment).

Dr. Lori Shaleen, Ph.D., is an expert examiner as defined by NDCC § 25-03.1-02(6). Dr. Shaleen testified at the hearing.

Dr. Abordo rendered a professional opinion in the documents provided to the Court regarding J.S.'s diagnosis, stating that it was Paranoid Schizophrenia, a mental illness, Diabetes, and hypertension. Dr. Shaleen testified at the hearing and rendered a professional opinion regarding J.S.'s diagnosis stating that it was Paranoid Schizophrenia.

J.S. has appealed various commitment orders on prior occasions during this hospital admission. During that period of time he has been treated primarily with Haldol, Insulin, ward milieu, and group activities.

His prior commitment orders were based on a number of factors, including his lack of insight into his mental and physical disabilities, his refusal to take medication, and in the past, threats and acts of violence.

Dr. Shaleen testified, that there have been no acts of violence by J.S. in the recent past, but there have been expressions of suicide and that J.S. at times becomes threatening. J.S. testified that if discharged with medications that he would not take the medications.

Dr. Shaleen testified that J.S. isolates himself and requires prompts to perform hygiene. Dr. Shaleen testified that J.S. was placed in an individual room due to threat of aggression.

Dr. Shaleen determined that J.S. still remains a danger as a result of lack of insight into his mental and physical illness, his continued belief that he does not need medication and his statements that he would not take medication either for his mental or physical illnesses if released from the hospital, his history of aggression, and his frequent statements that he will take his life if he is discharged on medication.

Dr. Shaleen testified and Dr. Abordo indicated in his report that J.S., as a result of his mental illness, requires prompting and motivation to care for himself and act on requirements of daily living and that J.S.'s lack of insight interferes with his attendance at group therapy as J.S. does not believe such therapy is necessary since he does not believe that he is ill. Dr. Shaleen also testified that J.S. has shown some improvement relative to participating in group therapy.

Dr. Shaleen testified, that J.S. refuses oral medication and cooperates and receives medication

intramuscularly. J.S. testified that he refuses all medications.

Dr. Abordo indicated in his report that alternative treatment is likely available but is not appropriate for J.S. Dr. Abordo indicated that J.S. generally refuses discussions of possible places he might live. J.S. insists he will return to Devils Lake, believing people are there waiting for him to occupy his apartment which he vacated many years ago.

Dr. Abordo's report indicates that there are no basic care or transitional living facilities in the state which will accept J.S. if he does not take his medications.

Dr. Shaleen testified that J.S. would be a danger to others if he were discharged as evidenced by his history. She testified that less restrictive treatment would not be appropriate under his current situation. Dr. Shaleen testified that J.S. has been referred to four different basic care facilities and has been rejected because J.S. has clearly stated that he will refuse medications.

LAW AND ARGUMENT

I. THE ISSUE OF WHETHER J.S. CAN BE FORCED TO TAKE MEDICATION UNDER THE CONTINUING TREATMENT ORDER IS NOT PROPERLY BEFORE THIS COURT.

J.S. argues that J.S. cannot be forced to take medications because the petitioner did not file a request for authorization to treat with medication in its petition for continuing treatment. (Brief of Appellant p. 7). Under NDCC § 25-03.1-29, the scope of review in involuntary commitment cases is limited to a review of the procedures, findings, and conclusions of the lower court. See also In the Interest of H.G., 2001 ND 142,¶3, 632 N.W.2d 458. "It is obvious that this court must have "findings" to review if we are to fulfill the requirements of this statute." In the Interest of F.R., 353 N.W.2d 773 at 775, (N.D. 1984).

J.S. correctly indicates in his brief that J.S. was notified and served the petition for continuing treatment on May 7, 2004, and that a request for the authorization to administer medication was not included in that petition. (Brief of Appellant p. 9). Authorization to administer medication was not sought in the petition or during the hearing. The court did not find nor conclude that court-authorized involuntary treatment with prescribed medication

was necessary and therefore did not authorize such forced medication. Therefore, as that issue was not before the district court and the district court did not make any findings or conclusions relative to the issue of involuntary treatment with prescribed medication, that issue is not properly before this Court.

In his brief, J.S. argues that the notice of medication presented by the North Dakota State Hospital was not received but shared with his counsel during the hearing and therefore violated Rule 5(a), N.D.R.Civ.P. (Brief of Appellant p. 9). Said notice reflects the medications, if any, provided to a patient in the 24 hour period preceding the hearing. (Brief of Appellant, p. 9) Due to the time period covered in the notice, it is only made available immediately prior to or during the initial portion of the hearing. Evidentiary matters at involuntary treatment hearings are governed by the North Dakota Rules of Evidence, NDCC Section 25-03.1-19. See also In the Interest of D.H., 507 N.W.2d 314 (N.D. 1993). J.S. did not seek a continuance nor object to the notice of medication at the hearing. Under N.D.R.Ev. 103(a), error may not be predicated on admission of evidence unless a timely objection was made. J.S. may not raise this issue for the

first time on appeal. See In the Interest of K.P., 2004 ND 52 ¶24, 676 N.W.2d 744.

II. THE COURT PROPERLY FOUND ALTERNATIVE TREATMENT WAS NOT APPROPRIATE AND DID NOT ERROR BY FAILING TO ORDER A LESS RESTRICTIVE ALTERNATIVE.

The scope of review in involuntary commitment cases is limited to a review of the procedures, findings, and conclusions of the lower court. In the Interest of H.G., 2001 ND 142,¶3, 632 N.W.2d 458. District courts are required to use a clear and convincing standard of proof, while the reviewing Court uses a more probing clearly erroneous standard of review, to balance the compelling interests of protecting a mentally ill person and of preserving that person's liberty. In the Interest of J.K., 1999 ND 182, ¶10, 599 N.W.2d 337. A district court's finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence the reviewing Court is left with a definite and firm conviction a mistake has been made. H.G., 2001 ND 142,¶3, 632 N.W.2d 458.

J.S. argues that the district court erred in its finding of continued hospitalization, because there was not clear and convincing evidence that alternative treatment is not available or adequate to prevent harm to J.S. or others. (Brief of Appellant p. 13).

J.S. argues the district court erred in failing to order a less-restrictive alternative treatment required by NDCC § 25-03.1-21(1). Section 25-03.1-21(1), NDCC, provides:

> 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 other than hospitalization is appropriate for a period of ninety days.

The North Dakota Supreme Court has stated numerous times that the statutory procedures require that a mental health patient has a right to the least restrictive conditions necessary to achieve the purpose of treatment. See, e.g., In the Interest of R.M., 555 N.W.2d 798, 800 (N.D. 1996). To comply with the requirements of NDCC § 25-03.1-21(1), the district court is required to make a two-part inquiry: (1) whether a treatment program other than hospitalization is adequate to meet the individual's treatment needs, and

(2) whether an alternative treatment program is sufficient to prevent harm or injuries which an individual may inflict on himself or others. In the Interest of J.K., 1999 ND 182, ¶15, 599 N.W.2d 337.

The district court must find, by clear and convincing evidence, that alternative treatment is not adequate or that hospitalization is the least restrictive alternative. Id. The district court's findings are critical to ensure the basis for the district court's decision is clearly articulated, thereby demonstrating that the careful and serious consideration so clearly warranted in the context of an involuntary commitment proceeding has indeed been given. In the Interest of Palmer, 363 N.W.2d 401, 403 (N.D. 1985).

J.S. contends the district court erred in its finding, because the petitioner failed to present clear and convincing evidence that alternative treatment was not available or adequate to prevent harm to J.S. or others. Direct evidence of overt violence or even an expressed intent to commit violence is not required in commitment proceedings. In the Interest of D.P., 2001 ND 203,¶9, 636 N.W.2d 921. The Court must accept the inferences drawn by the district court when reasonable inferences can be drawn

from credible evidence. In the Interest of M.S., 1999 ND 117,¶8, 594 N.W.2d 924.

There was evidence that J.S. was a person requiring in patient treatment and that alternative treatment was not available or adequate to prevent harm to J.S. or others. Dr. Shaleen's testimony indicated that the lack of insight in J.S., relative to his mental and physical illnesses, is such that based upon his past aggression and statements of suicidal tendencies if released on medication, J.S. will refuse to take medication if left to his own devices.

Dr. Shaleen testified that a reduction or cessation in diabetic medication would likely result in the patient being hospitalized or suffering from a diabetic reaction which could result in a loss of consciousness or death.

Dr. Shaleen testified that there is a substantial likelihood of a serious risk of harm to others based upon J.S.'s history of unprovoked physical aggression. There was testimony of what options existed and why these potential options would not be appropriate for J.S. Dr. Shaleen testified that alternative treatment facilities have refused to accept J.S. because of his refusal to take medication.

The court also relied on Dr. Abordo's report assessing availability and appropriateness of alternate treatment and supporting documents.

Dr. Abordo's report specifies facilities that have rejected J.S. because of his refusal to take medications (App. pp. 12-13). Dr. Abordo's report further indicates that medication compliance is also a prerequisite for a transitional living placement. (App. p. 13).

Further, there is evidence in the record to indicate the district court considered the report prepared by Dr. Abordo assessing the availability and appropriateness of alternate treatment when concluding no alternative treatment program would be appropriate. Dr. Abordo's report states, "Patient continues to verbalize he will kill himself if he is discharged. He does not care for self unless much encouraged. States he will not take meds if discharged." (Appendix pg. 6)

The district court's finding that no less restrictive alternative treatment was appropriate for J.S. is supported by clear and convincing evidence.

CONCLUSION

The issue of involuntary treatment with prescribed medication was not properly before the district court and

therefore not properly before this Court. The issue of alternate treatment was properly before the district court and the court properly found that alternative treatment was not appropriate to prevent harm to J.S. or others. The court's decision was based on clear and credible evidence.

DATED this 15th day of July, 2004.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE INTEREST OF J.S., RESPONDENT

Stutsman County #2004-R-227

Supreme Court #20040183

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
:
COUNTY OF STUTSMAN)

Jolene Brown, being first duly sworn on oath, does depose and say: that she is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 15th day of July, 2004, this affiant deposited in the mailing department of the United States Post Office at Jamestown, North Dakota, a true and correct copy of the following documents filed in the above captioned action:

BRIEF OF PETITIONER/APPELLEE

That the copies of the above documents were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Jodi Koch Scherr
Attorney at Law
Post Office Box 356
Valley City, North Dakota 58072

To the best of your affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be served.

That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Jolene Brown

JOLENE BROWN

SUBSCRIBED and SWORN to before me this 15th day of July, 2004.

LEO A. RYAN, Notary Public
Stutsman County, North Dakota
My Commission Expires:12/27/08